It is ordered, That the initial decision be modified by striking the last sentence of the fourth full paragraph on page 61 and the fifth full paragraph on page 61.

It is further ordered, That the initial decision be modified by striking the order on page 61 and substituting therefor the following:

> *It is ordered,* That respondent Montgomery Ward & Co., Incorporated, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of any articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:
>
> > Representing, directly or by implication that any of respondent's merchandise is guaranteed unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

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

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

Commissioners Elman and Reilly dissented and have filed dissenting opinions.

IN THE MATTER OF

NATIONAL DAIRY PRODUCTS CORPORATION

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

Docket 7018. Complaint, Dec. 31, 1957—Decision, July 28, 1966

Order requiring a company engaged in processing and distributing dairy and food products with headquarters in New York City, to cease discriminating in prices and promotional allowances between competing retailers handling the product line of its Sealtest Foods Division, in violation of Secs. 2(a) and 2(d) of the Clayton Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that National Dairy Products Corporation has violated and is now violating the provisions of subsections (a) and (d) of Section 2 of the Clayton Act (U.S.C., Title 15, Section 13), hereby issues its complaint charging as follows:

COUNT I

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

PARAGRAPH 1. Respondent named herein is National Dairy Products Corporation. Respondent is a corporation organized and existing under and by virtue of the laws of the State of Delaware. Respondent's principal office and place of business is located at 260 Madison Avenue, New York City, New York.

PAR. 2. Respondent is extensively engaged in the business of purchasing, manufacturing, processing, distributing, and selling dairy and allied products in various States of the United States and in the District of Columbia.

Since respondent's incorporation on December 8, 1923, it has acquired the entire stock or control of assets of numerous concerns. Respondent, formerly a holding company, in 1956 carried forward a program of integration and corporate simplification, taking over properties and assets of more than forty principal domestic subsidiaries and continuing their operations as divisions. Respondent has also caused a number of its subsidiaries to be merged with one another. As of December 31, 1956, respondent held 100% of the voting stock in its remaining subsidiaries, being about forty in number. Respondent's program of integrating its subsidiaries is now wholly or substantially completed.

Respondent conducts its business through its divisions and subsidiaries. Through its Sealtest division, respondent sells milk, vitamin D milk, homogenized milk, concentrated fresh milk, chocolate milk, buttermilk, cream, butter, eggs, cottage cheese, special milks, and other dairy products to homes, restaurants, stores, hospitals, hotels, and institutions in States in the Eastern, Midwestern, and Southern parts of the United States, including the District of Columbia. Respondent has numerous ice cream brands sold sectionally in various parts of about 33 States and in the District of Columbia, primarily in the Eastern part of the United States.

Respondent is the largest distributor and seller of dairy products in the United States. Respondent's net sales for 1956 were $1,352,878,027.00.

PAR. 3. Respondent sells dairy products of like grade and quality to a large number of purchasers located in many States of the United States, particularly in those of the East, South, and Midwest, and in the District of Columbia for use, consumption, or resale therein.

Respondent maintains and operates a large number of receiving stations, manufacturing, and processing plants and distribution depots located in or near the cities, towns, and places where it sells its said products. The bulk of respondent's said products are delivered to its customers in its own trucks.

PAR 4. In the course and conduct of its business respondent is now and for many years past has been shipping dairy products from the State or States where such products are manufactured, processed, or stored in anticipation of sale and shipment, to purchasers located in other States of the United States and in other places under the jurisdiction of the United States, including the District of Columbia in a constant current of commerce as "commerce" is defined in the Clayton Act. Respondent also sells its said products in commerce as "commerce" is defined in the Clayton Act to purchasers located in the same states where such products are manufactured, processed, or stored in anticipation of sale.

Included among respondent's plants and facilities for the manufacture, processing, and sale of dairy products, respondent owns and operates a manufacturing and processing plant located in the city of Toledo, Ohio, where it manufactures and processes substantial quantities of its diary products which respondent sells in Ohio and Michigan. Other substantial quantities of said products are manufactured and processed in other States by other divisions, plants, or subsidiaries of respondent, which respondent ships or causes to be shipped to respondent's Toledo, Ohio, plant for subsequent distribution and sale. Some of such products are shipped in packages ready for sale and others are shipped in bulk and are further processed in respondent's Toledo plant for subsequent sale. Raw milk is purchased by respondent from farmers and dairymen located both in Ohio and in other States, including Michigan, which is shipped and transported to respondent's Toledo, Ohio, plant where it is processed and subsequently sold to purchasers located in Ohio and Michigan. Respondent owns or operates a depot and sales office in Monroe, Michigan, to which its said products are transported or caused to be transported by respondent from its Toledo, Ohio, plant for subsequent sale in Michigan. Respondent transports, or causes to be transported, substantial quantities of its said products in respondent's own trucks from respondent's Toledo, Ohio, plant into Michigan which respondent sells and delivers to customers located in Michigan. In other instances respondent sells its said dairy products to distributors who transport said products from Toledo, Ohio, to various cities, towns, and places in Michigan, principally nearby to Monroe, Michigan, who sell the same to customers in those areas. Respondent has been and is engaged in a constant and uninterrupted trade in its said products in interstate commerce in sales of its dairy products in the States of Ohio and Michigan, as herein alleged.

PAR. 5. The bulk of respondent's wholesale business is done with retailers such as stores, restaurants, hotels, and other businesses and establishments which resell to consumers.

Respondent, in the sale of its said products to retailers and consumers, is in substantial competition with other manufacturers, processors, distributors, and sellers of dairy products. Many of respondent's retailer-customers as herein described are in substantial competition with one another in the resale of respondent's said products to consumers.

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

Included among such sales at discriminatory prices were sales of milk and other dairy products by respondent, particularly those made by and through its Sealtest division, in the cities of Toledo, Ohio, and Monroe, Michigan, and in nearby cities, towns, and places in Ohio and Michigan.

One of the methods and plans used by respondent to effect and carry out such discrimination in price is a quantity discount or rebate schedule or system applicable to its retailer-customers located or doing business in the areas of Ohio and Michigan hereinbefore described, which respondent formulated and put into effect on or about November 1, 1954, and which with certain changes therein, is still in force and effect.

Respondent's quantity discount and rebate plan is applied to the monthly purchases by its retailer-customers of respondent's dairy products computed in points including all kinds of fluid milk and buttermilk, half and half, whipping cream, coffee cream, sour cream, and cottage cheese. Each fluid milk product and cottage cheese is assigned a given number of points, as follows:

1 quart	milk (all kinds)	1 point
1 "	half and half	2 points
1 "	whipping cream	8 "
1 "	coffee cream	4 "
1 "	sour cream	4 "
1 "	buttermilk	1 point
5 pound	carton cottage cheese	5 points

Respondent's monthly quantity discount and rebate schedule as amended and effective in 1956, based upon respondent's point system and showing the average number of retailer-customers in each discount bracket and the percentages of discounts or rebates received for the months of March, August, and November 1956, is as follows:

Points	No. of Customers		Percent
0 to 699	Toledo, Ohio	414	
	Monroe, Mich.	109	None
700 to 999	Toledo, Ohio	64	
	Monroe, Mich.	7	2%
1000 to 1499	Toledo, Ohio	59	
	Monroe, Mich.	12	3%
1500 to 1999	Toledo, Ohio	28	
	Monroe, Mich.	9	4%
2000 to 2999	Toledo, Ohio	17	
	Monroe, Mich.	8	5%
3000 to 4999	Toledo, Ohio	10	
	Monroe, Mich.	9	6%
5000 to 6999	Toledo, Ohio	3	
	Monroe, Mich.	1	7%
7000 to 9999	Toledo, Ohio	1	
	Monroe, Mich.	None	8%
10000 to 14,999	Toledo, Ohio	3	
	Monroe, Mich.	None	9%
15000 to 24,999	Toledo, Ohio	13	
	Monroe, Mich.	2	10%
25000 to 39,999	Toledo, Ohio	1	
	Monroe, Mich.	None	11%
40000 and over	Toledo, Ohio	9	
	Monroe, Mich.	4	12%
Total number of customers		783	

Respondent's sales of its products in Toledo, Ohio, and Monroe, Michigan, including sales made in nearby cities and towns amounted to $8,605,115.31 for the year 1956. Many of respondent's retailer-customers in these areas were large chain stores and other stores having a common ownership or control, including voluntary associations or groups of stores having a central buying office. In the quantity discount schedule hereinabove set forth, such customers are shown as a unit, regardless of the number of individual stores involved for the reason that respondent in computing the volume of monthly purchases of such customers pays or credits its monthly quantity discount or rebate according to the rate applicable to the aggregate purchases of all stores in the chain or central buying group without regard to the monthly volumes of purchases of such individual stores. If purchases by such customers are paid for in cash respondent rebates the discount at the end of each month by check. In the case of credit sales the discount is credited on the monthly bills. Many of the individual stores in Michigan belonging to a chain and sold respondent's dairy products by respondent's independent distributors are paid the discount or rebate applicable to the aggregate purchases of all the stores of the chain. Respondent accomplishes this by requiring its independent distributors to pay 7% of the discount and respondent pays the balance of 5% of the maximum discount to the chain's headquarters. All of the large chain stores and central buying groups are paid the maximum discount or rebate by respondent on purchases made by all their stores located in Toledo, Ohio, and Monroe, Michigan, and elsewhere.

The more numerous of respondent's retailer-customers are those who receive no discounts or rebates under respondent's monthly quantity discount and rebate plan and those customers whose purchases fall within the smaller discount and rebate brackets under said plan. These are the small, usually independent retailer-customers who compete with the large chain and central buying groups which respondent's discount and rebate system is principally designed to favor and whose volume of purchases in most instances falls within the highest brackets of said quantity discount schedule.

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

(a) Between respondent and its competitors in the sale and distribution of dairy products;

(b) Between retailer-purchasers of said products receiving such discounts and rebates computed by the percentages of each bracket of said quantity discount and rebate schedule and competing retailer-purchasers receiving none;

(c) Between retailer-purchasers of said products receiving such discounts and rebates computed by the percentages of higher brackets of said quantity discount and rebate schedule and competing retailer-purchasers receiving such discounts and rebates computed by the percentages of lower brackets.

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

COUNT II

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

PAR. 9. Paragraphs One through Five of Count I hereof are hereby set forth by reference and made a part of this count as fully and with the same effect as if quoted herein verbatim.

PAR. 10. In the course and conduct of its business in commerce, as aforesaid, respondent has paid or contracted for the payment of money, goods, or other things of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished or agreed to be furnished by or through such customers in connection with the handling, sale, or offering for sale of respondent's dairy products and respondent has not made or contracted to make such payments, allowances, or consideration available on proportionally equal terms to all of its other customers competing in the sale and distribution of such products.

Included among such discriminatory and disproportionate allowances respondent has paid and allowed advertising and promotional allowances in connection with the resale of its said products to some of its customers while not offering such payments and allowances to other competing customers. As illustrative of such practices, respondent has paid certain amounts of money to selected customers, principally to large grocery store chains on openings of new stores, special advertising events, and other advertising campaigns where such advertising includes Sealtest products. Many of respondent's dairy products are sold to the public under the trade name "Sealtest." In such instances the advertising copy is prepared and paid for by the customer at the local newspaper rate, sometimes at discounts, and respondent pays said favored customer on the basis of national line rates, which are much higher than the local or discount rates which the advertiser is required to pay to the newspaper. Respondent has not offered such allowances and payments to many of its customers who compete with those who receive such benefits. Many of such discriminatory payments and allowances as herein alleged have been made by respondent to its customers located and doing business in Toledo, Ohio, and in Monroe, Michigan, as well as in other places and towns in the States of Ohio and Michigan.

PAR. 11. The acts and practices as alleged in Paragraphs Nine and Ten above are in violation of subsection (d) of Section 2 of the aforesaid Clayton Act.

Mr. William H. Smith for the Commission.

Mr. Robert S. Gordon and *Mr. Charles H. Watts* of New York, N.Y.; *Chadwell, Keck, Kayser, Ruggles & McLaren* of Chicago, Ill., by *Mr. John T. Chadwell, Mr. Richard W. McLaren,* and *Mr. Paul H. LaRue* for respondent.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

JULY 10, 1963

INDEX

This proceeding is based upon a complaint charging respondent, National Dairy Products Corporation, through its Sealtest Foods Division (hereinafter sometimes called "Sealtest"), in Count I with violating subsection 2(a) of the Clayton Act, as amended, and in Count II with violating subsection 2(d) of that Act. The subsections provide, *inter alia*:

(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .

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

The record is voluminous and contains hundreds of pages of exhibits which include very technical charts and graphs developed in the course of respondent's cost justification defense. Respondent admits that its Sealtest Foods Division has sold and sells its products of like grade and quality at differing prices to customers who compete with each other in the resale at retail of such products.

Respondent defends the 2(a) charges on the grounds, *inter alia,* that: (1) some of the challenged transactions are not in interstate commerce; and (2) complaint counsel has failed to prove the requisite competitive injury resulting from Sealtest's price differences. A portion of respondent's evidence consists of its "meeting competition" defense authorized in subsection 2(b) of the Clayton Act providing:

. . . upon proof being made . . . that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of the section, . . . *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet the equally low price of a competitor, or the services or facilities furnished by a competitor.

However, the largest and most voluminous portion of respondent's case is its cost justification defense under subsection 2(a) of the Clayton Act, providing:

. . . that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . .

Respondent's counsel has characterized its cost justification as possibly the most elaborate and expensive defense of this kind ever presented to the Federal Trade Commission. It involved stop watch time studies, for one week for each delivery route, during July 1958, of every milk delivery, on each route, to respondent's wholesale customers in the Toledo, Ohio-Monroe, Michigan, area, and for one week each, for each of the ice cream delivery routes in Memphis, Tennessee, from approximately October 19, 1959, to November 18, 1959. Each separate delivery function was timed with stop watches, cost studied, and costs thereon allocated.

Respondent stresses the paucity of proof in this record of injury to primary line competition in the areas involved. Subsection 2(a) does not impose the responsibility upon Commission counsel of necessity of proving primary line injury so long as the evidence in the aggregate establishes the anti-competitive effect of respondent's price discriminations.

Respondent concedes in its proposed findings and brief that if the price differential is substantial injury to competition in the secondary line may be inferred. (See the Commission's decision in *Tri-Valley Packing Association,* Docket No. 7225 and 7496, Commission's Opinion dated May 10, 1962 [60 F.T.C. 1134]; *American Oil Company,* Docket No. 8183, Commission's Opinion dated June 27, 1962 [60 F.T.C. 1786]; and the Commission's Opinion of June 28, 1962, remanding the case in *United Biscuit Company of America,* Docket No. 7817 [60 F.T.C. 1893]. This latter case involved a volume discount schedule somewhat similar to the one involved in the instant case.)

The Supreme Court, in *F.T.C.* v. *Anheuser-Busch, Inc.,* 363 U.S. 536, (1960), has defined a price discrimination within the meaning of the phrase "discriminate in price" in subsection 2(a) as merely a price difference, and respondent's price differences to competing customers are readily admitted by it in this record.

"Prices" as such are not the pricing mechanism with which most of the evidence in this record concerns itself. It is rather, respondent's volume discount, or rebate schedules, which established graduated varying rebates to be allowed by respondent from its published list prices, in the event a customer purchased a stipulated volume of ice cream, or a designated number of rebatable points of fluid milk and dairy products. The effect of allowing different rebates from the same list price to competing customers may be a price discrimination. (See *United Biscuit, supra.*)

Respondent's pricing practices during the cost study periods are sufficiently typical and illustrative of its pricing practices to furnish a basis for adjudicating the price discrimination charges. However, the entire record, including all testimony, exhibits, pleadings, and extensive oral argument have been carefully considered.

Respondent has not offered any substantial evidence in defense of the subsection 2(d) charges in Count II of the complaint. In its brief respondent implies that it is chiefly interested in having such 2(d) cease and desist order, if any, as may be issued limited to the products as to which the violation has been found.

This proceeding is now before the undersigned hearing examiner for final consideration on the complaint, amended answer thereto, testimony, and other evidence, and proposed findings as to the facts, and conclusions, together with briefs and reply briefs, and oral argument. The hearing examiner has carefully considered the proposed findings and conclusions, the briefs and oral argument. All findings and conclusions of law proposed by the parties which are not hereinafter specifically found or concluded are herewith rejected. All motions heretofore made, and presently undisposed, which are not otherwise specifically ruled upon in this decision, are hereby denied. Based upon the entire record of this proceeding, the examiner makes the following:

FINDINGS OF FACT

Respondent, National Dairy Products Corporation, a Delaware corporation, with its principal office and place of business at 260 Madison Avenue, New York, New York, is described as the largest dairy corporation in the world. It is a single, integrated company (Tr. 879). Respondent manufactures and distributes in interstate commerce a variety of food and other products including fluid milk products and ice cream manufactured and distributed by its Sealtest Foods Division.

Respondent operates through seven separate divisions: Sealtest Foods, Kraft Foods, Breakstone Foods, Sugar Creek Creamery, Humko Products, Metro Glass, and its Research and Development Division.

Sealtest Foods Division has seven geographical divisions: the Northeastern at Schenectady, New York; the Metropolitan in New York City; the Eastern and Breyer Divisions in Philadelphia, Pennsylvania; the Southern with headquarters at Charlotte, North Carolina; the Great Lakes at Pittsburgh, Pennsylvania; and the Central at Chicago, Illinois. A vice president in charge of each of these seven geographical divisions reports directly to the President of Sealtest Foods Division (Tr. 6163). Its Southern Division is typical in general organizational structure. The Southern Division is headed by a vice president of Sealtest Foods. Each of the four districts within the Division is headed by a district manager. Within each district are a number of zones headed by zone managers. Below the zone level is the branch or plant manager. A zone may have from three to six branches. In most instances plants are located within a zone (Tr. 6164), but in those instances in which a zone does not have a plant located within it, it is supplied by a plant from another zone. At the branch level, a branch or plant manager is responsible for the operations in the particular community in which he is located. Branches and plants handle milk and ice cream; some handle both; and some handle only milk or only ice cream (Tr. 6164).

In some instances the ice cream may be manufactured and sold through a marketing organization separate and apart from the fluid milk marketing operations.

The product line involved in this proceeding is the fluid milk, homogenized milk, vitamin D milk, concentrated fresh milk, chocolate milk, buttermilk, cream, butter, eggs, cottage cheese, ice cream, and other dairy foods and all other products which are manufactured or sold by respondent's Sealtest Foods Division.

The period of time basically involved in these proceedings are the years 1956 to 1960, inclusive.

Respondent's net sales for its fiscal years 1961–1956 were:

1961	$1,790,834,000	1958	$1,548,386,000
1960	1,667,176,000	1957	1,432,319,000
1959	1,605,725,000	1956	1,352,878,000

According to respondent's annual report to its stockholders for the year 1961 (CX 189), it had 69,993 stockholders, 48,822 employees, and the book value of its common stock, excluding intangibles, was $445,901,000.

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

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

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

Respondent sells fluid milk products and ice cream of like grade and quality to its various wholesale customers at various places, including those located in, and served by, its plants at Toledo, Ohio-Monroe, Michigan; Jackson-Lansing-Battle Creek, Michigan; Memphis, Tennessee; and New Orleans, Louisiana.

The company markets its products in most of the States of the United States east of the Rocky Mountains; in Canada; the British Isles; much of western Europe; and Australia. Although respondent has contended throughout the proceedings that certain of its individual plant operations are not in interstate commerce, this examiner incorporates herein by reference his ruling of January 18, 1960 (Appendix A attached), including the facts found therein, in which he denied respondent's motion to dismiss this proceeding on the grounds that the challenged transactions, or some of them, were not and are not in interstate commerce. Respondent is engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

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

Respondent, as an integrated corporate entity, is legally responsible for all of the acts and doings of each and all of its officers and employees acting within the scope of their authority. In order to obtain a cease and desist order, complaint counsel need not have proven a Section 2 violation by each of Sealtest's branches, zones, districts, and divisions.

Although the evidence in this record has not been confined solely to Sealtest's pricing practices for the two units used in pricing its products, *i.e.*, a half-gallon container of fluid milk and a gallon of ice cream, unless otherwise indicated, this initial decision will generally be deemed to refer to those two units because the evidence with respect to Sealtest's pricing practices for its half-gallon milk units and gallon ice cream is typical and illustrative of the pricing practices being challenged.

In some instances Sealtest's milk and ice cream product lines are separately manufactured, priced, sold and delivered in separate marketing systems to its customers. Milk is sold directly to consumers in their homes; to distributors at the platform who pick it up and resell it to their own accounts in stores or homes, and sometimes deliver it to respondent's customers. Respondent's milk products with which we chiefly deal here are those which are sold to wholesale customers for resale at retail.

Sealtest's ice cream is ordinarily delivered to stores who resell it at retail to "take-out" customers. In this decision, the phrase "off-premise consumption" or "off-premise customers" refers to the ultimate consumers who take the particular product off the premises where it is purchased.

In every area where respondent operates, and particularly in the areas as to which evidence was introduced in this proceeding, competition in the milk and ice cream business is very keen. There are local competitors who operate only in the particular market or region and companies which operate in several States or on a nationwide basis. Illustrative of respondent's interstate competitors are Borden, Foremost, Beatrice Foods, Carnation Milk, and Dean Milk Company. Illustrative of local competitors are Page, Babcock, Driggs, Sewell, Fornier-Lakeside, Loud and Jackson, Taylor, and Mid-West.

Complaint counsel's evidence in this record has been confined to respondent's pricing practices in (a) the Toledo, Ohio-Monroe, Michigan, area; (b) the Lansing-Jackson-Battle Creek, Michigan area; (c) the Memphis, Tennessee, area as to ice cream sales only; and (d) the New Orleans, Louisiana, area.

Respondent's pricing procedure under particular attack is its so-called volume discount or rebate schedules. However, there is substantial proof of "off-list" pricing which was not related to any discount schedule. This "off-list" pricing is conceded by respondent's witnesses, John Armstrong, who had general supervision of its Toledo milk study, and Clayton P. Thompson, who had general charge of its Memphis ice cream study.

Sealtest's monthly quantity discount schedule for Memphis ice cream effective February 4, 1957 (CX 76) is typical of such a schedule:

Gallons	*Discount Per Gallon*
50–79	2¢
80–109	3¢
110–139	4¢
140 & over	5¢

Dealers owning and maintaining all of their own equipment will receive 10¢ per gallon discount from our quoted wholesale list price on bulk ice cream, bulk sherbet, bulk ice milk, half gallons ice cream and sherbet, pints ice cream and sherbet. No discount will be paid on specialty or novelty items.

The Malone and Hyde stores who were a member of the Malone and Hyde group stores in Memphis had their purchases aggregated and Malone and Hyde received a 7 cents per gallon rebate, as did National Food of Tennessee (Tr. 887), and Kroger (Tr. 890). A 7 cents per gallon rebate was also paid to Food Center. Respondent referred to such off-scale rebates sometimes as "off-scale" and sometimes as "specially negotiated."

Respondent's quantity discount schedules for milk and dairy products were more complicated: the various items in the Sealtest dairy line were assigned a designated number of "rebatable points" and, in determining the discount (or rebate) bracket into which a customer fell, the rebatable points were totaled, not the dollar or product volume.

The complaint (Par. Six, page 82) sets forth an example of the manner in which rebatable points were allocated to fluid milk products:

1 quart milk (all kinds)	1 point
1 quart half and half	2 points
1 quart whipping cream	8 points
1 quart coffee cream	4 points
1 quart sour cream	4 points
1 quart buttermilk	1 point
5 pound carton cottage cheese	5 points

Some of respondent's dairy products did not have any rebatable points assigned to them, *e.g.*, yogurt, orange juice, malted milk, and butter.

"The period of the cost study" or "cost study period" as used in this initial decision, unless otherwise designated, means for Toledo-Monroe milk the month of July 1958, and for Memphis ice cream, October 19, 1959, to November 18, 1959.

The rebate schedule in effect at Toledo during the cost study period provided for rebates from 2 percent off list price, to be paid to customers purchasing from 700 to 999 rebatable points, up to 12 percent for customers purchasing 40,000 or more rebatable points per month. In August 1960, respondent put a revised rebate schedule into effect at Toledo with a revised point bracket and rebate scale. Under that schedule no change was made in the number of rebatable points required, to and including a 5 percent rebate. The succeeding rebate brackets, 6 percent through 12 percent, inclusive, were narrowed so as to qualify customers for higher rebates upon the purchase of fewer monthly rebatable points.

In the Toledo-Monroe area effective November 4, 1956, respondent's wholesale list prices for homogenized milk was 42 cents a half gallon and 21 cents a quart. The following changes became effective on the dates shown: February 3, 1957, the wholesale list of the half gallon was 40 cents, and the quart 20 cents. On April 1, 1957, the wholesale price list of the half gallon became 38 cents, and the quart 19 cents; on July 7, 1957, the wholesale list of the half gallon returned to 40 cents, and the quart to 20 cents. On August 1, 1957, the wholesale list of the half gallon rose to 42 cents, and the quart to 21 cents (CX 5, *in camera*). Respondent's wholesale list prices for homogenized milk in Toledo and Monroe for 1958 were: Effective February 2, 1958, the half gallon 40 cents, and the quart 20 cents (CX 57). On April 6, 1958, the half gallon was priced at 38 cents, and the quart 19 cents (CX 58); and effective April 20, 1958, the half gallon was 40 cents, and the quart was 20 cents (CX 59). It was on the basis of these or similar wholesale list prices that respondent's discounts and rebates were computed, paid and allowed, in those instances where respondent adhered to its discount and rebate schedule.

The July 1958 and August 1960 Toledo-Monroe milk volume rebate schedules were:

July 1958 (Cost Study Period) (CX 168-P) Monthly Rebatable Points Required	*Rebate*	*August 1960 (CX 172) Revised Point Brackets and Discount Scale Monthly purchase of Rebatable Points Required*
0 – 699	0%	0 – 699
700 – 999	2%	700 – 999
1,000 – 1,499	3%	1,000 – 1,499
1,500 – 1,999	4%	1,500 – 1,999
2,000 – 2,999	5%	2,000 – 2,999
3,000 – 4,999	6%	3,000 – 3,999
5,000 – 6,999	7%	4,000 – 4,999
7,000 – 9,999	8%	5,000 – 5,999
10,000 – 14,999	9%	6,000 – 6,999
15,000 – 24,999	10%	7,000 – 8,499
25,000 – 39,999	11%	8,500 – 9,999
40,000 and over	12%	10,000 and over

Although respondent put the new discount bracket into effect in August 1960, in Toledo, it did not make new time and cost studies under the new schedule. It utilized the time studies, cost studies, and customers' quantities purchased, shown in its July

1958 time studies, and classified customer locations in accordance with the brackets in the new schedule to show the new bracket-by-bracket cost (Tr. 5035, 5062). Insofar as the record shows the revised rebate schedule is still in effect and is the one under which Sealtest is currently pricing its dairy products in the Toledo area.

The rebates indicated in the above schedules were paid on the basis of a published price list. For example, one of Sealtest's customers in the 10 percent rebate bracket, buying a half gallon of milk which was listed at 40 cents, paid a net price of 36 cents. A competing customer receiving no rebate paid 40 cents.

It has been testified to by several witnesses, is agreed to by the parties, and is found as a fact that a very few cents or percentage points difference in the price of Sealtest's products would be sufficient to cause a customer to change from one seller to another seller, at both the wholesale and retail levels, in all of the markets as to which evidence was introduced.

The parties here have agreed and the examiner finds that competition in the sale of Sealtest's products here involved, including ice cream, is very keen in all the localities as to which evidence was offered, at both the wholesale and retail levels.

Respondent admits throughout its proposed findings, and it is found that Sealtest's volume rebate schedules resulted in its selling products of like grade and quality in the four different geographic areas here involved at different net prices to its customers who competed with each other in the resale of said products at retail and that the difference in price was substantial. Under the Supreme Court's holding in *F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U.S. 538, this constituted a price discrimination.

Sealtest discriminated in the prices at which it sold its products during the relevant periods in its (a) Toledo-Monroe, (b) Jackson-Lansing-Battle Creek, (c) Memphis, and (d) New Orleans area operations. Such discriminations included the practice of paying higher rebates to some customers than were paid to other customers; of paying no rebates to some customers, and rebates of varying amounts to others; of specially negotiating higher rebates to some customers than were provided for on any rebate schedule (*e.g.*, the original 12 percent rebate to the Kroger chain in the Toledo-Monroe area, the 7 cent per gallon rebate on ice cream to the Malone & Hyde chain in Memphis, and the special prices for its milk products and ice cream to the Hill stores and their successor, the Winn-Dixie chain in New Orleans).

Some examples of respondent's price discriminations are particularized below for the areas indicated. Findings have not been made for each and every price discrimination proven in this record. The facts hereinafter set forth are deemed adequate to support a finding that Sealtest discriminated in price within the rationale of the *Anheuser-Busch; Tri-Valley; American Oil;* and *United Biscuit,* decisions *supra.* It is not necessary, to support a cease and desist order, that Sealtest's pricing practices be broken down and separately analyzed for its fluid milk sales and its ice cream sales. Although the Memphis evidence was restricted to Sealtest's ice cream sales, Sealtest's price discriminations, whether in the fluid milk or ice cream line, should be proscribed unless they are either cost justified, or found to have been made in good faith to meet the equally low lawful price of a competitor.

PRICE DISCRIMINATIONS—TOLEDO-MONROE

Sealtest Foods Division maintains a bottling plant at Toledo, Ohio, for milk distributed in the Toledo-Monroe, Michigan areas. The Toledo plant was formerly known as Ohio Cloverleaf Dairy (Tr. 93). Prior to 1956, it was a wholly owned subsidiary of respondent (Tr. 27, 94, 104).

The Toledo plant handles and distributes a general line of fluid milk products in Toledo and the surrounding area (Tr. 27; CX 46). It sells its milk products for both wholesale and retail home delivery (Tr. 277). The Toledo plant does not manufacture ice cream. Ice cream is manufactured in Detroit and Kalamazoo, Michigan, and Huntington, Indiana. Toledo distributes annually about 600,000 gallons of ice cream within its territory (Tr. 138).

Although no bottling is done at respondent's Monroe branch, it distributes milk, prepackaged for the consumer, in Sealtest trucks on wholesale and retail routes (Tr. 198–9, 205). The Monroe area is served from routes originating in Detroit (Tr. 123, 152, 163).

Approximately 10 percent of the Toledo plant's total volume of fluid milk products is shipped to the Monroe, Michigan branch (Tr. 123, 162–163) which serves the city of Monroe and most of Monroe County (CX–47, 48). It is redelivered by the branch on its wholesale and retail routes (Tr. 205).

Wholesale milk distribution is effected by respondent through 22 routes at Toledo and 5 at Monroe (Tr. 1620; RX 34). Wholesale customers served by these routes include retail stores, which purchase for resale at retail; and restaurants, hotels, and institutions, which purchase for on-premises consumption (Tr. 1765, 1858–60). Evidence in support of the complaint has been confined chiefly to sales to customers purchasing for resale at retail, representing about 82 percent of the Toledo plant's volume (Tr. 1874).

The Toledo plant uses distributors operating from Hillsdale, Hudson, Adrian and Tecumseh, Michigan, to serve areas in lower Michigan which are not otherwise served by the Monroe branch.

The distributors sell for their own accounts to both wholesale and retail customers and serve some Kroger and a Wrigley store (Tr. 221–22, 225). They also deliver to retail outlets which are Sealtest customers.

In June 1958, the Toledo plant's wholesale price for half gallons of milk in paper cartons was 40 cents (CX 59; Tr. 229–30, 232, 480, 2047, 3288, 3373). Other items were sold at the wholesale price shown on CX 59, subject to rebates ranging from 2 percent to 12 percent, depending upon quantities purchased under the Toledo plant's graduated quantity discount schedule. Butter, yogurt, Reddi-Whip, and orange juice, were not subject to rebates (Tr. 289–90, 411).

In early 1958, the wholesale price of milk, half gallons, in paper cartons, distributed by the Monroe plants, was 40 cents (Tr. 3373). The Monroe branch was using a rebate schedule similar to that of the Toledo plant (Tr. 247, 248, 3306, 3392–93).

In Respondent's Proposed Findings (hereinafter referred to as RPF) number 48, page 21, respondent admits:

> The record shows that the Toledo plant sold Sealtest fluid milk products at different rebates to different wholesale customers in the Toledo and Monroe areas (CX 5, 13, 19, 51A, 51B; R. 417, 436, 452, 454, 471, 483, 494). The differences in the amount of rebates paid such customers resulted from the application of the rebate schedule. No wholesale milk customer received a discount higher than 12 percent (R. 3091, 3293-94).

The Kroger and Wrigley stores served by the Toledo-Monroe plant's Michigan distributors each received a 12 percent rebate (Tr. 172, 186–87, 223).

Paul Julian of Hudson, Michigan, one of respondent's distributors, paid a 7 percent discount (Tr. 178) to seven of his wholesale customers (Tr. 173, 177–78), and the other distributor, LeVon Hephner of Adrian, Michigan, did not pay any discounts to wholesale accounts other than Kroger and Wrigley. Julian's 7 percent discount to his wholesale customers was paid out of his own pocket. Respondent had specially negotiated the 12 percent rebate to Kroger and Wrigley, and at the time of the 1958 hearing at Toledo, the 12 percent discounts to Kroger and Wrigley were shared, 6 percent by the Toledo plant and 6 percent by the distributors themselves (Tr. 179, 186–87, 190, 223–24). Sealtest is accountable for the 12 percent discount paid to the Kroger and Wrigley stores served by the Michigan distributors (RPF 51).

At the Toledo hearings, Richard O. Files of Village Farm Dairy, a Sealtest competitor, testified to a decline in the sales of that company. LeClare A. Smith of Trilby Farms Dairy, likewise a Sealtest competitor, testified to a decline in retail sales, and attributed such decline in part to "loss leader" sales of milk in the supermarkets (Tr. 340).

Donald S. Shunk of Cherry Grove Dairy, serving the Toledo-Monroe areas with 17 retail routes and a wholesale route, also testified to a decline in his retail home delivery business and attributed this decline in retail sales to the "loss leader" practices in the supermarkets (Tr. 370–73). These "loss leaders" were made possible in part, by Sealtest's pricing, which paid the high volume supermarkets as much as a 12 percent rebate, and the small independent no rebate.

Some of Sealtest's competitors in the Toledo-Monroe area were, among others, Driggs, Babcock, Page, Meadow Gold, Cherry Grove, Borden, Village Farm, and Trilby Farm Dairy.

Respondent asserts that the change in its discount schedule which became effective in the Toledo-Monroe area on August 1, 1960, reducing the volume requirements for the 6 percent to 12 percent brackets, and reducing the 12 percent bracket from 40,000 rebatable points to 10,000 rebatable points, was effectuated because competing dairies, notably Driggs and Babcock, provided for their top rebate with fewer rebatable points.

Respondent's Exhibits 165 and 166 are attached to an affidavit (Respondent's Exhibits 166–B, C and D) by Glenn W. Whittaker, zone manager for respondent out of Toledo. Respondent's Exhibit 165 purports to state the points discount schedule for Driggs, dated February 1, 1959, and Respondent's Exhibit 166 purports to be the Babcock schedule. Solely on the basis of Mr. Whittaker's affidavit, the examiner cannot find that Respondent's Exhibits 165 and 166 establish the prices charged by Driggs and Babcock for their milk products. These exhibits are not the best evidence and are based upon hearsay. Even though it were found that Respondent's Exhibit 165 and Respondent's Exhibit 166 were Sealtest's competitors' discount schedule, such fact, would not excuse the respondent's price discriminations in the Toledo-Monroe area.

Such evidence does not prove the *net prices* at which Sealtest's competitors in this area were selling their products which competed with Sealtest's products.

At the time of respondent's cost study in the Toledo-Monroe area, 423 grocery stores and other locations selling respondent's milk and milk products for off-premises consumption were served from wholesale milk routes. Respondent discriminated in price between competing wholesale customers listed on CX 168A–N by paying many of them no rebate and by paying others at discounts ranging from 2 percent to 12 percent. Many of the unfavored wholesale customers competed with the favored customers in the resale of respondent's milk and milk products. The payment of the rebates and the variations in the rebates paid resulted in substantial competitive injury to respondent's unfavored wholesale customers.

John H. Armstrong of A. T. Kearney & Company of Chicago, who was in charge of respondent's Toledo milk study, testified (Tr. 2122–23) that of 22 Kroger stores in that area served by the Toledo plant during the study period, only 3 Kroger stores purchased the 40,000 rebatable points per month to fall within the 12 percent rebate bracket. Nevertheless, the entire Kroger chain was paid a 12 percent rebate. The Kroger stores which received the 12 percent unearned rebate competed with other customers of Sealtest who received a lesser rebate, or no rebate at all.

Although evidence of price discrimination was introduced for respondent's ice cream sales separately from the rest of the Sealtest product line, it was unnecessary for complaint counsel to have proven price discrimination for both ice cream and fluid milk products separately. Even though Sealtest ice cream was priced and rebated differently from the rest of the Sealtest line, all that complaint counsel need have proven is price discrimination as to *any* of the product line.

Prior to the time Sealtest started serving Kroger in 1955, Kroger had not been served by any other dairy but had processed its own brand of milk at a company-owned dairy (Tr. 278, 3014, 3107). Prior to agreeing to pay its 12 percent rebate to Kroger in 1955, Sealtest's top Toledo rebate had been 10 percent. From 1955 until February 1960 Sealtest was the sole supplier of milk products to the Kroger stores in the Toledo area (Tr. 3012), and paid Kroger its top 12 percent rebate while it was at the same time paying no rebate, or substantially less rebate, to Sealtest customers with whom Kroger competed.

A & P had about 18 stores in the Toledo area which purchased only Sealtest cottage cheese and dip. Yet the entire chain was paid a 10 percent specially negotiated rebate (Tr. 2983). A & P competed with other Sealtest customers who purchased its entire product line; who were paid no rebate or less rebate than the 10 percent to A & P.

Glenn Whittaker, respondent's Toledo-Monroe manager, testified (Tr. 3007, *et seq.*) that he had a conversation with Danny Buick of Foodtown (Monroe) in early 1958 and Buick told him United Dairy was giving him a "28 percent off from list retail." Since Sealtest's highest rebate bracket was 12 percent, it was not meeting United's alleged 28 percent rebate with its 12 percent rebate.

The number and percentage of store locations buying respondent's dairy products in the Toledo, Ohio-Monroe, Michigan, area during the cost study week, which were paid off-scale rebates, by brackets, were:

Rebate Bracket	No. of Store Locations Paid Rebates on Basis of Rebates Paid, by Brackets (CX 168A–N)	No. of Store Locations paid Off-Scale Rebates, by Brackets (CX 168A–N)		Percent of No. of Store Locations Paid Off-Scale Rebates, By Brackets
		Chain Stores	Other	
0%	163	—	—	—
2	27	—	—	—
3	34	—	—	—
4	21	—	—	—
5	12	—	—	—
6	7	—	—	—
7	2	2	—	100.00%
8	—	—	—	—
9	—	—	—	—
10	32	28	4	100.00
11	—	—	—	—
12	125	118	2	96.00
Totals	423	148	6	36.41%

The rebates paid by respondent during July 1958 in the Toledo, Ohio-Monroe, Michigan, area to chain and group stores compared with rebates earned by the stores in each chain or group during the study week were:

Chain Stores	Rebate Paid July 1958	Total No. of Stores	Rebates Earned during Study Week by Individual Stores											
			0%	2%	3%	4%	5%	6%	7%	8%	9%	10%	11%	12%
Sears	7%	2				1		1						
Casper-Miglores	10	2					2							
Golden Drumstick, etc.	10	3	1			1		1						
A. & P. Stores	10	18	6	3	6	2	1							
Bellman's	10	5					2	1	1	1				
Associated Grocers	12	39	7	5	4	6	7	4	6					
Red & White	12	18	1	1	1	2	3	4	2	2		1		1
Joseph's	12	5										5		
Tri-County	12	8		1		3	1	1	1	1				
Big Bear	12	2								1		1		
Saveway	12	11					2	2	1			4	1	1
Seaway	12	8							1		1	5	1	
Kroger	12	22	1							1	4	7	6	3
National Foods	12	5									1	2	2	
Foodtown	12	4				1	2	1						
Wrigley's	12	1										1		
Totals		153	16	10	11	16	20	15	12	6	6	26	10	5

(CX 168–H–N)

Rebatable sales by respondent of its dairy products to chain and group stores, sales at off-scale rebates, and the percentage of off-scale sales during July 1958 were:

Chain or Group Stores	Rebate Paid July 1958	No. of Stores		Total Rebatable Sales	Sales at Off-Scale Rebate	Percent of Off-Scale Sales	Reference
		Total Sold	Paid Off-Scale Rebate				
Sears Market	7%	2	2	$ 252.92	$ 252.92	100.00%	CX 168 H
Casper-Miglores	10	2	2	267.73	267.73	100.00	CX 168 I
Golden Drumstick, etc.	10	3	3	218.98	218.98	100.00	CX 168 H
A. & P.	10	18	18	973.64	973.64	100.00	CX 168 I
Bellman's	10	5	5	1,114.13	1,114.13	100.00	CX 168 I
Associated Grocers	12	39	39	4,248.62	4,248.62	100.00	CX 168 J
Red & White	12	18	17	6,567.70	3,496.70	53.24	CX 168 K
Joseph's	12	5	5	4,508.95	4,508.95	100.00	CX 168 K
Tri-County Super Dollar	12	8	8	1,265.61	1,265.61	100.00	CX 168 L
Big Bear	12	2	2	1,165.83	1,165.83	100.00	CX 168 L
Saveway	12	11	10	7,602.06	5,521.28	72.63	CX 168 L
Seaway Foodtown	12	8	8	7,003.80	7,003.80	100.00	CX 168 L
Kroger	12	22	9	24,421.64	17,489.05	71.61	CX 168 M
National Foods	12	5	5	4,778.73	4,778.73	100.00	CX 168 M
Foodtown	12	4	4	502.94	502.94	100.00	CX 168 N
Wrigley's [1]	12	1	1	1,000.90	1,000.90	100.00	CX 168 N

[1] Rebate computed on combined point sales to Monroe and Adrian, Mich. stores (RX 54 M). Latter not included in study.

Respondent's Exhibit 54–A lists 45 Sealtest independent customer-locations in the Toledo-Monroe area for which the discount paid in July 1958 varied from their sales volume bracket during the week of the study. Respondent admits that some of these customers were paid off-scale. Respondent's Exhibit 54–A reflects, *inter alia*, the following:

Customer's Name	Discount Paid in July 1958	Correct Discount Based on Company's Method of Computation
Peoples Market	12%	3%
Segur Market	0%	2%
Nancys Place	0%	2%
Mullens Grocery	0%	2%
La Plant Grocery	10%	6%
Country Market	10%	6%
Save Mor Super	12%	6%
Prescott Market	10%	7%
Hoffmans Market	10%	8%

Respondent's Exhibit 127A shows that during the period of the Toledo milk cost study, respondent's 423 off-premises consumption customers were paid rebates as follows: (It should be noted, however, that in Respondent's Exhibit 127A the individual customer locations are allocated to rebate brackets in the new rebate schedule (CX 172) which became effective in August 1960, *supra.*)

Individual Customer Locations	Discount Paid %	No. of Locations	Cost as Percent Distribution of Rebatable Sales
0– 699	(0%)	155	51.59
700– 999	(2)	31	39.65
1,000–1,499	(3)	38	31.57
1,500–1,999	(4)	26	26.86
2,000–2,999	(5)	10	22.79
3,000–3,999	(6)	6	19.94
4,000–4,999	(7)	1	19.93
5,000–5,999	(8) ([a])	1	17.24
6,000–6,999	(9)	0	----
7,000–8,499	(10) ([b])	2	14.52
		270	
Voluntary & Cooperative Groups			
J Associated Grocers	12	39	22.19
K Red & White	12	18	12.34
L TriCounty Super Dollar	12	8	19.21
M Safeway	12	11	11.10
		76	
Stores under Common Ownership			
N Foodtown (Monroe)	12	4	24.37
O New Beer Stop, etc.*	10	3	24.45
P Casper-Miglores	10	2	23.07
		9	

See footnotes at end of table, page 104.

	Individual Customer Locations	Discount Paid %	No. of Locations	Cost as Percent Distribution of Rebatable Sales
Corporate Chains				
A	A&P	10	18	23.15
B	Sears	7	2	23.37
C	Bellmans	10	5	17.77
D	Big Bear	12	2	11.15
E	Joseph's	12	5	10.78
F	National	12	5	10.10
G	Kroger	12	22	9.69
H	Wrigleys	12	1	9.60
I	Seaway Foodtown, Inc.	12	8	10.02
			68	

(a) Prescott Market, see Respondent's Exhibit 54.
(b) Mickas Market & Hoffmans Market. See Respondent's Exhibit 54.
*Includes State Park Beer Stop and Golden Drumstick.

Associated Grocers group, with 39 locations, whch was paid the highest, or a 12 percent rebate, had a distribution cost of 22.19 percent of rebatable sales ascribed to it. Individual customer locations in the 5 percent rebate bracket had almost the same distribution cost, 22.79 percent of rebatable sales, and yet the individual customers received less than half the rebate which the Associated Grocers group received. According to Respondent's Exhibit 127–A, during the cost study period, in Toledo-Monroe respondent paid a 12 percent rebate to customers whose distribution costs, expressed as a percentage of rebatable sales, varied from a low of 9.60 percent to serve *one* location of *Wrigley's* to a high of 24.37 percent to serve *four* Foodtown locations. Expressed another way, although Foodtown's distribution costs were more than 2½ times the distribution costs of *Wrigley's*, they both received the same 12 percent rebate.

Similarly, individual customers with two locations, whose distribution costs are stated to be 14.52 percent of rebatable sales, were paid a 10 percent rebate, and New Beer Stop, State Park Beer Stop, and Golden Drumstick were paid the same 10 percent rebate even though their distribution costs are stated in Respondent's Exhibit 127A to have been 24.45 percent of rebatable sales. If, as respondent asserts, distribution costs, expressed as a percentage of rebatable sales, were the criteria by which Sealtest fixed the rebates which it paid its customers, such criteria was, in practice, ignored by respondent in pricing Sealtest products. John Armstrong, in charge of the Toledo cost study testified to this fact, in effect. Such practice implies basis defects in Sealtest's quantity discount schedules and the studies made to cost justify them.

In Respondent's Exhibit 45A captioned "Summary of sales and distribution costs-by location-computed time" the 423 customer locations used also for Respondent's Exhibit 127, *supra*, were allocated to different rebate brackets than those to which they were allocated on Respondent's Exhibit 127, as follows:

Rebate Bracket %	*Locations in Bracket*
0	165
2	38
3	43
4	40
5	29
6	22
7	13
8	8
9	6
10	26
11	10
12	5
A & P 10	18
	423

Respondent's Exhibit 45A reflects that distribution costs to the 18 A & P locations were 23.15 percent of rebatable sales. If A & P had been rebated according to such distribution costs, it would have been in the 5 percent rebate bracket.

Allocation of the 423 store locations to discount brackets on the Respondent's Exhibit 45 series does not jibe with the similar allocation on Respondent's Exhibit 127, (*supra*).

Commission's Exhibit 61, *in camera*, shows rebates to respondent's 15 largest ice cream customers purchasing for resale at retail in Toledo for March through May 1958 as follows:

REBATES TO FIFTEEN LARGEST ICE CREAM CUSTOMERS PURCHASING FOR RESALE AT RETAIL
OHIO CLOVER LEAF, TOLEDO, OHIO, MARCH THRU MAY, 1958

Customer	Address	March Rebates	April Rebates	May Rebates
Joseph Super Market		10%	10%	10%
F. N. Johnson I.G.A. Stores	Bellefontaine, Ohio	10%	10%	10%
Kroger Co.		8%	10%	10%
Bartley Co. (Red & White Stores)		10%	10%	10%
A-G Food Stores		10%	10%	10%
National Food Stores		6%	6%	8%
Kohl's Market	Columbus Grove, Ohio	6%	6%	6%
Koehler Market	Oak Harbor, Ohio	5%	5%	5%
Naborhood Market	Lima, Ohio	5%	5%	5%
(1) Furrey's Carryout	3326 Stickney, Toledo, Ohio	10¢ gallon	10¢ gallon	10¢ gal.
Cook's Variety	Trilby, Ohio	5%	5%	5%
Manor's Market		4%	4%	4%
Shiets Market	Fremont, Ohio	4%	4%	4%
D&D Market		4%	4%	4%
Burkey Grocery	Ai, Ohio	4%	4%	4%

(CX 61, *in camera*)

According to Commission's Exhibit 168–A–N, *in camera*, during the cost study period, respondent's Toledo, Ohio, plant had wholesale customers in Toledo numbering 208 to whom respondent paid and allowed discounts and rebates from 2 percent to 12 percent. For the same period respondent had wholesale customers in Toledo numbering 132 to whom it paid and allowed no discounts and rebates. For this same period, respondent's Monroe, Michigan, branch had wholesale customers numbering 52 to whom respondent paid and allowed discounts and rebates from 2 percent to 12 percent and wholesale customers numbering 31 to whom it paid and allowed no discounts and rebates.

The discount and rebate schedules utilized by Sealtest's Toledo and Monroe branches were tailored and applied principally to purchases by independent wholesale customers, and not to respondent's chain store customers. During the cost study period respondent's independent wholesale customers purchasing respondent's products which, on a point basis, came within the 0 percent—6 percent brackets of the discount and rebate schedule, were paid and allowed discounts and rebates by respondent more or less according to said schedule.

In the payment and allowance of rebates to corporate chain stores and central buying groups, wholesale customers, Sealtest frequently disregarded its discount and rebate schedule. It paid higher rebates to the corporate chains and central buying groups than should have been paid and allowed, had its rebate schedule been adhered to. These higher "off-scale" discounts and rebates to the corporate chains and central buying groups gave them a competitive advantage over the independent grocer, and competitively injured the independent vis-a-vis the corporate chains and central buying groups. For example: John Davis, owner of an independent grocery in Toldeo, paid respondent 40 cents net for its milk in half gallon containers. In the resale of respondent's products Davis' store competed with Kroger, Big Bear and Joseph's (Tr. 296). These stores purchased the milk for 40 cents list less a 12 percent rebate, thereby paying 35.2 cents for the same half gallon for which Davis was paying 40 cents (CX 168–M, 168–L, 168–K, *in camera*).

Ben Peterman, a Monroe, Michigan, grocer, paid respondent 40 cents for a half gallon of milk and received a 2 percent rebate (Tr. 417). Peterman was in competition with Kroger and Gruber Stores in his vicinity, both of which were receiving a 12 percent rebate on respondent's products, and were therefore paying respondent less for its products than were the independents with whom they competed.

Peter Betrus worked for his father who owned an independent grocery in Monroe. The store purchased Sealtest's half gallons of milk for 40 cents, less a rebate of 4 percent or less. Betrus' average rebate was about 3 percent. A Kroger store about a mile distant from Betrus, which competed with him in the sale of such products, received a 12 percent rebate. Betrus testified that his competitors were Foodtown, Kroger, Wrigley and Gruber (Tr. 441), all of which were paid a 12 percent rebate (CX 168–N, CX 168–J, *in camera*).

Fred Burke, an independent grocer in Monroe, paid Sealtest 40 cents a half gallon and 20 cents a quart net. His store was competing with a Kroger store about six blocks away, a Wrigley store about 15 blocks away, and Gruber's about a mile away, all receiving a 12 percent rebate (Tr. 457–8).

Walter Joseph Salwitz, owner and operator of a grocery store in Toldeo, paid respondent 40 cents for its half gallons of milk and received a 2 percent rebate. Salwitz purchased the entire Sealtest line (Tr. 482). His store was competing with Kroger, Big Bear, Joseph's, and National Tea in the resale of respondent's products, all of which stores were paid a 12 percent rebate (Tr. 483).

Earl Alvin Boger, (Tr. 493, *et. seq.*) operated a grocery in Toledo, and paid 40 cents a half gallon, net, for respondent's milk. He was competing with a Kroger store, about four blocks away, which was being paid a 12 percent rebate; and was paying 35.2 cents per half gallon of milk. Boger also purchased other products in the Sealtest line.

PRICE DISCRIMINATION—
LANSING-JACKSON-BATTLE CREEK AREA

Sealtest maintains a fluid milk processing plant at Lansing, Michigan, which processes milk, chocolate milk, bottled milk, half and half, and skimmed milk (Tr. 581). Additional products in the line, *i.e.*, butter, yogurt, cottage cheese and coffee cream are obtained from other sources. All of these products, except butter and yogurt, are sold under the Sealtest brand. The sales territory of the Lansing plant embraces all of western Michigan (Tr. 627), with distributing plants at Grand Rapids, Jackson and Kalamazoo. Lansing does not manufacture ice cream.

Wholesale distribution to stores in Jackson was achieved by company trucks operated on company routes, transporting milk products from the Lansing plant to Jackson, and by independent contract haulers.

The examiner rejects respondent's contention that its Lansing - Jackson - Battle Creek sales are intrastate transactions, and not in the course of interstate commerce (See RPF 102, 103), in spite of the holding in *Willard Dairy Corp.* v. *National Dairy Products Corp.*, 309 F. 2d 943 (6th Cir. 1962). On May 27, 1963, the Supreme Court of the United States denied certiorari in the *Willard* case. Respondent urges that its Jackson-Lansing-Battle Creek operations are exempt from the Robinson-Patman Act under the rationale of the *Willard* decision. Even though the *facts* should support respondent's contentions, which they do not, respondent's price discriminations in other areas are sufficient to support a cease and desist order, unless cost justified, or made in good faith to meet the lawful lower price of a competitor. However, in this proceeding the product line involved is not only fluid milk, but all of the Sealtest products sold by it in the Jackson-Lansing-Battle Creek area. The record will support a finding, in this examiner's opinion, that discriminatory pricing by respondent during the relevant period in its Jackson-Lansing-Battle Creek area did involve Sealtest products which moved in interstate transactions. In his dissent to the Supreme Court's denial of certiorari in the *Willard* case, Justice Black pointed out that the lower court decided the interstate commerce question on a technical point of pleading. Willard requested permission to amend its complaint so as to plead properly the facts which would have conferred jurisdiction, and moved to dismiss its complaint without prejudice so that it could file a new suit. The district judge rendered summary judgment, dismissing the suit on its merits. This examiner's ruling of January 18, 1960, dealing with respondent's "interstate commerce" defense is attached to this opinion as Appendix A.

In his dissent to the denial of certiorari, Justice Black stated, in the *Willard* case:

> Judgments like the one left standing here make it difficult indeed for small, independent, local companies to survive against the predatory assaults of their larger and more powerful interstate competitors.

At the time of the September 1958 hearings at Lansing, Michigan, the wholesale price of half gallon Sealtest homogenized, Vitamin D milk was 40 cents in Lansing (CX 62, App. A, Item 2; Tr. 537) ; 38 cents in Jackson (CX 73; Tr. 537, 836) ; and 33 cents in Battle Creek. The wholesale prices of other items in the Jackson-Lansing fluid milk line are shown in the price lists appearing in the record as Commission's Exhibit 62, and Exhibit 73.

There was a volume discount schedule in the Lansing area similar to that in Toledo (CX 62, App. A, Item 3, Tr. 530, 611–13), containing rebate brackets ranging from 3 percent to 10 percent. This discount schedule was revised as of October 6, 1958, by increasing the rebate payable for 18,000 rebatable points and over from 10 percent to 12 percent (CS 168).

No discount schedule was ever put in effect for the Jackson area (Tr. 541, 3577–78, 3641), although as shown by Commission's Exhibit 62, Appendix A, Item 4, discounts ranging from 5 percent to 12 percent were granted by Sealtest to its wholesale customers in that area.

The Sealtest discount schedule was withdrawn in the Battle Creek market shortly after it was introduced, and since August 18, 1958, the wholesale prices of fluid milk products and by-products in the Battle Creek area have not been subject to rebates (CX 62, App. A, Item 2).

In its proposed finding (RPF 109) respondent admits,

> The record shows that Sealtest fluid milk products have been sold at different prices to different wholesale customers in Lansing and Jackson, Michigan (CX–62, App. A, item 4). The price differences among the wholesale customers in Lansing resulted from discounts granted pursuant to the discount schedule in effect there and from discounts negotiated with individual customers. The price differences among the wholesale customers in Jackson all resulted from discounts individually negotiated, no discount schedule having ever been used in that market. (R. 541, 3577-78, 3641) . . . .

At the Lansing hearing, on March 12, 1959, complaint counsel offered the testimony of John M. Foster (Tr. 1319, *et seq.*), William Alexander (Tr. 1334, *et seq.*), Vincent Pecora (Tr. 1337, *et seq.*), David Magliocco (Tr. 1353, *et seq.*), Frank Paradise (Tr. 1387, *et seq.*), Mrs. Ruth Blackwell (Tr. 1398, *et seq.*), Orlando Fabino (Tr. 1411, *et seq.*), and Peter Forte (Tr. 1427, *et seq.*), all of whom were independent grocers in Lansing, Michigan. These witnesses testified to the keen competition in their business in that area; and the fact that just a few cents or percentage points difference in the price of Sealtest's products would cause a customer to change from one seller to another. The witnesses testified to the adverse effect of Sealtest's price discriminations on their business.

Magliocco named Schmidt's as one of his competitors, selling

Sealtest's milk cheaper than he could sell it. Mrs. Blackwell was being paid a 3 percent rebate, paid 37 cents for a half gallon of milk, and had received complaints from her customers that her milk price was higher than the price of her competitors. Among the competitors named were National Food Stores, A & P, and Schmidt's Stores.

Mrs. Blackwell further testified that 2 or 3 cents in the price of milk would cause a customer to change stores (Tr. 1403).

In administering its rebate bracket in Lansing, all stores where there was a common ownership had their purchases aggregated. In Lansing in June 1958, respondent paid rebates to 16 wholesale milk customers with 53 outlets; in July 1958, to 17 wholesale customers with 54 outlets; and in August 1958, to 16 wholesale customers with 54 outlets.

Robert A. Tice, Jr., manager of respondent's Lansing area, testified that the sales volume of the Lansing plant for the year preceding the consolidation of the Lansing and Grand Rapids operation on March 1, 1958, was approximately $2 million, and after the consolidation was $4 million (Tr. 605). In the area served by the consolidated operation, respondent's Lansing operation was the largest of all competitive operations (Tr. 609), its trading area covering Lansing, Jackson, Battle Creek, Grand Rapids and Kalamazoo.

Commission's Exhibit 62, page 17, shows that in Jackson, Michigan, during June, July and August 1958, respondent paid 10 percent rebate to National Food Store, No. 40, and to Wrigley Store, No. 34. It paid a 12 percent rebate to Kroger Store, No. 93.

Respondent entered the Jackson dairy products market in the spring of 1957. Prior to that time the prices of all the Jackson dairies were about the same (Tr. 775). After respondent entered this market, it offered lower prices to the customers of the other dairies who had been in business in Jackson. Dairies thereafter operating in Jackson were Servall-Jersey; Fornier-Lakeside, Loud & Jackson, Purity Ice Cream Co. of Adrian, Michigan, and the Lansing branches of Borden, Swift, and Harvin; Page of Toledo, Miller Dairy Farms of Eaton Rapids, Matthews, a local company, Risdon of Detroit, and Meadow Gold Division of Beatrice Foods (Tr. 6021–23, 6033–35). By a series of acquisitions, Harvin is now part of McDonald Dairy Products Co. of Flint.

Respondent's entry into the Jackson market disturbed what had otherwise been a stablized price situation and resulted in price cutting and discriminatory pricing.

Oliver Sweitzer of Servall Dairy Farms testified (Tr. 664, *et seq.*) to losing business to respondent after it entered the Jackson market with its lower prices. The accounts claimed to have been lost included Top Notch Ice Cream Stores, Niehauss Grocery, Putnam's Finer Foods, National Food Stores, Inc., Fenwick's Grocery, Cunningham Drug Stores, and Jackson Food Market, Inc.

Mr. Sweitzer testified on September 17, 1958 (Tr. 668). "I attributed the fact that discounts are prevalent today to the fact that it was the desire of National Dairies to attain a percentage of sales in the town and I believe that it was a means of predatory competition on their part to undersell the local dealers."

The milk business of the Wrigley Store at Jackson was taken away from Fornier-Lakeside by respondent as well as the Kroger business. Respondent was paying the Kroger chain a 12 percent rebate (CX 62, page 17, *in camera*) and the Wrigley chain a 10 percent rebate during June, July and August 1958.

Among respondent's wholesale customers in Lansing, those not receiving and those receiving discounts competed in the resale of respondent's milk and milk products, with others especially supermarkets, receiving discounts or larger discounts. The owners of small independent grocery stores, hereinbefore named: Messrs Foster, Alexander, Pecora, Magliocco, Paradise, Mrs. Blackwell, Fabino and Forte, receiving either no discounts or small discounts, were competitively injured by respondent's pricing practices in Lansing. They competed with other Sealtest customers who were buying its products at lower net prices.

In the Jackson, Michigan, market, Harold Peterson installed the first wholesale route for respondent in early 1957 (Tr. 1437–38). Peterson testified that the price he offered to wholesale customers was the base or list price that other local dairies were charging their customers reduced by respondent's volume discounts which ranged from 3 percent to 10 percent (Tr. 1438–39). Peterson and Cowden, both employees of respondent, solicited wholesale business (Tr. 1440). Some of the stores which received a 10 percent rebate, obtained it without regard to volume (Tr. 1441–45). The amount of the rebate was not reduced in the event that the stores receiving it did not sell the volume upon which a 10 percent discount was based under the discount schedule (Tr. 1443).

When Sealtest entered the Jackson market it undercut the prices previously prevailing in that market. Its discounts were not related to the volume of rebatable products purchased. This pricing practice continued for the most part, during 1958 (CX 62, page 17, *in camera*). Respondent's discriminations in price injured its competitors. Its unfavored wholesale customers competing with its other favored wholesale customers were also injured.

During the period of the time study, Sealtest discriminated in the prices at which it sold its dairy products in Lansing, Michigan, by paying varying rebates from its list prices to its customers who competed in the resale of Sealtest products. This resulted in competing customers paying different net prices for respondent's goods of like grade and quality. The following customers in Lansing were paid the indicated rebates from respondent's list prices:

3 percent	*Anthony's Foodmarket
	*B&J Shoppe
	Craig's Market
	DeMarco's Grocery
	*Everybody's Market
	Jim's Market
	Wally's Food Market
4 percent	Nakfoor Grocery
	Pete's Market
5 percent	*Vet's Market
10 percent	A & P
	*Home Dairy
	*L & L Shoprite Market
	*Lansing Wholesale Grocery Co.
	National Food Stores
	*Schmidt Bros. Super Market
	*Tom's Shoprite Market (CX 62, page 15)

*Of these 17 customers, rebates to 9 were individually negotiated, and 8 of the rebates were based upon the rebate schedule.

During the same period other competing customers in Lansing were paid lesser rebates or no rebates at all.

During the period of the cost study (July 1958), respondent's Lansing, Michigan, wholesale customers purchasing ice cream for resale at retail were allowed rebates per unit as follows:

Customer Name	*Rebate Per Unit*
Butterfield Theatres, Inc.	.0957 Dz.
*Converse Drug	.1356 Gal.
Family Drug	.1338 Gal.
Gasper Drug	.2304 Gal.
Northside Pharmacy	.1726 Gal.
Rumsey Pharmacy	.0539 Gal.
Schmidt Bros. Super Markets	.0582 Gal.

*Rebate includes 10¢ per gal. equipment allowance on bulk and package. (CX 62, page 16.)

At the same time other competing wholesale customers of respondent who purchased its ice cream for resale were paid either no or differing rebates.

During the period of the cost study (July 1958), respondent's Jackson, Michigan, wholesale customers purchasing ice cream for resale at retail were allowed rebates per unit as follows:

Customer Name	*Rebate Per Unit*
Barrett's Take Out	.0472 Gal.
Butterfield Theatres, Inc.	.2500 Dz.
Driscoll's Mkt.	.0087 Gal.
Ernie Schelling	.0634 Gal.
*Edw. Schonhard Party Store	.0833 Gal.
*Topnotch Dairy Store	.4557 Gal.
*Wrigley's No. 34	.3031 Gal.

*Rebate includes 10¢ per gal. equipment allowance on bulk and package. (CX 62, page 18.)

At the same time other competing wholesale ice cream customers of respondent in Jackson were paid either no or differing rebates.

Battle Creek milk customers received rebates August 5–16, 1958, as follows:

Komarck's Grocery #1 and #2	rebated at 3¢
Orchard Park Grocery	rebated at 3¢

(CX 62, page 19.)

Some of Sealtest's Battle Creek ice cream customers were paid a rebate for June, July, and August 1958. The rebates per unit paid for July 1958 were:

Customer	*July 1958 Unit Rebate*
*Andy's Drive Inn	.2428 Per Gal.
Dandy Handy Dairy Store	.0583
Komarck Grocery	.0723
Mac's Variety Store	.1137
Orchard Park Grocery	.0238
Purity Dairy Bar	.2138

*Rebate includes 10¢ per gallon equipment allowance on bulk and package. (CX 62, page 20.)

In July 1958, respondent paid differing rebates to its Jackson, Michigan, customers as indicated below. These were not based upon any volume discount schedule, but were specially negotiated, as follows:

Customer	*Rebate %*	
Topnotch Dairy Store	10	(later increased to 12%)
Barrett's Take Out	10	
National Food Store No. 40	10	
Wrigley, Inc., No. 34	10	

Customer	Rebate %
Kulsea Grocery	5
Ideal Fruit Market	5
Robinson's Wildwood Market	8
Hanser Roman Grocery	5
Red Vest Dairy Bar	10
Day's Grocery	6
Dutch Clee's Market	10
Putnam Foods	10
Jackson Food Market	10 (later increased to 12%)
Neihaus Grocery	10
Kroger No. 93	12

(CX 62, page 17.)

Respondent's payment of these rebates constituted (See CX 62, page 17) a price discrimination between the above customers and those receiving no rebates, as well as a price discrimination between respondent's customers receiving differing rebates. It resulted in competing customers paying different net prices for products of like grade and quality being sold by respondent in the Jackson-Lansing-Battle Creek area.

PRICE DISCRIMINATIONS—MEMPHIS, TENNESSEE

Complaint counsel offered no evidence of discrimination in the prices at which respondent sold its milk to competing customers in Memphis, Tennessee, because the state law prohibited discounts in the sale of milk (Tr. 910). Insofar as this initial decision relates to Memphis, it deals solely with respondent's pricing of its ice cream.

More than 10 national, regional and local ice cream companies served the Memphis wholesale market. They included: Swift, Midwest, Taylor, Sealtest, Colonial, Klinke, Southern, Santi, Memphis Ice Cream Co., and Velvet Ice Cream Co. (Tr. 925–26, 992–93, 1052, 1075).

The Sealtest Foods Division maintains a milk and ice cream plant at Memphis which is under the jurisdiction of its Central Division with headquarters at Chicago (Tr. 871–72). The raw milk used by the Memphis plant is obtained in the normal course of business from a receiving station at Martin, Tennessee; 75 percent of this milk is produced on dairy farms in Tennessee and 25 percent in Kentucky. The Memphis plant manufactures the mix used by it in making ice cream (Tr. 880–82), and distributes the ice cream from the Memphis plant and from branches at Milan, Tennessee, and Grenada, Mississippi, and by a distributor at Paragould, Arkansas (CX–85; Tr. 863).

The Memphis plant packages ice cream under three brands: "Sealtest" (its regular), "Fro-Joy" (its secondary), and "Hyde Park" (comparable to "Fro-Joy") the private label used for ice cream sold to the member stores of Malone & Hyde, Inc. (hereinafter sometimes referred to as "M & H"), a Memphis wholesale grocery chain. Sealtest brand ice cream has a higher butter fat, solids and flavoring content than Fro-Joy (Tr. 904 *et. seq.*, 5508–09). Respondent's Fro-Joy and Hyde Park brands are goods of like grade and quality.

As previously found, respondent's volume discount schedule for Memphis ice cream, effective February 4, 1957, applied to wholesale sales of package ice cream on the basis of monthly purchases, which was:

Gallons	*Discount Per Gallon*
Less than 50	None
50–79	2¢
80–109	3¢
110–139	4¢
140–and over	5¢

Since February 4, 1957, the wholesale prices of Sealtest and Fro-Joy package half gallons and pints have been subject to volume rebates, ranging from 2 cents to 5 cents per gallon (CX–76; Tr. 53–63, 5415–17). An additional 10 cents per gallon allowance was paid on these items to customers owning and maintaining their own refrigeration equipment.

Commission's Exhibit 77 *in camera*, a list of respondent's ten largest ice cream customers pruchasing for resale at retail, served by routes originating in Memphis, January through July 1958, reflects rebates paid by respondent, as follows:

7¢ per gallon rebate	*3¢, 4¢, and 5¢ per gallon rebates*
Malone & Hyde, Inc.	Bruno By-Ryt Food Store–5¢ per gal.
Food Center of Tennessee	Bud & Hals–5¢ per gal.
(Kroger and National Tea stores should also have been shown as recipients of 7¢ per gallon rebate.)	Weona No. 105–5¢ per gal.
	Weona No. 106–5¢ per gal.
	Village Grocery–5¢ per gal. Clarksdale, Mississippi
	Frayser Drive Market–5¢ per gal.
	Nic Nac Grocery–3¢, 4¢, 5¢ per gal.
	DeCaro's Drive In–2¢, 3¢, 4¢ per gal.

During respondent's cost study period in Memphis ending November 18, 1959, its ice cream was sold at discriminatory net prices to its customers who competed in the resale of such ice cream. Some customers received no rebate, while others were rebated on the basis of the rebate schedule then in effect from 2 cents per gallon to 5 cents per gallon, and the large food chains, National Tea, Kroger, Food Center, and Malone & Hyde were rebated on the basis of 7 cents per gallon (RX-109-C). According to Respondent's Exhibit 117-A, Sealtest paid 213 customers in accordance with the package rebate schedule, during the Memphis cost study period, as follows:

Rebate Paid	*Customers*
No rebate	140
2¢ per gallon	43
3¢ per gallon	11
4¢ per gallon	7
5¢ gallon	12
	213

At the same time, 222 off-premises customers were paid off-schedule rebates 4-7 cents per gallon as follows:

Customer	*Locations*
Malone & Hyde	190—
National Tea	3—
Kroger	1—
Food Center	6—
All other	22—
	222—

The 22 locations listed as "all other" in Respondent's Exhibit 117-A are further identified on Respondent's Exhibit 109-C. It appears, however, from Respondent's Exhibit 109-C that there are 24 stores instead of 22 listed on Respondent's Exhibit 109-C as having been paid off-schedule rebates as follows:

Discount Bracket (Gallons Rebatable)		*Rebate Paid (Per Gallon)*
Month—0—49 Week—0—11.54	0¢	
Bolivar Drug		$.05
Croswell Drug		.05
Philpot Grocery		.04
Posey Drug		.05
Purdy-Jester Drug Company		.05
S. & S. Drug		.05
Swindler's Pharmacy		.05
Selmer Drug		.05
Peels Drug		.05
Rhea Drug		.05
Walker's Walgreen		.05
Atkins Grocery & Market		.07
M. & R. Grocery		.07

Discount Bracket (Gallons Rebatable)		*Rebate Paid (Per Gallon)*
Month—50—79 Week —11.55—18.47	2¢	
Wings Food Market		.05
Fletcher Pharmacy		.05
Foppiano's Grocery		.05
Harrell Drug		.05
Jack's Sundry		.05
Williams Store		.05
National Food Store #5		.07
Spotts Drug		.20
Month—80—109 Week —18.48—25.40	3¢	
Terrell Drug		.05
Waldran Drug		.05
National Food Store #32		.07
Month—110—139 Week —25.41—32.32	4¢	
None	-0-	-0-

(RX 109C.)

During January through July 1958, of respondent's ice cream customers purchasing for resale at retail in Memphis, the indicated number did not receive rebates:

Month	Total Number of Wholesale Customers	Number not Receiving Rebate	Percent
January 1958	304	219	72
February 1958	313	229	73
March 1958	325	222	68
April 1958	322	199	62
May 1958	321	188	59
June 1958	319	158	50
July 1958	322	162	50

This shows that from 50 percent to 73 percent of respondent's retailer-customers did not receive rebates during the month of January through July 1958.

Many of respondent's customers who did not receive rebates were in competition with Kroger, National Tea, and Food Center stores, and with retail stores franchised by Malone & Hyde, receiving a 7 cent per gallon off-schedule rebate (Tr. 887), and with other retailer customers of respondent receiving 2 cents, 3 cents, 4 cents, or 5 cents per gallon rebate according to its discount schedule.

Malone & Hyde, Inc., food distributor in the Memphis area for many years, maintains warehouses at Memphis, Sikeston, Missouri, and Tupelo, Mississippi (Tr. 5401). From these warehouses it supplies approximately 333 retail food stores with a full line of grocery products. All of its retail stores are independently owned, but member stores pay membership fees. In February 1958, 221 M & H stores (respondent's largest group of wholesale customers) in the Tennessee-Arkansas-Mississippi area purchased and resold respondent's ice cream products (CXs 77 and 91, both *in camera*).

Commission's Exhibit 75-A is respondent's list price dated July 20, 1957, and the current list prices at the time of hearings in Memphis in November 1958. At that time the price of Fro-Joy had been reduced from $1.19 to $1.15 per gallon (Tr. 867-69). Respondent's price for a gallon of Sealtest brand in half gallons was $1.32 (Tr. 907).

Mr. Hyde testified that M & H requested respondent to package a private label ice cream that they could sell at a low price. Respondent sold its private label Hyde Park ice cream at a lower wholesale price to the M & H chain than the competing stores paid respondent for its Fro-Joy brand.

Respondent asserts that the M & H chain constituted only one customer and that, since this firm was the only wholesale food distributor to which respondent sold ice cream, this firm, as a wholesaler, was not competing with any of respondent's other retailer-customers.

The evidence does not support respondent's position concerning the competition between the M & H stores and respondent's other retailer-customers. Respondent's general manager at Memphis, Vaughn L. Ashenbrenner, testified, and it is found, that many of the stores which did not receive discounts from respondent on purchases of ice cream, or received a discount less than that allowed M & H, competed in the sale of respondent's products with the Malone & Hyde group and with the Food Center stores in Memphis:

Q I would like for you to tell me, Mr. Ashenbrenner, I am interested in the question of competition between these stores that receive nothing and the stores of Malone & Hyde and Food Center of Memphis who do receive discounts on the purchases of ice cream; as you will note there from Commission's Exhibit No. 77 you can see the Malone & Hyde discount.

* * * * * * *

Q I want you to tell me if it isn't true that many of these stores that I just read off to you from Commission's Exhibit No. 80 who receive no discounts on ice cream, aren't they, many of them in competition with Malone & Hyde Stores and Food Center of Tennessee?

A Yes, sir.
Q That is in the sale of ice cream?
A Yes, sir.
Q And dairy products?
A Yes, sir.

HEARING EXAMINER HIER: Is the same thing true with Food Center and these independents?

THE WITNESS: Well, these stores that he is mentioning here, Your Honor, are in competition with Food Center and Malone & Hyde Stores, yes, sir. (Tr. 886, 887.)

The Food Center stores, one of respondent's largest Memphis ice cream customers, at the time of this testimony, consisted of six large supermarkets located generally throughout the city of Memphis, and were receiving, as previously found, 7 cents a gallon rebate, which was 2 cents a gallon more than was provided for Memphis ice cream rebates in respondent's "volume rebate schedule" (Tr. 888). They also received a 10 cent per gallon allowance if they purchased and maintained their own refrigeration equipment and an advertising allowance computed on the basis of 2 percent of total purchases.

Nearly 40 percent of respondent's ice cream purchased by Malone & Hyde was packed under the Hyde Park label (RXs 100, 117–A). Malone & Hyde salesmen solicited their franchised stores to sell brands handled by the company, including respondent's ice cream. Respondent's driver delivered its ice cream directly to the individual M & H stores (Tr. 1030, 1045, 5402, 5405–6) and, upon delivering the ice cream, obtained a signed invoice showing the amount delivered (Tr. 1030, 1045, 5406).

During the period of respondent's cost study in Memphis (October 19, 1959—November 18, 1959), 190 separate Malone & Hyde store locations were represented in Respondent's Exhibit 108–A, one of the cost study exhibits. Respondent treated Malone & Hyde as a single customer for some purposes of the cost study, but as 190 individual store locations in running the stop watch time studies.

The 190 Malone & Hyde store locations reflected in Respondent's Exhibits 108 and 117–A, if rebated according to the schedule, would have been in brackets as follows:

Rebate Bracket (¢)	*Number of Locations*
0	51
2	40
3	21

Rebate Bracket	Number of Locations
4	13
5	65
	190

However, these 190 locations were paid rebates, as previously found, of 7 cents per gallon.

In computing the 7 cents a gallon rebate payable to Malone & Hyde on the ice cream purchased by the member stores, respondent aggregated all the purchases of all Malone & Hyde stores. In addition, an advertising and promotion allowance amounting to 2 percent on total dollar purchases, excluding ice cream novelties which were not rebated, was also paid. The 7 cent a gallon rebate was passed on to the member stores of the Malone & Hyde group. Mr. Hyde testified on November 17, 1958, that the 7 cent a gallon and 2 percent arrangement had been in effect "about two years" under verbal agreements with Sealtest. He also testified (Tr. 1011) that the rebates received from respondent are returned to the stores "at the end of their membership period."

Every four weeks, Sealtest sent Malone & Hyde a recap "showing the number of gallons each one of our member stores have purchased and the amount of refund that is due them" (CXs 92–A thru 92–R, *in camera*).

Clayton P. Thompson, Assistant Comptroller of Sealtest and the man in charge of its Memphis ice cream study, testified (Tr. 4418) that one of respondent's customers at West Memphis (Spotts' Drug, RX 109–C) which had received a 20 cent rebate from respondent was placed in the 2 cent bracket on Respondent's Exhibit 108–A when the cost study was made. Respondent's Exhibit 108–A shows that, during the period of the time study, out of a total of 435 customers receiving rebates, according to the exhibit, 204 were in the "no rebate" bracket:

Per Gallon Rebate	No. of Customers Receiving the Rebate
0¢	204
2¢	91
3¢	35
4¢	20
5¢	85
	435

(RX 108–A.)

Competitor witnesses testifying concerning injury to first-line competition in Memphis, were John C. Pontius of Robert S. Taylor, Inc.; Myron Garber, President of Memphis Ice Cream Co.;

and Hearn W. Tidwell, President of Southern Ice Cream Company. Mr. Pontius testified (Tr. 934) that a 3 percent difference in the wholesale price of ice cream is sufficient to switch business from one supplier to another; that one of his brands competed with one of respondent's brands; and that his business had declined during the last five years (Tr. 926, 927) because of the competition of supermarkets with drug stores which formerly were the bulk of his accounts.

Myron Garber listed respondent as one of his competitors in the Memphis area (Tr. 972); testified that his customers were mostly grocery stores; and stated that his company had not shown a profit for the last five years on account of his competitors' "low wholesale prices for ice cream" (Tr. 977, 1005).

Respondent's Fro-Joy and Hyde Park ice cream brands, packaged and sold by it at wholesale, are comparable to Garber's "Thrift-Pak" brand (Tr. 979, 993). The Thrift-Pak brand competes with Garber's "Super Rich" brand and is comparable to and competes with respondent's Sealtest brand. (Tr. 980, CX 88.) In Garber's experience, a 2 cent a gallon difference in the wholesale price will influence stores to switch business from one supplier to another (Tr. 989).

Tidwell named, among his competitors, Sealtest, Swift & Company, Midwestern Dairy Products, Taylor Ice Cream Company, Colonial Ice Cream Company, and Santi Ice Cream Company (Tr. 1051, *et seq.*). His "Southern" brand competed with the Sealtest brand. At the time of the hearing, November 17, 1958, he was selling Southern for $1.60 per gallon for pints and $1.20 per gallon for half gallons. It was this witness' opinion that the national companies, such as respondent, usually set the standard of prices in the market and that a difference of 4 percent or 5 percent in price would swing any business.

All of the witnesses testified (Tr. 1055) that price was a big factor in getting the Malone & Hyde business, and Tidwell stated that on many occasions he had tried, but was unable to obtain business from a M & H member store because of respondent's special price arrangement with them (Tr. 1056–57, 1059).

Respondent's witness, Clayton Thompson, testified (Tr. 4390) that at least 225 of the customer locations appearing on Respondent's Exhibit 108–A (one of the cost study exhibits) were rebated at a higher rate than they were entitled to under respondent's discount schedule, and that the rebates to these 225 locations were *not* cost justified (Tr. 4392).

Respondent's volume discount schedule was applied only to sales to independent wholesale customers. Higher discounts were paid to chain stores and central buying groups.

Mr. Thompson testified (Tr. 4394–96):

HEARING EXAMINER GROSS: That is not—see, that is where you and Mr. Smith cross horns, Mr. Thompson, because you have said that these cost justifications are not based on the customer basis but they are based on a location basis; is that right?

THE WITNESS: The schedule itself is based on a per location basis, your Honor.

HEARING EXAMINER GROSS: All right. Then if you are going to pay them on a customer basis then you are disregarding the schedule; is that correct?

THE WITNESS: That is correct.

* * * * * * *

THE WITNESS: I was thinking how to phrase it in a sense. The schedule, the discount schedule, and the rebate schedule for package customers or off-premise customers as reflected in the published price list at Memphis, which is in my opinion completely justified on RX 108-A, that schedule purports to show the cost justification of the schedule itself if applied on a per location basis, or when applied on a per location basis.

There are, if our arithmetic is correct here—I am using the 225 locations which was an estimate, if we recall, but that would leave 215 customers or locations that were paid on the schedule, and in my opinion would be cost justified.

Now, as to the balance of the 225 locations of which we are speaking, they are not cost justified on the schedule themselves, that is as to the schedule, but are cost justified except for those which I mentioned as against those customers who are on the schedule. (Emphasis supplied.)

Mr. Thompson further testified as to respondent's pricing of its ice cream in Memphis:

. . . I found no situation of multiple store operations that were being paid on the schedule. As I have previously testified—

HEARING EXAMINER GROSS: When you say these schedules, which schedule do you mean?

THE WITNESS: The package rebate schedule.

HEARING EXAMINER GROSS: How were they being paid?

THE WITNESS: The chains in each case were being paid, as I have said in the two chains, let's say 7 cents per gallon, which was off the schedule, it was a negotiated price, and there was no reason to find it on the schedule. It is an off schedule price entirely, it had nothing to do with the rebate schedule itself. (Tr. 4756.)

Eighty percent of the rebatable package ice cream was sold off-scale in Memphis and not in accordance with the published quantity discount schedule, as shown by the following tabulation prepared from Respondent's Exhibits 117–A and 117–B:

	On Scale	Off Scale	Totals	Percent of Off-Scale to Total
No. of Customer Locations	213	222	435	51%
Packaged Ice Cream Rebatable Gallons	2,558	10,231	12,789	80%

One hundred and forty customer locations, or 26 percent of the total, received no rebate during the study week. Seventy-three out of 533 customers received a rebate of 2 cents to 5 cents per gallon (RX 117–A). The regular published rebate schedule was applied by respondent to only 20 percent of the gallonage of packaged ice cream sold by the respondent in the Memphis market and surrounding territory.

Respondent bases its claim of cost justification of its quantity discount schedule for ice cream in the Memphis area on Respondent's Exhibits 108–A, 109–A, 117–A, 118–A, and 119–A, among others, and the testimony of witnesses Clayton P. Thompson, James F. Benjamin and John P. Duffy. However, 80 percent of the rebatable ice cream gallonage, as previously found, was sold at off-scale prices. Witness Thompson further testified:

HEARING EXAMINER GROSS: In other words, it is your contention that [RX] 108-A proves that CX 76 if administered as it is set out would be cost justified?

THE WITNESS: That is correct.

HEARING EXAMINER GROSS: . . . but the fact of the matter is that it is not administered as it is set out.

THE WITNESS: That is correct. (Tr. 4414.)

Respondent's cost exhibits summarized weekly sales and distribution costs classified by package rebate volume brackets for deliveries of ice cream during the study period. The customers were classified on the basis of the volume of ice cream purchased during the study week in accordance with the published rebate schedule (Tr. 4241). However, only 20 percent of the gallonage sold to the customers was rebated in accordance with the published schedule.

Clayton Thompson and James Benjamin testified on behalf of respondent that detailed time studies were made of the wholesale delivery of ice cream produced in respondent's Memphis, Tennessee, plant (RX 95–A–H). The time studies were made for a period of one week for each of the nine routes operated out of that plant during the period from October 19 to November 18, 1959 (Tr. 4146). The delivery and other distribution costs applicable to Memphis ice cream were computed for October 1959 and allocated to the various distribution functions (RX 103) Then the monthly expenses were averaged for the study week and average costs per functional unit obtained as a basis of allocation to customers (RX 105).

Through the application of statistical formulae to its stop watch observations, the drivers' time was "computed" for each delivery and for each customer location during the study week (RXs 96–A–D, 97, 99, 106, and 107). In allocating "Direct Delivery Expenses" to customers (RXs 107, 108–B; Tr. 4211–13), respondent did not use the time as actually observed, but used this "computed" time. However, the computed times differed substantially from the observed times (See RX 115). For example, on a 10-gallon delivery of ice cream to three different customers, the observed times varied widely, yet the computed times used by respondent were identical:

Reference	Delivered Gallons	Computed Time (Min.)	Observed Time (Min.)
RX 175A; Tr. 4321–2	10	10.0740	5.74
RX 175G; Tr. 4322	10	10.0740	8.20
RX 175–I; Tr. 4322	10	10.0740	4.17

When respondent later allocated its delivery expense (Tr. 4327), it used computed time, instead of observed time. This resulted in variations of as much as 50 percent from the actualities.

Mr. Thompson testified:

HEARING EXAMINER GROSS: Don't let me misquote you then. If I understand you, what you are saying is that although your rebate schedule could be cost justified on a theoretical basis that it actually is not being used down there as a matter of practical fact; is that right?

THE WITNESS: In these—no, sir, it is being used for all of the stores that are on the regular price schedule.

HEARING EXAMINER GROSS: For the independents?

THE WITNESS: That is correct.

HEARING EXAMINER GROSS: In other words, the independents are being rebated on the basis of the schedule which is here being tried; is that right?

THE WITNESS: Yes, sir.

HEARING EXAMINER GROSS: But the chain stores are being rebated on a different basis?

THE WITNESS: That is correct, but not because they are chains, your Honor. (Tr. 4756-57.)

For the Memphis ice cream cost study, Respondent's Exhibit 108–A prepared on a per location basis (comparable to RX 45–A for Toledo milk) shows distribution costs per gallon of package ice cream.

Volume Requirements	Rebate Point	Rebatable Gallons Sold (See CX 186–A–E)	Locations	Distribution Costs Per Rebatable Gallons
0–49 Gal.	0¢	1,136	204	$ .6471
50–79 Gal.	2¢	1,338	91	.5014
80–109 Gal.	3¢	780	35	.4754
110–139 Gal.	4¢	591	20	.4268
140–over Gal.	5¢	8,944	85	.3425
			435	
All other customers			98	.5734

Deliveries to M & H stores were included in the cost study on a per location basis. M & H stores were allocated to the rebate volume brackets as determined by their respective deliveries for the study week. Nevertheless, a 7 cent per gallon rebate was paid on all such gallonage.

At the same time, Respondent's Exhibit 117–A reflects the following per gallon distribution costs to respondent's off-schedule customers.

Customer	Rebate	No. of Locations	Rebatable Gallons Sold	Distribution Costs Per Rebatable Gallons
Malone & Hyde	7¢	190	8,760	.3726
National Food	7¢	3	73	.5552
Kroger	7¢	1	136	.4177
Food Center	7¢	6	1,123	.3840
All Others	Various	22	229	.4826

A rebate of 7 cents per gallon was specially negotiated for M & H whose distribution costs were $.3726 per gallon as well as for National Food whose distribution costs were $.5552 per gallon. This reflects a $.1826 difference in distribution costs between two chains receiving the same 7 cent off-scale rebate. This is a greater difference in distribution costs than existed between the 2 cent rebate bracket ($.5014) and the 5 cent bracket ($.3425). This casts doubt upon the manner in which Memphis rebate schedule was structured, and the validity of the cost study which was made to justify such schedule. Considered along with the witness Thompson's testimony, *supra*, that 225 locations which had been time studied in connection with Memphis ice cream were rebated at a higher rate than they were entitled to; that these 225 locations were not cost justified; and that the volume discount schedule was not used for rebating multiple unit operations, but only for independent customers, Sealtest's price discriminations in Memphis appear to have been, and are, found to be precisely the type subsection 2(a) was designed to prevent.

At the time of the hearings the examiner pointed out to the witness Thompson that respondent was going to great expense and trouble to cost justify its Memphis ice cream rebate schedule which respondent had, in fact, ignored for more than 50 percent of its customers and 80 percent of its gallonage (Tr. 4390, *et seq.*).

PRICE DISCRIMINATIONS—NEW ORLEANS, LOUISIANA

Milk:

Respondent maintains a milk and ice cream plant at New Orleans, Louisiana, with distribution branches at Baton Rouge, Louisiana, and Jackson, Mississippi. It operates a condensery at Brookhaven, Mississippi (Tr. 1086). These are part of respondent's Southern Division with headquarters at Charlotte, North Carolina. A substantial percentage of the raw milk coming into the Sealtest New Orleans plant originates in Mississippi, the remainder originates in Louisiana.

Respondent packaged under its Sealtest brand at the New Orleans plant homogenized milk, cream line milk, chocolate milk, buttermilk, skim milk, chocolate drink, whipping cream, breakfast cream, sour cream, half and half, creole cream cheese, and dry cottage cheese (Tr. 1087, 1145). From June 1951 until October 1960, respondent packaged milk products under a private label, "Velva" for the H. G. Hill Stores, Inc., a food chain in the New Orleans area, and for the Winn-Dixie Stores, Inc., which were successors to the Hill stores (CX 98-A-C; Tr. 1091-92).

Although the New Orleans plant never published a discount schedule for Sealtest brand milk items (Tr. 1103-1146), respondent did grant discounts on this brand to select customers. Respondent's private label milk products, packaged under the Velva label, was supplied to the Hill stores and to the Winn-Dixie supermarket chain, as successor to the Hill stores, at negotiated prices.

In its proposed finding 155, respondent admits—"Prior to August 1, 1958, Sealtest's New Orleans plant sold milk and milk products to different wholesale customers at different prices. Such price differences resulted from the rebates granted to certain wholesale customers on their purchase of Sealtest brand milk items, and from the somewhat lower prices charged Hill Stores and its successor, Winn-Dixie, for Velva brand milk items." (CXs 98–A–C, 107–A–B, 108, 109, 114–118)

Winn-Dixie is a large corporate chain supermarket operation, and almost all of its stores are large supermarkets (Tr. 1160–61). It is an interstate operation, having stores in a number of States, including Florida, Alabama, Mississippi, and Louisiana (Tr. 5993). Its capital stock has been traded on the New York Stock Exchange (Tr. 5994). Respondent served a minimum of 25 Winn-Dixie stores from its New Orleans plant and made deliveries by truck to each store (Tr. 1128–29).

The Winn-Dixie stores in the Metropolitan New Orleans area were and are in extensive competition with other grocery stores in that area to which respondent sold its products. According to respondent's own witness, Winn-Dixie "pretty well blankets this area competitively in the retail distribution of milk and milk products." (Tr. 1165)

Sealtest brand milk—half gallons, homogenized vitamin D and pasteurized—were sold by the New Orleans plant at the following wholesale prices from the dates indicated:

	10–28–57	6–2–58	8–1–58	9–26–58
H.V.D.	49¢	47¢	49¢	49¢
Pasteurized	47¢	45¢	47¢	47¢

(CX 102–105.)

Respondent's prices of Velva brand milk sold to Winn-Dixie stores during the period January 1 through July 31, 1958, under its contract with Winn-Dixie as shown by Commission's Exhibits 164–B and 163–F were as follows:

	1–1–58 1–31–58	2–1–58 2–28–58	3–1–58 3–30–58
Standard Milk ½ gals.	$.3890	$.3870	$.3802
Homo. Vit. D ½ gals.	.3906	.3884	.3818
	3–31–58 5–4–58	5–5–58 6–1–58	July 1958
Standard Milk ½ gal.	$.3870	$.3770	$.3658
Homo. Vit. D ½ gal.	.3884	.3784	.3672

During the months of January through July 1958, respondent sold its milk and milk products to 14 National Food stores located in New Orleans and in other places in Louisiana and in Mississippi (CX 115). Respondent's total gross sales to National Food stores amounted to $91,701.82 on which respondent paid rebates of $7,327.60 or 7.99 percent of sales (CX 115).

During the months of January through July 1958, respondent also sold its fluid milk products in the amounts indicated to other wholesale customers who received rebates as follows:

Name of Customer	Gross Sales	Amount of Rebate	Percent Rebate
Schwegmann Bros.	$62,479.90	$3,123.99	5% (CX 117)
Time Saver, Inc.	45,830.48	4,583.06	10% (CX 117)
B & C Stores	9,368.16	562.09	6% (CX 117)
J. L. Collins	7,980.58	349.38	4.75% (CX 118)

During the months of January through July 1958, respondent sold milk and milk products to Winn-Dixie Stores, Inc., (which respondent delivered to its stores located in Metropolitan New Orleans) at net billing as per respondent's contract with Winn-Dixie, in the total amount of $464.410 (CX 107–A). Subtracting sales of respondent's milk and milk products sold under respondent's own trade brand Sealtest, respondent's sales to Winn-Dixie stores of milk and milk products processed and packaged under Winn-Dixie's trade brand Velva for the months stated, amounted to $385,951 (CX 114).

Respondent's Velva brand milk products and its Sealtest brand were goods of like grade and quality.

Respondent's net price of milk to Winn-Dixie during the year 1958, preceding the November hearings in New Orleans, was 4 cents or 5 cents a quart (approximately 20 cents a gallon), less than its regular published wholesale price (Tr. 1111). The out-of-store resale price for some stores was 49 cents a half gallon in paper cartons.

Commission's Exhibit 109 indicates that of the total number of respondent's milk customers in New Orleans purchasing for resale at retail from January through September 1958, those receiving and those not receiving rebates are divided as follows:

1958	Customers	Not Receiving Rebates	Receiving Rebates
January	631	615	16
February	634	613	21
March	640	619	21
April	642	621	21
May	645	623	22
June	651	629	22
July	659	637	22
August	665	665	None
September	674	674	None

Frank Meydrich (Tr. 1182, *et seq.*) independent grocer and operator of the Venice Gardens Super Food Market at 2727 South

Claiborne Street, New Orleans, who had been selling Sealtest products for a considerable time, testified to the adverse effect upon his business resulting from the competition of a Winn-Dixie store which was right across the street. The adverse effect upon Mr. Meydrich's business was ascribed by him in part to the low price at which the competing Winn-Dixie stores were able to sell Velva brand milk. At transcript page 1193, Meydrich testified that when the housewives found that they could buy Velva milk at a reduced price at the Winn-Dixie store "they stayed with it" and never came back to him.

James L. Collins (Tr. 1213, *et seq.*), independent grocer in New Orleans, had a competing Winn-Dixie store right across the street which sold Sealtest milk, and ice cream. Collins was paying 45 cents for pasteurized milk and 47 cents for homogenized milk. The Winn-Dixie store was selling a gallon of milk for 89 cents, which was less than Collins' cost. Mr. Collins testified further that he had been competitively injured by respondent's pricing practices in New Orleans and that Winn-Dixie was selling respondent's products cheaper at retail than the price at which Collins could buy at wholesale (see CX 155). Collins testified that Velva milk is of like grade and quality to Sealtest milk (Tr. 1219), and that, although his gross sales were showing an increase, his net profit was way down from the previous year due to competition from Winn-Dixie.

Henry L. Weysham (Tr. 1228, *et seq.*), trading as Piggly Wiggly, an independent grocer in New Orleans carrying a general line of groceries, including Sealtest products, had a Winn-Dixie store about a block and a half away. He was paying 45 cents or 47 cents for a half gallon of respondent's milk. Although he was given a discount on Sealtest beginning in the spring of 1958 which brought his cost down (Tr. 1232), it did not put him in a position to compete with the 39 cents a half gallon at which Winn-Dixie was selling the milk it was purchasing from respondent. Weysham testified (Tr. 1233), "Milk is a volume item, a traffic item. When housewives can pick up a bottle of milk for six or seven cents cheaper than anywhere else, she's going to shop there."

Witnesses from two of respondent's competitors, T. F. Carver of Walker-Roemer Dairy (Tr. 1261, *et seq.*) and Hughes O. Otnott, sales manager of Walker-Roemer Dairy (Tr. 1276 *et seq.*), and Cleveland G. Jenkins (Tr. 1291, *et seq.*) of the Estelle Dairy, testified concerning the competitive impact upon their business resulting from the discriminatory prices at which respondent was selling its milk products in the New Orleans area, particularly respondent's special prices to Winn-Dixie. In addition to Walker-Roemer, and Estelle, other competitors in the area were Borden and two additional local companies, Brown's Velvet and Gold Seal.

The examiner rejects respondent's argument that its declining position in the New Orleans fluid milk market negates any finding of injury to primary line competition due to respondent's pricing of its milk products in New Orleans. Proof of injury to primary line competition in a Robinson-Patman case does not require the same evidentiary showing that is required in a Section 7 case. Price discrimination under subsection 2(a) may be proscribed where its effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce. It is possible that the adverse effect may not inure to the benefit of the discriminator, but will inure to another competitor who reaps the benefit of the price discrimination. Respondent's pricing of its milk in New Orleans injured Walker-Roemer and Estelle dairies, even though respondent has not been proven to be the only beneficiary of the price discriminations which respondent practiced.

Both Caver and Jenkins testified that Winn-Dixie specials on Velva brand milk caused them to lose retail home delivery business. Otnott testified that he was unable to sell any of Walker-Roemer's milk products to Winn-Dixie although he had been constantly seeking to do so. Walker-Roemer was unable to obtain any of Winn-Dixie's business because of the special pricing arrangements existing between respondent and Winn-Dixie.

The evidence supports a finding, and the examiner finds, an adverse competitive effect upon both primary line and secondary line competition as a result of respondent's pricing of its milk products in the New Orleans area. However, as previously stated, proof of competitive injury to either the primary or secondary line is all that is required for the issuance of a cease and desist order.

Ice Cream:

Sealtest's New Orleans plant manufactures ice cream which it sold and distributed in the New Orleans area and, from branches, in the Baton Rouge, Louisiana, and Jackson, Mississippi, areas (Tr. 1086–87, 1121–22, 6004–05). Such ice cream was packaged under the plant's own "Sealtest" and "Cloverland" brands. Sealtest brand ice cream contained 12 percent butterfat and true fruits and flavors. Cloverland, the secondary brand, contained 10 percent butterfat and might have artificial flavors (Tr. 1088). From 1951 to October 1960, the New Orleans plant packaged ice cream under the private labels Velva for H. G. Hill Stores, Inc., and, thereafter, "Superbrand" for the Hill Stores' successor, Winn-Dixie Stores (Tr. 1161–62, 5928, 5929–30). Velva and Superbrand ice cream were of substantially the same grade and quality as Sealtest's own Cloverland brand (CX 98–A, 187; Tr. 1091–92, 5931–32, 5936, 6000).

Ice cream manufactured at the New Orleans plant was sold and distributed to wholesale customers in the New Orleans area and, from branches, to wholesale customers in the Baton Rouge, Louisiana, and Jackson, Mississippi, areas (Tr. 1024, 1086–87, 1121–22).

Sealtest and Cloverland package ice cream was sold at the following wholesale prices (per gallon of half gallons) from the dates indicated:

	Jan. 1956	June 25, 1956	Sept. 3, 1957	Aug. 1, 1958
Sealtest	$1.70	$1.60	$1.60	$1.60
Cloverland	1.40	1.30	1.30	1.27

(CXs 100, 101, 197.)

Prior to August 1, 1958, the wholesale prices of Sealtest and Cloverland ice cream were subject to volume rebates of 2 cents to 10 cents in accordance with a rebate schedule (CX 106) containing five rebate brackets, established on the basis of annual quantities purchased: 5,000 gallons—10 cents; 4,000 gallons—8 cents; 3,000 gallons—6 cents; 2,000 gallons—4 cents; and 1,000 gallons—2 cents. The schedule provided for the payment of the same rebates on a monthly volume of one-twelfth that of the annual volume requirement for the same bracket (CX 106; Tr. 1104, 5909–12, 5923–25).

From 1951 to approximately July 1956, Sealtest and Velva products were priced to H. G. Hill Stores, Inc., in accordance with the letter agreement dated May 30, 1951 (CX 98–A–C). Under this agreement, Velva ice cream was sold to this customer at the same published wholesale price as Cloverland (CX 98–A). Following Winn-Dixie's acquisition of H. G. Hill Stores, Inc., about July 1, 1956, the private label was changed from Velva to Superbrand (Tr. 5930). On or about August 1, 1956, the net price to be paid by Winn-Dixie for Superbrand ice cream was established at $1.10 per gallon for half-gallon packages, or $1.05 where Winn-Dixie furnished its own refrigeration cabinets (Tr. 5971). Sealtest ice cream was furnished to Winn-Dixie at regular published wholesale list price as it had been to Hill Stores (CXs 98–B, 99; Tr. 5971).

In its proposed finding (RPF 535), respondent admits:

Prior to August 1, 1958 Sealtest's New Orleans plant sold package ice cream at different prices to different wholesale customers (CX 110A and B, 119–121). Such price differences were the result of rebates granted to certain wholesale customers on their purchases of Sealtest and Cloverland package ice cream, and of the lower net price to Winn-Dixie for Superbrand ice cream.

From January through July, 1958, respondent paid its ice cream customers, named, the indicated rebates:

Customer	Gallons	Rebate	Average Rebates per gallon
Winn-Dixie	26,898.5	$3,777.05	14.02¢ (CX 119)
Schwegmann Bros.	13,563	1,752.50	12.92¢ (CX 121)
Time Saver Stores	5,238	462.50	8.83¢ (CX 121)

on its own brands of ice cream, Sealtest and Cloverland.

A 10 cent per gallon rebate on their purchases of Sealtest and Cloverland ice cream were also paid to A & P, J. L. Collins, trading as Piggly Wiggly, Pap's Food Store, P.I.G. Store, Crawford Store, Sav Way Store, and R. N. Hatton, trading as Piggly Wiggly (CX 110–A–B).

Respondent discrimination in price between different, competing wholesale purchasers in the sale of ice cream of like grade and quality manufactured and sold in respondent's New Orleans area operations. From January through July 1958 respondent sold its Sealtest brand to a large number of competing customers at the list price of $1.60 per gallon with no discounts. For the same period, respondent sold the Sealtest brand ice cream to Winn-Dixie Stores at an average discount of 14.02 cents per gallon; Schwegmann Brothers at an average discount of 12.92 cents per gallon; and Time Saver Stores at an average discount of 8.83 cents per gallon. Respondent's net prices to Winn-Dixie for its ice cream, established around August 1, 1956, continued in effect until July 31, 1958.

Competition between the Winn-Dixie supermarkets and respondent's other customers in the New Orleans area, both favored and non-favored customers, has heretofore been found in the milk marketing practices and is reiterated for its ice cream pricing. James L. Collins and Henry Weysham whose businesses were found to have been competitively injured by respondent's pricing of its milk products were likewise competitively injured by respondent's discriminatory pricing of its ice cream.

From January through September 1958, of respondent's ice cream customers in the New Orleans area purchasing for resale at retail, those receiving and not receiving a rebate and/or refrigeration allowance are divided:

Year 1958	Total Number of Customers	Customers Receiving Allowances	Number not Receiving Allowances
January	386	43	343
February	389	45	344
March	400	51	349
April	408	51	357
May	427	55	372
June	423	66	357
July	410	63	343
August	412	10	402
September	402	10	392

(CX 112, *in camera.*)

Respondent asserts that the Louisiana statute, known as the Louisiana Orderly Milk Marketing Act (La. Rev. Stats., Title 40 Ch. 4, § 940.1—23) which became effective August 1, 1958, has interposed a statutory bar to future price discriminations in Louisiana and that respondent's prior price discriminations in Louisiana are moot and will not be repeated.

The Louisiana Orderly Milk Marketing Act banned all rebates, discounts, and price concessions on milk and ice cream. In 1962 the Act was amended to provide for the regulation of milk and ice cream pricing by the State Milk Commission.

What respondent's argument boils down to is that the Louisiana Orderly Milk Marketing Act will prevent it from violating the Robinson-Patman Amendments to the Clayton Act. If the federal regulation of pricing did not prevent respondent from discriminating in the prices at which it sold products of like grade and quality to competing customers in Louisiana prior to passage of the Louisiana statute, what assurance is there that the state statute will achieve that which the federal statute sought, unsuccessfully, to achieve?

Respondent points out that Winn-Dixie has purchased its own milk and ice cream plant, and that since October 1960 respondent's New Orleans plant has no longer supplied Winn-Dixie with private label milk and ice cream (Tr. 6185–86). The thrust of this argument is that since respondent no longer sells to Winn-Dixie, in whose favor it discriminated, it will not in the future again discriminate in favor of any other customer or customers. This argument is untenable for obvious reasons.

The examiner rejects respondent's assertions that its discriminatory pricing in the New Orleans area has been rendered moot: (a) because the Louisiana Orderly Milk Marketing Act prohibits rebates and other price concessions in the sale of milk and milk products and ice cream; and (b) the loss of the Winn-Dixie account constitutes positive assurance that Sealtest in its New Orleans operations will not, in the future, violate the Robinson-Patman Act.

Respondent discriminated in price in favor of customers other than the Winn-Dixie stores; *e.g.*, Schwegmann Bros., Time Saver, Inc., B & C Store, A & P, Pap's Food Store, P.I.G. Store to the competitive injury of its non-favored customers in pricing both its milk and ice cream in the New Orleans area during the pertinent period. The loss of Winn Dixie as a customer constitutes no positive legal assurance, per se, that respondent may not in the future discriminate in price in favor of other customers as it has in the past.

In the course and conduct of its business in commerce respondent's Sealtest Foods Division has discriminated in the prices at which it has sold its products in its (1) Toledo, Ohio-Monroe, Michigan; (2) Jackson-Lansing-Battle Creek, Michigan; (3) Memphis, Tennessee; and (4) New Orleans, Louisiana, trade areas by selling products of like grade and quality at different prices to different, competing customers. The evidence shows that the effect of such discriminations in price in the areas indicated has been and may be substantially to lessen, injure, destroy, and prevent competition between respondent and its competitors, and between respondent's customers paying higher prices and those customers paying lower prices who compete with the non-favored customers in the resale of the Sealtest Foods Division's product line or portions thereof. The record supports a finding and the examiner finds an adverse competitive effect upon primary line competition and secondary line competition as a result of respondent's discriminatory pricing practices in the trade areas here involved. Although the evidence has been presented as to respondent's ice cream pricing separately from the remainder of Sealtest's products line, this is of no legal significance or effect. Complaint counsel need not have proven a complete and separate case of price discrimination for each of the seventy items in the Sealtest line, nor separately for fluid milk products and ice cream in all of the trade areas involved. Any unlawful price discrimination proven as to *any* of the items in Sealtest's product line should be enjoined.

Respondent's price discriminations are legally excused if they have been proven to be either (a) cost justified, or (b) made in good faith to meet the equally low, lawful price of a competitor.

Respondent concedes that not all of its price discriminations are cost justified: For example, in connection with its ice cream cost study in Memphis respondent's witness, Clayton Thompson, testified that 225 out of the 435 locations which were included in the ice cream cost study were paid rebates which were not cost justified on the basis of the rebate schedule then in effect, and John Armstrong testified in connection with the Toledo-Monroe milk study that some of the Toledo-Monroe price discriminations were not cost justified. However, respondent's over-all position is that its discriminatory prices which were not cost justified were made in good faith to meet the lawful, low price of a competitor.

Having found that respondent's pricing in the four areas was discriminatory and adversely affected competition in the primary line and in the secondary line, it is now in order to consider respondent's affirmative defenses of cost justification and meeting competition.

RESPONDENT'S COST JUSTIFICATION

Respondent's cost study witnesses included, among others, John H. Armstrong of the management consultant firm of A.T. Kearney & Company, Chicago, Illinois, who was in general charge of the Toledo milk study, and Messrs. Rich and Hansen, also of the Kearney firm; Kenneth B. Fishpaw, comptroller, respondent's Sealtest Foods Division; Clayton P. Thompson, assistant comptroller of Sealtest; James F. Benjamin, an industrial engineer on respondent's staff; Dr. Joel Dean of the firm of Joel Dean & Associates, economists, and statisticians; John P. Duffy of the Dean firm; Dr. James M. McKie, Professor of Economics and Business Administration, Vanderbilt University; and Wilbur S. Duncan, of the accounting firm of Arthur Anderson & Company. Respondent has stated that this study, exclusive of attorneys' fees, cost approximately $450,000. The studies proceeded on the assumption that insofar as they dealth with the processing, manufacturing, distribution and sale of Sealtest products, respondent did not have any significant differential in material costs with respect to one customer or group of wholesale customers as against others; that through the processing stage and into the cooler or freezer the raw materials and processing cost the same regardless of what customer received it.

Messrs. Armstrong, Duffy, Rick, Hansen and Benjamin rode Toledo-Monroe wholesale milk routes and as a result of their observations prepared forms for recording time spent by drivers on route and delivery functions. All daytime studies were carried out for a period of a week for each delivery route during a four-week period, July 6 through August 2, 1958, on all 27 of the regular wholesale routes operating out of respondent's Toledo-Monroe branch for a six-day period Monday through Saturday. This resulted in 162 time studies (Tr. 1786, 1795, 3676–77). A sample time study of a regular delivery route is in the record as RX–24A–Z24 and a sample special delivery time study appears as CX–169A to Z15.

Respondent proceeded on the premise that the time for delivering its products to its customers respresented the most variable of its costs; that the output of its delivery men could be expressed in terms of the *units* of the different products delivered; and that the wire case used by respondent for its delivery was the most accurate measure of the driver's output (R. 2310). The wire case held nine half-gallons, sixteen quarts, or twenty-five pints, and forty half pints. Irrespective of the product mix "the case is handled by the driver in the same manner" (Armstrong R. 1941). The driver would carry in to the store one case or two, one in each hand. Where more than two cases were being delivered, the driver would stack one case upon another up to five cases and use a two-wheel hand truck to wheel the product into the store. For the Toledo-Monroe study, half-gallons of homogenized milk in paper cartons respresented the bulk of route sales—63.54 percent of the total number of cases and 59.41 percent of the dollar value of the products delivered during the study. Quarts of homogenized milk in paper represented 7.42 percent of the cases and 6.17 percent of the dollar volume; other items individually represented 2.5 percent or less of the total (Tr. 1946; RX 31A & B).

"Drop time" was defined in the time study as the time that a driver spent on the premises of a particular customer taking orders, delivering the product, placing it in the display case, returning empty containers to the truck, collecting where necessary, and performing driver to customer delivery functions.

Although respondent has proposed many findings which set out in detail all of the procedures used in conducting the cost studies, in reducing the observed time to IBM cards, verifying the time, etc., it is not essential to an understanding of the cost study to describe the study step by step in detail.

All of the details of the time study were submitted to complaint counsel in advance of the hearing at which they were offered in evidence and complaint counsel did not put in any evidence of his own to rebut the cost study evidence of respondent.

Respondent contends: (1) that "statistical analysis of the Toledo data produced a drop-time curve and estimating equations which, given the size of a delivery, yield the most probable amount of direct labor time required by the driver to make delivery. Respondent claims 'computed time' is more reliable than the actual observed times recorded during the relatively short study period because computed time averages out random factors (which can distort a few observations), such as fast and slow drivers, congestion in the aisles or at the unloading dock, and the like. Thus computed time shows more accurately than a week's observed time the direct labor time requirements necessary in order to service a customer of given size over the course of a year. Respondent asserts additionally (2) testing the Toledo curve by sample time studies in other areas corroborated its validity and provided additional confirmation that an adequate sample had been obtained at Toledo; (3) the sample time studies in other areas showed that the Toledo curve expressed what might be called a law of Sealtest route men; wherever physical distribution of milk is handled in substantially the same manner as in Toledo, the Toledo drop-time curve may be used as a 'universal curve' for testing time-volume relationships and making cost studies on an economical sampling basis; (4) the fact that, in different markets, a relatively constant proportion (approximately 50%) of the routeman's time must be spent in supporting (or route overhead) activities—as shown by the Toledo and the sample time studies—confirms the soundness of spreading indirect time in proportion to the direct and assignable time."

Respondent presented in two steps the Toledo cost study: First, respondent computed the cost of serving each off-premise store, location by location, for the week studied; it then classified all such customer locations—on the basis of volume delivered during the study week—in brackets corresponding to those of its discount schedule (CX 5, p. 8; CX 168P). Second, respondent presented evidence with respect to the actual costs of serving, and the discounts it actually paid to, different "purchasers" at Toledo (RX 47A–C, 54, 57A–B). It collected the costs of serving one-store customers (grouping them by volume bracket), and it collected the costs of serving voluntary and cooperative group and corporate chain customers, showing the cost of serving each such purchaser for all the store locations it operated.

It is respondent's contention that section 2(a) of the Robinson-Patman Act, by its terms, prohibits discrimination in price only as "between different purchasers"; that the individual *stores* of a corporate food chain, such as Kroger, A & P, Malone & Hyde, and Winn Dixie, are not individual "purchasers" under the Act, but that The Kroger *Company,* A & P, Malone & Hyde, and Winn Dixie is the purchaser and each store location is merely a delivery point. Respondent contends that in adopting the cost justification proviso Congress clearly intended that the cost of serving corporate and cooperative "chains" should be considered, and this Commission has consistently dealth with the business entity, regardless of its units receiving deliveries, as being the "purchaser" for cost justification purposes. Accordingly, it is the cost of distributing to the food chain, and not to its individual store locations, that is to be considered in connection with the application of the cost justification proviso.

Additionally, respondent contends that while it may properly classify its customers in volume brackets and use its discount schedule as a yardstick for determining discounts to be paid to individual store operators (it being completely impractical to make a monthly study of the cost of serving each such store), it may at the same time pay discounts to chain customers either on the basis of averaging individual store volumes to determine bracket, or on the basis of individual negotiations, so long as the discounts so paid make only due allowance for cost savings actually realized in serving such customers as opposed to their competitors.

As a result of its experience in the Toledo milk cost study, respondent's study for Memphis ice cream was on a somewhat streamlined procedure. The exhibits in this latter study correspond to a large extent to exhibits in the milk study and serve like purposes (Tr. 3806–08). During the Memphis studies, package ice cream sales (half-gallons and pints) represented 81 percent of the total volume, including bulk, package, and novelties. The half-gallon respresented 94 percent of the package sales (R. 3814). Half gallons were packaged two to a bag and handled by the plant and the delivery man in a gallon unit. Pints were packaged eight to a box, also constituting a gallon and handled in the same fashion.

The ice cream was distributed on 9 routes operating out of the Memphis plant (the 9 routes handling about two-thirds of the plant's production), and through branches at Milan, Tennessee, Grenada, Mississippi, and a distributor at Paragould, Arkansas.

An ice cream route operated in similar fashion to the wholesale milk route except that the ice cream trucks were kept at much lower temperatures (Tr. 3810–11). There was no shipping platform for Memphis ice cream as there was for Toledo milk. The ice cream moved directly from the hardening room into the refrigerator trucks, and the ice cream driver in Memphis did not load; he merely checked to be sure that the truck contained what he had ordered the night before.

Clayton P. Thompson, assistant comptroller of Sealtest Foods, had overall supervision of the time study in Memphis. James F. Benjamin, an industrial engineer on respondent's staff, was responsible for making the time studies and compiling the data, and John P. Duffy of Joel Dean Associates, was responsible for the statistical analyses (Tr. 3821–22, 3829, 4005–6, 4853–54). Three men from respondent's audit staff, Messrs. Foy, Sackett, and O'Keefe, who had previously worked on the Toledo studies made the actual time studies. They also did the compiling and helped with the accounting phase (Tr. 3822–3823).

"Drop time" at Memphis was taken as an individual reading (Tr. 3826–27, 4006–7, RX–91). The observers rode with the drivers during the complete day from the time they punched the clock in the morning until they punched out at the end of the day and recorded the amount of time it took to perform the various activities involved in running their routes and making their deliveries (Tr. 4014–15, 4822–24). The time studies began on October 19, 1959, and continued until November 18, 1959, each of 9 routes being studied one complete week during the period. The study covered fifty route days (most routes operating 6 days a week but some a lesser number). The studies included observations of slightly over 1,000 deliveries to more than 500 customer locations (Tr. 3823–24, 3910, compare RX 96–D).

In certain details, the Memphis ice cream cost study differed from Toledo milk in that (1) the gallon package was used as the unit of measure instead of the wire basket, and (2) the drivers did not load the ice cream trucks at Memphis. The trucks were pre-loaded. Certain time which had to be computed in with Toledo milk did not have to be computed in the Memphis study.

The rebate on Memphis ice cream is and was expressed in terms of cents deducted from the posted wholesale price per gallon instead of in the percentile rebate brackets used in Toledo milk.

Otherwise, most of the observations with reference to the validity of the technical, scientific, legal and accounting aspects of the Toledo milk are reaffirmed as to Memphis ice cream. That is to say, the method of making the study, the procedures for using the data after it had been collected, and the data's efficacy in establishing the cost justification for the Memphis rebates are as valid for Memphis ice cream as they were for Toledo milk. These aspects of the Memphis study have not been specifically challenged by rebuttal evidence of complaint counsel.

In Memphis ice cream as in Toledo milk the real problem arises from the fact that although the cost study indicated that a certain rebate should be paid to a particular customer location, in too many instances a higher rebate was paid to that customer. Sealtest has the same challenges to meet with reference to its ice cream cost studies that it has to meet with reference to its Toledo milk study. How does it rationalize its off-scale and off-list rebating? Its rationalization for off-scale and off-list rebating of Memphis ice cream is the same as for Toledo milk, *i.e.*, that substantially all its off-scale and off-list pricing was either (1) cost justified, or (2) done to meet competition.

An additional problem in Memphis ice cream was the Malone & Hyde situation which accounted for a large bulk of Sealtest's volume of ice cream in Memphis and which was rebated at a flat 7 cents per gallon, which figure was not even on the rebate schedule. Sealtest maintains that Malone & Hyde is a wholesaler, constitutes only one customer, and that the retail outlets for which Malone & Hyde acts as wholesaler are not, in fact, privy to pricing arrangments between Malone & Hyde and Sealtest.

John P. Duffy testified that he concluded in connection with the Memphis ice cream study that it did not make any significant difference whether they used the package or the gallon as the unit of measure or some combination of the two (Tr. 4884); that the "rebate schedule . . . does not reflect . . . other highly particularized factors . . ." (Tr. 4869, *et seq.*). "We have got to elevate or restate these highly particularized observations to the same level of generality that obtains in and is reflected by the rebate schedule. This can only be done by an *averaging* process." (Tr. 4870; italic supplied.) At page 4873 the witness testified that it was necessary to use estimated times as opposed to observed times because "the use of observed time would entail serious inequities." (Tr. 4874.)

Respondent emphasizes that it regards its cost justification defense "with a great deal of seriousness." (Tr. 5843.) The examiner has considered such cost justification with equal seriousness. This cost justification involves thousands of pages of transcript, numerous exhibits, graphs, and cost projections. It includes the testimony of many witnesses and the expenditure of $450,000 as above stated. The examiner, who observed all the cost study witnesses, hereby attests to their excellent professional competence, educational background, qualifications and knowledgeability.

After having considered the entire record on cost justification, the examiner finds that the respondent has not proven by reliable, probative, and substantial evidence in this record that its price discriminations, which have heretofore been described in part, made *only* due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which respondent's Sealtest Division's products—the entire product line, including ice cream—were sold or delivered to the favored, vis-a-vis the unfavored, customers.

Stripped of technical, statistical, and economic ornamentation, the basic thrust of the cost study evidence was to justify two quantity rebate schedules, *i.e.*, the milk schedule in Toledo-Monroe in July 1958, and the ice cream schedule in Memphis, Tennessee, during October 19—November 18, 1959. [These schedules have previously been set out on p. 92 for Memphis ice cream and pp. 93–94 for Toledo-Monroe milk.]

Respondent's basic premise for both these cost studies has been, as previously stated, that its material cost for its products up to the time that they are ready for delivery to its customers is substantially the same—that it is only in the delivery and distribution of its product that the costs vary.

Kenneth B. Fishpaw testified (Tr. 5751) "Well, I believe that the only common denominator we have for allocating distribution costs is time. * * * Time is a controlling factor of cost and is common to each of our markets."

Dr. Roberts, president of Sealtest Foods, testified:

> The purpose of a schedule of this kind [respondent's discount schedule] is to be able to reflect to the buyer, which in this case would be a store, the cost reduction which the distributor has in delivering larger volumes *per stop, per delivery*, as against a small stop operation. [Italic supplied.]
>
> For example, a person who may buy two cases of milk as against a person buying 20 cases of milk, there is a lower cost per unit in delivery of the 20 cases than there is in the case of two cases. * * * (Tr. 6182.)

This premise is not startling, nor surprising, and Commission counsel has not challenged it.

The specially concurring opinion of Justice Douglas in *United States* v. *Borden Company,* 370 U.S. 460 (p. 472, *et seq.*), is so descriptive of the instant proceeding to justify its reproduction in full. In that opinion Justice Douglas said:

> This is not a case that involved problems of centralized purchasing by a large enterprise for all its constituent members, where the volume involved reduces the unit cost. We have here purchases by constituent members of chain stores of milk and milk products that will be sold at the particular store. The competitor is not a member of a competing chain or, if it is, the chain of which it is a part is a smaller one. The costs studies here involved have little, if any, relation to centralized management. They in the main pertain to two factors of cost. First, is the volume of sales of milk and milk products to the individual store and the method of payment. Second, the degree to which the store relieves the seller of milk and milk products from the costs of handling the product as it enters the store, of stacking or storing the products, and of returning the empty bottles or cartons.
>
> The changes in the Clayton Act made by the Robinson-Patman Act now before us were made to limit discounts as "instruments of favor and privilege and weapons of competitive oppression." S. Rep. No. 1502, 74th Cong., 2d Sess., p. 5; H.R. Rep. No. 2287, 74th Cong., 2d Sess., p. 9. The allowance by § 2(a) of "differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered" was explained as follows:
>
> "This limits the differences in cost which may justify price differentials strictly *to those actual differences traceable to the particular buyer* for and against whom the discrimination is granted, to the different methods of serving them, and to the different quantities in which they buy.
>
> "But such differentials whether they arise in operating or overhead cost must, as is plainly stated in the phrase quoted above, be those resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.
>
> "This, in its plain meaning, permits differences in overhead where they can actually be shown as between the customers or classes of customers concerned, but *it precludes differentials based on the imputation of overhead to particular customers*, or the exemption of others from it, *where such overhead represents facilities or activities* inseparable from the seller's business

as a whole and *not attributable to the business of particular customers* or of the particular customers concerned in the discrimination. It leaves open as a question of fact in each case whether the differences in cost urged in justification of a price differential—whether of operating or of overhead costs—is of one kind or the other. That is, whether or not it answers the above requirements as to differences resulting from differing methods or quantities in which such commodities are to such purchasers sold or delivered." H.R. Rep. No. 2287, *supra*, p. 10. (Italics added.)

While in some cases costs relevant to the issue of discrimination under the Robinson-Patman Act may be computed class by class, the only costs relevant here are those computed store by store. The question of cost of delivery to all stores in the favored chain is irrelevant, because overhead costs applicable to a business as a unit have no bearing on any of the cost formulae presented by this record.

In the case of *Bowman Dairy Co.*, as the Court points out, the company charged all independents for customer service rendered by Bowman's deliverymen whether the independents availed themselves of the service or not. Bowman also charged independents for the time and expense of daily cash collections and for the costs of delays in collecting. These items were charged to independents even though it was not shown that their system of payment was always in cash, rather than by central billings, the system used by the chains.

In the *Borden* case an independent who purchased substantially larger quantities than the average chain store could not qualify for the discount the chain store obtained. This resulted because the independents were treated as one class, the chain stores as another class. As in *Bowman* the independents who did not make cash payments were treated as if they did; and they were not given the advantage which the chain stores enjoyed by reason of centralized billing even though they were on a credit basis.

What was said in *Champion Spark Plug Co.*, 50 F.T.C. 30, 43, is relevant here:

> "Respondent's cost of doing business undoubtedly varied as among its different customers. All of its selling expenses were not applicable on a proportionately equal basis to sales to all of its customers. However, in the absence of a sound basis for determining the actual cost of selling to particular customers, the sales to each customer must bear their proportionate share of the entire selling expense. A cost justification based on the difference between an estimated average cost of selling to one or two large customers and an average cost of selling to all other customers cannot be accepted as a defense to a charge of price discrimination."

Where centralized purchasing for many stores takes place, the costs of dealing with the group as a class become relevant to the problem under § 2(a). But where, as here, no centralized purchasing is involved, the store-by-store costs are the only criteria relevant to the § 2(a) problem. Otherwise those with the most prestige get the largest discounts and the independent merchants are more and more forced to the wall.

The case was argued as if the grant of discounts was a natural right and that the Act should be construed so as to make the granting of them easy. The Act reflects, however, a purpose to control practices that lead to monopoly and an improverishment of our middle class. I would therefore read it in a way that preserves as much of our traditional free enterprise as possible. Free enterprise is not free when monopoly power is used to breed more monopoly. That is the case here unless store-by-store costs are used as the criteria for discounts. This case is thus kin to that in *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, where the lush treasury of a chain was used to bring a local bakery to its knees. Here, as there, the chains obtain a "competitive advantage" not as a result "of their skills or efficiency" but as a consequence of other influences.* There pricecutting was the weapon. Here it is the discount. Each leads to the same end—the aggrandizement of power by the chains and the ploughing under of the independents. The antitrust laws, of which the Robinson-Patman Act is a part, were designed to avert such an inquest on free enterprise.

Even though respondent's Toledo milk and Memphis ice cream rebate schedules had been cost justified on the basis indicated by Justice Douglas, which they were not, for reasons which are pointed out in this decision, such rebate schedules were disregarded so frequently that they were not the basis for respondent's pricing of most of the volume of its products which were sold to its competing customers during the cost study periods in Toledo and Memphis: only three out of 22 Kroger locations, all rebated at 12 percent, purchased the 40,000 rebatable points, required during the cost study. The feeding of distribution data and costs from 19 Kroger locations rebated at a 12 percent rate which they did not earn, and locations of other customers, rebated at a higher rate than they qualified for, distorted the data. The inclusion of 190 Malone & Hyde locations in Memphis (rebated at 7 cents per gallon, 2 cents per gallon higher than any bracket of the schedule), likewise fed non-representative data into the Memphis cost study. Eighty percent of the Memphis gallonage was rebated at a higher rate than the locations earned.

If the rebate brackets in the discount schedules were supposedly fixed by respondent's time studied distribution costs, it must be pointed out that respondent paid a 12 percent rebate to Toledo customers whose distribution costs varied, as stated elsewhere in this decision, from *a low of 9.60 percent to a high of 24.37 percent*. In Memphis there was a similar great variation in distribution costs in the same rebate bracket: For instance, although both were rebated at 7 cents per gallon, Malone & Hyde had a stated per gallon distribution cost of *$.3726* (CX 186H), whereas National Tea had a stated cost of *$.5552*.

Aside from such savings as might have resulted from central

*See *Curtiss Candy Co.*, 44 F.T.C. 237, 267–268, 274; *International Salt Co.*, 49 F.T.C. 138, 153–155, 157; *Champion Spark Plug Co.*, 50 F.T.C. 30, 43.

billing, and sales expense, the cost of delivering Sealtest products to the 190 separate Malone & Hyde locations in Memphis did not vary substantially from the cost of delivering the products to 190 independent locations. Each Malone & Hyde location required the same amount of distribution time as though it were an independent location. If bracketed as independents the 190 locations would have received rebates as follows:

Rebate brackets	*Number of locations*
0¢	51
2¢	40
3¢	21
4¢	13
5¢	65
	190

Another objection to the cost studies is respondent's use of "computed" time instead of "observed" time. Respondent has asserted in its proposed findings, in its original brief, and its reply brief that the application of correlation analysis and the "method of least squares" to the time study data has been approved by government agencies including the Federal Trade Commission, in similar cost studies. It was by this procedure that respondent's cost experts converted "observed" time to "computed " time. Nevertheless, when a particular delivery function of respondent was observed and timed, the observed time should have been fed into the data analysis process, rather than a projected "computed" time. The witness Thompson admitted that the substitution of computed time resulted in processing cost study data which varied as much as 50 percent from the actual observations (Tr. 4327, *et seq.*).

In Memphis 10,231 out of 12,789 rebatable gallons sold during the cost study period were rebated off-scale, and more than 50 percent of the customer locations served were likewise rebated off-scale.

According to RX 45C, 423 Toledo-Monroe locations which were cost studied during July 1958 grouped into discount brackets according to volume of rebatable products purchased during the week of the study as follows:

Rebatable Points Per Month Required	Discount or Rebate	Locations
0 - 699	0%	165
700 - 999	2%	38
1000 - 1499	3%	43

Rebatable Points Per Month Required	Discount or Rebate	Locations
1500 - 1999	4%	40
2000 - 2999	5%	29
3000 - 4999	6%	22
5000 - 6999	7%	13
7000 - 9999	8%	8
10000 - 14999	9%	6
15000 - 24999	10%	26
25000 - 39999	11%	10
40000 and over	12%	5
		405
A & P	10%	18
		423

However, according to RX 57, of these 423 locations those belonging to voluntary and cooperative groups, stores under common ownership and corporate chains were actually rebated as follows:

Voluntary and Cooperative Groups:	Rebate Paid	No. of Locations
J Associated Grocers	12%	39
K Red and White	12	18
L Tri County Super Dollar	12	8
M Saveway	12	11
		76
Stores under Common Ownership:		
N Foodtown (Monroe)	12	4
O New Beer Stop, State Park Beer Stop and Golden Drumstick	10	3
P Casper-Miglores	10	2
		9
Corporate Chains:		
A A&P	10	18
B Sears	7	2
C Bellmans	10	5
D Big Bear	12	2
E Josephs	12	5
F National	12	5
G Kroger	12	22
H Wrigleys	12	1
I Seaway Foodtown, Inc.	12	8
		68
		153 locations

RX 45C (which follows) gives a per location breakdown of the rebates earned by these customers based upon volume of rebatable products purchased during the week of the cost study, to wit:

NATIONAL DAIRY PRODUCTS CORPORATION, F.T.C. #7018 TOLEDO AND MONROE MILK DISTRIBUTION OF LOCATIONS BY SIZE IN RX45A AND B OFF PREMISE CONSUMPTION CUSTOMERS

Toledo-Monroe Discount Brackets-													
Points of Rebateable Product Per Month:		0–699	700–999	1,000–1,499	1,500–1,999	2,000–2,999	3,000–4,999	5,000–6,999	7,000–9,999	10,000–14,999	15,000–24,999	25,000–39,999	40,000–Over
Points of Rebateable Product Per Week:		0–161.53	161.54–30.76	230.77–346.14	346.15–461.53	461.54–692.30	692.31–1,153.84	1,153.85–1,615.37	1,615.38–2,307.68	2,307.69–3,461.53	3,461.54–5,769.22	5,769.23–9,231.76	9,231.77–Over
Discount Scale— Per Cent of Rebateable Dollar Sales		0%	2%	3%	4%	5%	6%	7%	8%	9%	10%	11%	12%
Distribution of Customer Locations *Individual Customer Locations:*	Total Number of Locations by Volume of Rebateable Product Purchased—Week of Study*												
Those in Same Bracket-Week Versus Month													
On Scale	225	151	17	27	18	8	4	--	--	--	--	--	--
Off Scale#	9	--	3	1	--	--	3	1	1	--	--	--	--
Those in Different Bracket—Week Versus Month#	36	4	11	10	8	2	--	--	1	--	--	--	--
Voluntary and Cooperative Groups													
Associated Grocers	39	7	5	4	6	7	4	6	--	--	--	--	--
Red and White	18	1	1	1	2	3	4	2	2	--	1	--	1
Tri County Super Dollar	8	--	1	--	3	1	1	1	1	--	--	--	--
Saveway	11	--	--	--	--	2	2	1	--	--	4	1	1
Stores Under Common Ownership													
Foodtown (Monroe)	4	--	--	--	1	2	1	--	--	--	--	--	--
Near Beer Stop, State Park Beer Stop and Golden Drumstick	3	1	--	--	1	--	1	--	--	--	--	--	--
Caspers - Miglores	2	--	--	--	--	2	--	--	--	--	--	--	--
Total Except Corporate Chains	355	164	38	43	39	27	20	11	5	--	5	1	2

Corporate Chains:													
Sears Markets	2	--	--	--	1	--	1	--	--	--	--	--	--
Bellmans	5	--	--	--	--	2	1	1	1	--	--	--	--
Big Bear	2	--	--	--	--	--	--	--	--	--	1	--	--
Josephs	5	--	--	--	--	--	--	--	--	--	5	--	--
National	5	--	--	--	--	--	--	--	--	1	2	2	--
Kroger	22	1	--	--	--	--	--	--	1	4	7	6	3
Wrigleys	1	--	--	--	--	--	--	--	--	--	1	--	--
Seaway Foodtown, Inc.	8	--	--	--	--	--	--	1	--	1	5	1	--
	405	165	38	43	40	29	22	13	8	6	26	10	5
A&P	18												
Total Off Premise Locations	423												

Note:
*Including special deliveries on the basis of ⅛ of eight weeks deliveries in Toledo and ¼ of four weeks deliveries in Monroe, both periods ending August 2, 1958.
#See RX 54 for detailed listing of these customers.

According to RX 57A respondent's maximum 12 percent rebate was paid to 123 locations of a group of respondent's customers in the Toledo-Monroe area even though only five locations qualified for a 12 percent rebate according to RX 45C.

Respondent admits in its proposed findings (RPF 338) the 12 percent discount to Associated Grocers and Tri-County Super Dollar among the voluntary and cooperative groups, the 10 percent discount to A & P, the 7 percent discount to Sears, the 10 percent discount to Bellman's are not fully cost justified.

The cost studies failed to establish the basis upon which respondent assigned rebatable points to the various items in the Sealtest product line. For example, why was one rebatable point assigned to a quart of milk and eight points assigned to a quart of whipping cream? (p. 93, *supra.*) Which was done first in Sealtest's rebating practices: assigning rebatable points to the items in the product line, or ascertaining distribution costs? This is vital because one of respondent's drivers could carry a case of whipping cream into a customer location in the same time that he could carry in a case of quarts of milk, but the customer would earn eight times as many rebatable points for the whipping cream as for the milk. It is true that some of the cost study witnesses testified that they had studied "product mix" for the deliveries and concluded that it averaged out. However, if time is the most costly element in Sealtest's delivery and distribution process, and it takes the same amount of time to deliver a case of milk as it does to deliver a case of whipping cream, but the whipping cream is worth eight times as many rebatable points as the milk, this element should have been taken into account in the time studies. A Sealtest driver serving a large supermarket might be able to deliver many cases of whipping cream because the supermarket sells sufficient whipping cream at retail to buy it by the case. Another driver, delivering to an independent grocery store, possibly would deliver cases which contained considerably fewer rebatable points per case, but require the same amount of time to deliver.

Using "rebatable points" purchased as a basis for fixing rebates appears therefore to be inconsistent with using "distribution costs," unless the correlation of the two is shown better than was done.

Another practice in respondent's cost justification which the Commission and the Courts have disapproved is "aggregating" and "averaging" the purchases by all the locations of multi-unit customers in determining the rebate bracket into which the customer falls. In its Reply Brief (p. 33) respondent asserts:

> In one breath, counsel supporting the complaint contends that Sealtest aggregated the volume of multi-unit purchasers in order to determine their rebate brackets *under its discount schedules,* and in the next breath he states that large portions of Toledo milk and Memphis ice cream volume were sold "off-scale," *i.e.,* that Sealtest's Toledo milk rebate schedule "was *not used* in determining the applicable rebate on sales to chain or group stores" (CCPF 63), and that a large portion of Sealtest's Memphis ice cream volume "was sold off-scale and *not in accordance with the published quantity discount schedule*" (CCPF 69) (emphasis supplied).
>
> These two propositions are obviously incompatible: either Sealtest aggregated volume in order to determine rebates payable *in accordance with its schedules,* or it negotiated rebates outside *its schedules* (to meet competition). As we have demonstrated in our proposed findings of fact (RPF 354-59, 613), the latter proposition is true; the former is not.

The examiner respectfully disagrees with respondent's position stated above. RX 45C, *supra,* lists 16 customers in the voluntary and cooperative groups, stores under common ownership, and corporate chains, with 153 locations, for which the volume was aggregated in order to determine their brackets under respondent's discount schedules. Messrs. Whittaker, Armstrong, Clayton and Duffy testified that Sealtest aggregated and averaged the purchases of multi-unit customers to determine rebates payable according to the rebate schedules, *and* to fix off-scale rebates. Respondent's multi-unit customers were cost studied on a per location basis, but paid rebates on the basis of aggregating the sales of all the units in a chain.

Respondent's position is that the cost justification statute uses the word "purchasers" and, therefore, the point of competition is between "purchasers"; *i.e.,* Malone & Hyde vis-a-vis National Food, Kroger vis-a-vis A&P, the chain vis-a-vis the independent. Although 22 Kroger locations were included in the Toledo-Monroe cost study, John Davis testified that he competed with a specific Kroger location, a specific Big Bear, and a specific Joseph's location. Ben Peterman likewise named a specific Kroger and Gruber store in his vicinity. The Betrus' store competed with specific Foodtown, Kroger, Wrigley and Gruber stores. The independent store owners who testified from other areas were able to indicate the specific locations of their competitors, as well as the multi-store operators as a class.

In the *Borden* opinion, *supra,* Justice Douglas stated, *inter alia:*

While in some cases costs * * * may be computed class by class, the only costs relevant were those computed store by store * * *

Although complaint counsel has not pressed his allegation of territorial price discrimination, such territorial price discrimination would exist if large national retail grocery chains such as Kroger and A&P could, by negotiating an off-scale rebate in a particular area be put at a competitive advantage with reference to its competitors in an adjacent area.

The innate nature of dairy products being what they are (not susceptible to warehousing, central distribution techniques, etc.) Sealtest products must be delivered to the store location from which they are resold at retail. It is from a specific location that competition emanates.

During the course of the hearings respondent's witnesses were asked to react to a hypothetical situation in which two grocery stores purchase the identical volume of Sealtest rebatable products for any given period of time. One of the stores is an independent being rebated at 5 percent and the other store is a member of a corporate chain rebated at 12 percent. None of respondent's witnesses was able, within the theories of its cost studies to justify paying a 5 percent rebate to the independent and a 12 percent rebate to the adjoining corporate chain store, without the competitive injury which the statute is designed to prohibit.

John Armstrong testified (Tr. 2666):

A. Well, the first question that had to be determined was whether and what was the relationship between distribution costs and the volume in which customers were served and whether the discount schedule that Toledo had used was cost justified in itself. We chose to test whether the discount schedule was cost justified on a per location basis. I emphasize that because in making this test we did not aggregate the sales to the various chains or voluntary groups. We took each location of the chain or voluntary group and let it stand on its own feet. We were using the data purely to test the relationship between distribution costs and the volume delivered during the week of the study. RX 45-A shows that the discount schedule interpreted on a location basis is cost justified.

Mr. Armstrong further testified (Tr. 2677) that the cost study never analyzed A&P by volume bracket. On respondent's Exhibit 45 "* * * A&P is set forth separately as 18 locations. * * * Because A&P doesn't buy a full line of products. It buys only cottage cheese." Nevertheless A&P was granted a 10 percent discount on its purchases of cottage cheese alone (Tr. 2680). The cottage cheese purchased by A&P was only one out of 70 products in the Sealtest line. Respondent has not proven that the A&P stores, considered on an aggregated basis, or on a per location basis purchased between 15,000 and 25,000 rebatable points of cottage cheese per month during July 1958 so as to qualify for the 10 percent rebate under the schedule then in effect.

James W. McKie, who, among other things, had ridden the company delivery trucks in order to be familiar with its distribution problems, testified (Tr. 2831–32):

Q. Then if the record shows that a Krogers store by reason of the quantity received was placed in a certain bracket and the discount that that store actually received did not correspond to the bracket in which the quantity placed it, what effect would that have on your computation?

A. *It wouldn't have any effect on the computation of the actual cost saving.* It would have no effect at all upon that because the measurement of the time associated with the volume of product delivered depends upon the volume of product delivered. *It had nothing to do with any discount actually paid.* (Emphasis supplied.)

Q. Well, do you mean to say that if 100 cases of milk are delivered to the Kroger store and 100 cases of milk are delivered to an independent store, that the costs of delivery are different?

A. No, sir, I do not. Our computation would show, I am speaking now of Mr. Duffy's computations, Mr. Duffy's computations would show, in my judgment, that the *average* costs associated with these two deliveries would be the same. (Emphasis supplied.)

As previously stated, in August 1960, respondent put a new discount schedule into effect in Toledo (p. 94 *supra*) but did not make new time and cost studies to justify the new schedule. Respondent utilized the time studies, cost studies, quantities purchased, as well as the other data which had been collected when it was cost studying the old Toledo schedule. (p. 94 *supra*) Respondent asserts, nevertheless, that its new schedule is equally as well cost justified as the original Toledo schedule which was cost and time studied. It would appear, therefore, that under respondent's theory practically any rebate schedule could be cost justified. In its proposed findings (RPF 343, p. 143), respondent states "Accordingly, there is no particular or specific discount schedule which is necessarily applicable to a given market; there are many possibilities with respect to different bracket widths, different breaking points between brackets, and different amounts of discount. * * *"

Respondent asserts that its volume discount schedules represent a good faith attempt to pass on cost savings to its customers;

and that some sort of volume discount pricing is essential to the "survival" of the dairy industry. A volume discount schedule, which is properly cost justified, and administered without discrimination, may provide a pricing mechanism by which cost savings are passed on to Sealtest customers. Volume discount schedules are not unique to the dairy business. The Commission and the Courts have passed upon the legality of volume discount schedules in many different situations. They have not found that volume discount schedules constitute discriminatory pricing *per se.* In the specific factual situation of this case it is the administration or application of Sealtest's volume discount schedules, particularly the high percentage of off-schedule rebates; "aggregating" and "averaging" for multi-unit chain operators, and the substitution of computed time for observed time which resulted in many of the price discriminations. Respondent's contention that a denial of its right to use a volume discount schedule would "hurt not only Sealtest but the entire dairy industry" misreads and misinterprets the thrust of prior decisions and precendents in which graduated quantity discount schedules have been adjudicated.

John Armstrong testified that respondent's practice of aggregating purchases would explain the discount received by quite a few customers but it would not explain all (Tr. 2434–40, 2480, *et seq.*, 5158, *et seq.*). Respondent admits "what while Sealtest's cost study exhibits showed that many of its discounts were cost justified, others were not * * *" and "But Sealtest made no claim either that all its discounts were paid in accordance with its schedule, or that all its discounts were cost justified. * * *" (RPF 358, p. 150) Moreover, Clayton Thompson testified as previously quoted "Now as to the balance of 225 locations of which we are speaking, *they are not cost justified on the schedule themselves,* that is as to the schedule, * * *" (italic supplied).

In its original brief (pp. 56–59) respondent refers to Justice Douglas' concurring opinion in the *Borden* case, *supra,* and states "* * * But Justice Douglas, we submit, misreads the legislative history upon which he relies, and he represents a minority of one on the Court upon this point."

Respondent also alludes to Examiner Creel's disposition of the cost defense in *Foremost Dairies, Inc.,* Docket 7475 [62 F.T.C. 1344]. Since respondent's brief was filled in this case the Commission has decided *Foremost* (see opinion dated May 23, 1963). In that opinion the Commission also quoted the *Borden* decision in 370 U.S. 460. The Commission, *inter alia,* stated [pp. 1361–1362]:

As to respondent's claim that its discounts to the Barber's, Speedway and Furr's chains were cost-justified, it is clear that the cost study relied upon fails to meet the basic requirements of an adequate cost justification defense. Although the study was based upon purported differences in delivery costs between purchasers within designated average delivery-volume brackets, discounts were not granted to all purchasers within the larger volume brackets, but only to the Furr's, Barber's and Speedway chains. Independents whose delivery volumes approached or equalled those of the chain stores received no discounts. Thus, although respondent asserted that the challenged discounts were cost-justified as against the 70 percent of its Albuquerque customers who fell within its 1-40 quart average delivery bracket, Conniff's Market, an independent whose owner testified that he competed with the Barber's stores, averaged 72 quarts per delivery but received no discount.

This is precisely the defect condemned by the Supreme Court in *United States* v. *The Borden Company*, 370 U.S. 460, 469-70 (1962). As the Court observed,

" . . . such a grouping for cost justification purposes, composed as it is of some independents having volumes comparable to, and in some cases larger than, that of the chain stores, created artificial disparities between the larger independents and the chain stores. It is like averaging one horse and one rabbit."

In view of this obvious defect, there is no need to consider the other asserted deficiencies in respondent's cost justification defense.

In view of respondent's own admissions that many of its price discriminations are not cost justified, and for reasons which have heretofore been specifically set forth, the examiner is unable to find that respondent's price discriminations, proven in this record, made only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which Sealtest products were sold or delivered to its customers.

RESPONDENT'S MEETING COMPETITION DEFENSE

Subsection 2(b) of the Clayton Act (p. 87, *supra*), *inter alia*, provides "* * * that nothing herein contained shall prevent a seller-rebutting the *prima facie* case thus made by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet the equally low *price* of a competitor, * * *" (italic supplied).

It should be noted that the statute speaks only in terms of "the equally low price of a competitor" and does not use the words "discount" or "rebate."

Respondent seeks to exculpate all of its discriminatory *prices* which are not cost justified by asserting that, as to each customer to which a non-schedule or off-schedule *rebate* was paid, such *re-*

bate was paid to meet a similar *rebate* offered by one of respondent's competitors.

Inasmuch as meeting competition is an affirmative defense, the burden of going forward, and the burden of proof are upon respondent. Since the statute does not speak in terms of rebates or discounts, respondent was under the burden of placing in this record the best evidence available from which (a) the competitor's *price* being met could be ascertained; (b) proof that such price was a lawful lower price; and (c) evidence that such price was not part of an inherently discriminatory pricing system.

Assuming that respondent's rebates or discounts were only price reductions, it was incumbent upon respondent to prove its competitors' list prices from which the competitive discounts were allowed. In one or two instances, respondent has sought to prove a competitor's list prices, but it has not proven the competitor's rebate schedule.

If respondent had proven, which it has not, that all of its competitors had identical list prices for all products in the Sealtest line, then, by proving that it was meeting a competitor's rebate with an identical rebate, it would, inferentially, be proving what competitive price it was attempting to meet. Such proof is not in this record. One of respondent's witnesses, Melvin B. Lewis, an official with the Saveway buying group, testified that Saveway was willing to accept a *12 percent* discount from Sealtest at a time when the members of the group were receiving a *15 percent* discount from Meadow Gold (Tr. 3251). Respondent paid a *12 percent* rebate to Tri-County Super Dollar to match a *10 percent* rebate of Page Dairy, and a *12 percent rebate* to Foodtown (Monroe) to meet a *28 percent rebate* from United Dairy (p. 100, *supra*). The competitive rebate which respondent was allegedly meeting was frequently determined by nothing more than conjecture by Sealtest employees.

In *Standard Motor Products, Inc.*, 54 F.T.C. 814, at 823, the Commission discussed rebates, and the practice of aggregating purchases, both of which are present in the instant case.

20. The defense of meeting competition in connection with sales to the various group members is without merit. The good faith requirement of section 2(b) of the Clayton Act is not met where a price discrimination, with the required resultant effect, is for aggressive rather than defensive purposes. The allowance of discounts and rebates to members of the various groups based upon the aggregate purchases of all the members was designed to meet competition generally and to obtain the business of all the members of a group and were not allowed to meet an equally low price of a competitor.

21. If, as contended by the respondent, it granted a cumulative annual rebate to members of groups, based upon the aggregate purchases of all the members because its competitors were offering such rebate based upon the aggregate purchases of the members of a group, it could not be considered that such action was in good faith since the respondent well knew that the rebates offered by its competitors as well as the rebates offered by respondent to group buyers were unlawful in that the differences in price accorded group and nongroup purchasers could not be justified by showing differences in the cost of manufacture, sale or delivery since their source is a rebate system, based, not on the quantities or other factors involved in any particular sale, but rather upon the combined dollar amount of all sales to a group.

Sealtest knew, or should have know, that the granting of cumulative volume rebates by its competitors, and particularly the practice of aggregating and averaging, might have resulted in price discriminations. When Sealtest adopted that practice to meet competition, it was not necessarily meeting a lawful lower price, but may have been adopting a discriminatory pricing system within the interdiction of *F.T.C.* v. *A.E. Staley Mfg. Co., 324 U.S. 746,* and *F.T.C.* v. *Cement Institute,* 333 U.S. 683.

In its proposed findings 371 (pp. 156–157), respondent states:

371. Much of the evidence adduced in support of the meeting competition defense refers to the granting of equivalent discounts or rebates from equal "list prices." This is but a reflection of the realities of the market place, since price competition is waged by milk and ice cream companies through the granting of discounts or rebates from published wholesale list prices. Because of virtually identical raw material and labor costs, there is close similarity in the published wholesale list prices of the different companies serving a particular market.[42] *Customarily, therefore, the matching of a competitor's rebate results in a meeting of that competitor's equally low price within the meaning of the Section 2(b) proviso.*

[42] The price of raw milk (the principal ingredient in fluid milk and ice cream products) is in many markets fixed by Government order, so that all dairies in the market purchase raw milk at the same price. This is the case in the Toledo-Monroe and New Orleans areas (R. 210, 1141, 5887–88, 6042–43). In markets such as Lansing, Jackson, and Battle Creek, where Government orders are not in effect, farmers sell milk through producers' cooperatives at the same price to all dairies (R. 593–94).

Labor costs tend to be the same for all dairies in a market because of the existence of market-wide labor contracts (R. 5888, 6043).

In its Reply Brief (p. 49) respondent states:

* * * It is true, of course, that Section 2(b) speaks of the "equally low price of a competitor" but, as we have shown (RPF 371; *cf.* our supporting brief, p. 88), *list prices of competitors in the various markets ordinarily are the same, and price competition in the dairy industry is waged in terms of discounts from equal list prices.* * * * (Emphasis supplied.)

Respondent has not proven in this record, one of the above-stated basic assumptions of its meeting competition defense, *i.e.*, "list prices of competitors in the various markets ordinarily are the same * * *." One inference that might be drawn from the above statements of respondent is that the entire dairy industry uses a pricing system that is discriminatory, and hence unlawful under subsection 2(a) of the Clayton Act. There is no proof of such fact in this record. As previously found in this decision, quantity rebate schedules are not discriminatory *per se*. Such schedules can be structured so as to be cost justified, and they can be administered so as to be non-discriminatory. If, however, a rebate schedule has neither attribute, it might be part of an unlawful pricing system.

It is significant that respondent has asserted its meeting competition defense as to most of the same Toledo-Monroe milk customers (pp. 101, 102, 103, 147 and 148, *supra*) and Jackson milk customers (p. 114, *supra*) whose rebates respondent defended as having been cost justified. Respondent's position appears to be that price discriminations may be cost justified, in part, and meet competition, in part. Respondent defends its 12 percent rebate to the 22 Kroger stores in the Toledo-Monroe area, its 12 percent rebate to the 39 Associated Grocers stores, and its 7 cents per gallon rebate to the Malone & Hyde stores on the grounds that the price discriminations resulting from such rebates were *partly* cost justified, and *partly* granted to meet competition. Justice Douglas in the *Borden* opinion (p. 144, *supra*), indicated that the "grant of discounts" is not "a natural right."

Among others, respondent's meeting competition witnesses included:

Glenn W. Whittaker, manager, Sealtest-Toledo zone
William Matile, Associated Grocers' official
Melvin B. Lewis, Saveway Stores official
Frank Rossi, Sealtest's Monroe branch manager
Kenneth Cowden, former Sealtest Jackson branch manager
Gerald Dorr, Sealtest Jackson branch manager
Robert J. Fauson, former Sealtest Lansing plant manager
Harold Hurni, former Sealtest Lansing wholesale milk salesman
Robert Gage, former Sealtest Lansing wholesale milk salesman
Lawrence Huntley, Sealtest Jackson wholesale milk salesman
Ruth Nordman, one of the owners of Topnotch Dairy Store
Kenneth Booth, owner of Jackson Food Market
Cayce Medford, Sealtest Memphis ice cream sales manager
H. Robert Teesdale, former Sealtest Memphis ice cream sales manager
Mrs. Lawrence Matracea, proprietor of Jack's Sundry, Memphis

Joseph Foppiano, proprietor of Foppiano's Grocery, Memphis

Frank Fletcher, proprietor of Fletcher's Pharmacy, Memphis

Lewis Robinson, executive vice president, and president of Cloverland Products Corp., later a division of National Dairy Products Corp., New Orleans, La.

Thomas King, former Sealtest New Orleans sales manager

Charles Landreth, former Sealtest New Orleans zone manager

J. D. Allen, former Sealtest Lansing & Jackson ice cream manager

Richard T. Greenfield, Sealtest Toledo ice cream manager

Laton M. Henderson, former executive vice president of Cloverland Dairy, New Orleans

A substantial portion of respondent's meeting competition evidence consisted of the recital by its employees or former employees of conversations with Sealtest customers. At the time such testimony was offered, complaint counsel objected that such testimony was hearsay. The examiner admitted the evidence for the limited purpose of proving that such conversations may have taken place. However, the examiner specifically ruled that the hearsay evidence was not proof of the truth or falsity of the facts alleged to have been stated. This examiner concurs in the statement in *Exquisite Form Brassiere, Inc.*, Docket 6966* that in *Corn Products Refining Company* v. *F.T.C.*, 324 U.S. 726, and *F.T.C.* v. *A.E. Staley Mfg. Co.*, 324 U.S. 746, "the Supreme Court held that hearsay evidence of a competitor's offers, believed by the respondents therein, was not sufficient 'to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price [promotional allowance] would in fact meet the equally low price of a competitor.' "

Respondent did place in the meeting competition record the testimony of non-employee witnesses, including among others, William Matile, an Associated Grocers official, Melvin B. Lewis, a Saveway Stores official, Ruth Nordman of the Top Notch Dairy Store (see pp. 113–115, *supra*), and Mrs. Lawrence Matracea, Joseph Foppiano and Frank Fletcher (pp. 117–118, *supra*), all of Memphis. However, the testimony of these witnesses does not overcome the infirmity inherent in respondent's strong reliance upon hearsay, its failure to offer primary evidence of the facts upon which it relies, and its departure from the "best evidence" rule. The best evidence of competitors' list prices would have been the price lists themselves. Best evidence of the rebate schedules would have been the schedules themselves. In most instances the best evidence of competitors' offers of rebates was not adduced.

*See Revised Initial Decision After Remand dated March 15, 1963, p. 14 [64 F.T.C. 271, 280].

When the "best evidence" was offered, it did not substantiate respondent's assertions.

The testimony of Ruth Nordman (Tr. 5316, *et seq.*), one of the owners of the Top Notch Dairy Stores in Jackson, Michigan, does not support a finding that respondent's 12 percent rebate to Top Notch Dairy was paid to meet the offer of a 15 percent rebate by Serval Jersey Dairy: The facts are that Mr. Sweitzer of the Servall Dairy had loaned the witness and her husband a dairy cooler and other store fixtures to get started in business. When Mr. Sweitzer learned that the Nordmans were using the property which he had loaned them, to store Sealtest products, and that Don Donaldson, a Sealtest distributor, was running a Sealtest retail truck from the Nordman's place of business, Sweitzer on a Saturday morning, "took the compressor off the milk cooler; he took the cash register and the counter, the shelving, just about everything in the store" (Tr. 5320) from the Top Notch Dairy Store, and refused to furnish Servall products to the Nordmans. Mrs. Nordman "took on Sealtest milk that day that Mr. Sweitzer pulled out our equipment" (Tr. 5326) in the spring of 1958. At that time Sealtest gave Top Notch Dairy a 10 percent rebate. Granting the 10 percent rebate was not necessary at that time to "meet competition." Later the 10 percent was increased to a 12 percent rebate. Respondent asserts that RX 159 shows the reason for the 12 percent rebate. RX 159, purporting to be a letter dated April 21, 1958, from Mrs. Nordman to Sealtest, *inter alia,* stated:

> Servall Dairy has offered us a 15% discount from the regular wholesale list price. Unless your company can compete, let this letter be notice that we are discontinuing Sealtest Dairy Products as of April 12, 1958.
>
> Very truly yours,
> Ruth P. Nordman
> (Mrs. Charles Nordman)

The letter, although dated April 21, 1958, was not offered when its author testified in April 1961, but was offered later through respondent's witness, Gerald Dorr on February 5, 1962. The record does not disclose why respondent did not offer the letter when its author was on the witness stand and could have been cross-examined concerning the alleged 15 percent offer from Servall. Mrs. Nordman did not mention such 15 percent offer, allegedly made in April 1958, when she testified in April 1961. On the basis of the entire record the examiner finds that respondent's 12 percent rebate to Top Notch dairy was not granted to meet a 15 percent offer from Servall. RX 156 considered in the context of the record is not proof of respondent's meeting Servall competition.

Similarly, RX 16 and RX 17, letters dated in January 1958 from the Santi Ice Cream Company to Malone & Hyde in Memphis do not substantiate respondent's assertion that Sealtest's 7 cents per gallon off-schedule rebate on ice cream to the Malone & Hyde Stores was paid to meet the competition of Santi Ice Cream Company. These letters, dated in January 1958 and offered at hearings in Memphis on November 17, 1958, were part of the cross-examination of complaint counsel's witness, Joseph R. Hyde (Tr. 1031, *et seq.*). The original Sealtest rebate to Malone & Hyde had been negotiated by Vaughn Ashenbrenner in 1951 at 5 percent. It was changed in 1954 (Tr. 1010). The 7 cents per gallon plus 2 percent for advertising arrangement had been negotiated for Malone & Hyde "about two years" before Mr. Hyde testified on November 17, 1958, in Memphis (Tr. 1011). That means the discriminatory pricing found in this decision was established in the year 1956, considerably before the competitive offer of Santi Ice Cream, claimed to be proven by RX 16 and RX 17.

The testimony of Melvin B. Lewis of the Saveway buying group (Tr. 3251, *et seq.*) which was paid a 12 percent rebate (pp. 103, 148, *supra*) reflects some of the flaws in respondent's meeting competition defense: (1) Sealtest did not match competitors' rebate offers with identical rebates (*i.e.*, it matched Meadow Gold's 15 percent with its own 12 percent; Tr. 3251); (2) Saveway switched from Meadow Gold to Sealtest—not because of the rebate paid by Sealtest—but because the Meadow Gold containers leaked, and its milk turned sour because of the long distance it had to be transported. "We just had to get some other brand of merchandise" (Tr. 3251); (3) Sealtest's 12 percent rebate to Mr. Lewis may have eliminated Meadow Gold as a Sealtest competitor but it did not meet the price of Cherry Grove dairy which continued to split into the account with Sealtest. Mr. Lewis was paying Sealtest 40 cents base price less a 12 percent rebate, or $.3520 per half gallon, and was paying Cherry Grove 33 cents. He sold Sealtest milk for 39 cents, and Cherry Grove at 3 for a dollar. His volume was divided between Sealtest and Cherry Grove about 50 percent to each; (4) Mr. Lewis could not state whether any dairy other than Sealtest had a 12 percent discount, nor was he familiar with the prices of other dairies or their discounts (Tr. 3253), although he had been in the grocery business since 1923, with Kroger for four years, A & P for nine years, and in business for himself since November 1936. With such business background, Mr. Lewis could be expected to be familiar with the pricing and rebating practices of the dairies in his vicinity—if such practices were a matter of common knowledge, as respondent asserts.

Mr. Matile, another meeting competition witness, an officer of the Associated Grocers buying group, had done business with Sealtest for 30 years. In 1954, Meadow Gold offered a 5 percent rebate to the Associated Grocers group on an individual basis, and a 10 percent rebate if all or substantially all of the stores in Associated Grocers would put in Meadow Gold products. Associated Grocers did not make Meadow Gold's offer known to Sealtest. Sealtest did not meet Meadow Gold's offer, and lost a few of the Associated Grocers stores. Sealtest gave a 10 percent rebate, and later a 12 percent rebate to the Associated Grocers stores. At the time of Mr. Matile's testimony on September 23, 1960, in Toledo, he was buying from Driggs and Sealtest and getting a 12 percent rebate from each. He was paying 40 cents per half gallon, less a 12 percent rebate and selling the products out of his store at 39 cents. The witness emphasized the importance "a quality product" as well as price has, in meeting competition (Tr. 3144) in the dairy business. In 1954, the time of Meadow Gold's offer, the Associated Grocers buying group had 30 to 40 stores. At that time Mr. Matile was buying from Page Dairy and Sealtest. He did not contact Page or Sealtest before accepting Meadow Gold's 10 percent rebate offer. Meadow Gold split into his store with Sealtest and Page.

Mr. Matile testified that he never saw a Meadow Gold discount schedule (Tr. 3162). He further testified (Tr. 3175):

A. At that time we were having trouble with Meadow Gold products. It was being shipped too far. I don't believe it was refrigerated enough, and we were having a lot of trouble, we were having leakers, and we were having sour milk.

HEARING EXAMINER GROSS: What is leakers?

THE WITNESS: Well, the cartons, I think, they were handled roughly and they were hauling them too far.

HEARING EXAMINER GROSS: I see.

A. And the boys, the rest of the store owners were getting a little disgusted, so was I, because it makes a lot of mess in your case if you get a leaker. You have to clean them up. We had been after them to establish maybe a place in Toledo to distribute the milk from, but they were hauling it in from Lima and we were having considerable trouble.

So when Sealtest came out with their new schedule, we were pleased because we had had our fill, I would say, at that time of Meadow Gold.

This testimony indicates that Associated Grocers did not switch back to Sealtest because Sealtest was "meeting competition," price-wise, but for other reasons.

Mr. Matile could not recall when Sealtest started paying the 12 percent rebate to Associated Grocers (Tr. 3183). He had no personal knowledge of Driggs' and Babcock's 12 percent rebate bracket (see p. 98, *supra*).

The testimony of Laton Michell Henderson who signed the original contract dated May 30, 1951, between Cloverland Products Division of respondent and H.G. Hill Stores, Inc., New Orleans, Louisiana (CX 98 A, B and C), of Lewis Robinson (Tr. 5857, *et seq.*) and of Charles E. Landreth (Tr. 5965) does not support a finding that respondent's prices to the Winn-Dixie chain (after they bought out the Hill Stores) were made to meet the price of any competitor. The alleged competitive offer of Foremost Dairies to Winn-Dixie does not stand proven in this record. Foremost did not have a plant in New Orleans and had to haul its products from a distance. CX 99 sets forth in skeleton form the conditions under which Winn-Dixie continued to buy Sealtest products as an extension of the original Hill Stores agreement of May 30, 1951. Hearings set, or requested, in New Orleans to receive other meeting competition testimony were cancelled at respondent's request. The testimony of Messrs. Henderson, Robinson and Landreth as to the Winn-Dixie pricing arrangements does not establish that they were made in good faith to meet the equally low lawful price of a competitor, what that price was, nor when or how Sealtest met the offer.

In his book *Complete Guide to the Robinson-Patman Act* (Prentice-Hall, Inc., 1963 Edition), the Honorable Wright Patman states, p. 96:

> Question. May a seller utilize the good-faith proviso to justify quantity or volume discounts, which he regularly grants to customers qualifying therefor on the basis of quantities they purchase, by showing that any one of his purchasers could have obtained an equally low price from another seller on a like quantity?
>
> *Opinion.* No. See International Salt Company, No. 4307, FTC, 1952.

In *International Salt Co., et al.,* 49 F.T.C. 138, the Commission, *inter alia,* stated (p. 153):

> * * * Thus, while respondents on September 17, 1936, apparently altered the amount of and the requirements for receiving this quantity discount to conform with what they understood to be the pricing practices of their competitors, this fact is of no particular importance, since the practice of granting discounts on the basis of the total annual requirements of a purchaser regardless of from whom they were purchased was employed by respondents

or their wholly owned subsidiaries prior to that date. Contrary to respondents' contention, the price differences resulting from the granting of these discounts to some but not all of the respondents' competing customers were not the consequence of departures from a non-discriminatory pricing scale which were made to meet lower prices of competitive sellers, but represented only the continued application of the discriminatory pricing standard previously adopted by respondents and used by them since November 1935. Moreover, despite the fact that the illegal nature of this discount was brought to the attention of respondents by the Commission's complaint in 1940, there is no evidence that respondents made any attempt to eliminate or lessen the amount of this discrimination until 1948. Respondents, in such circumstances, cannot be said to have acted "in good faith" within the meaning of section 2(b) of the statute.

After careful consideration of all of the facts, the Commission is of the opinion, and finds, that respondents have not shown that their discriminatory prices accorded the recipients of this discount were lower prices made in good faith to meet an equally low price of a competitor.

Respondent's meeting competition defense will exculpate its discriminatory prices only if such discriminations in price were made in good faith to meet individual competitive situations. Good faith is not present if a seller adopts the unlawful discriminatory pricing system of a competitor. The meeting competition defense is not available to justify specific lower prices on the basis of an inherently discriminatory pricing system. The equally low price of a competitor must be the equally low lawful price for a given quantity. If a seller fixes a lower discriminatory price, he must have reasonable grounds upon which he can conclude that his competitor's lower price does exist and what that price is. Good faith is not proven in a record if the seller acts entirely on unsupported, unverified verbal statements, nor is good faith established if the seller knew, or should have known that his competitor's price was unlawful, or inherently illegal.*

* * * The seller has the burden of bringing himself within the exculpating provision of § 2(b), which has been interpreted to afford an absolute defense to a charge of violating § 2(a), notwithstanding the existence of the statutorily prohibited anticompetitive effect, *Standard Oil Co.* v. *Federal Trade Comm'n.*, 340 U.S. 231. *Federal Trade Comm'n.* v. *Sun Oil Co.*, 371 U.S. 505.

Respondent has not, by reliable, probative and substantial evidence in this record, sustained the burden imposed upon it by and within the rationale of the footnoted decision (shown below). Res-

*See *F.T.C.* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945) ; *F.T.C.* v. *Standard Oil Co.*, 355 U.S. 396 (1958) ; *F.T.C.* v. *Cement Institute*, 333 U.S. 683 (1948) ; *F.T.C.* v. *National Lead Co.*, 352 U.S. 419 (1957) ; *F.T.C.* v. *Standard Brands, Inc.*, 189 F. 2d 510 (2d Cir. 1951) ; *Standard Oil Co. v. Brown* 238 F. 2d 54 (5th Cir. 1956); *Standard Oil Co.* v. *F.T.C.*, 340 U.S. 231 (1951); *Corn Products Ref. Co.* v. *F.T.C.*, 324 U.S. 726 (1945).

pondent has not proven that its discriminations in prices in the four trade areas involved in this proceeding, during the relevant periods, which were not cost justified, were made in good faith to meet the equally low lawful price of a competitor.

COUNT II

Respondent's 2(d) Violations

Paragraph Ten of Count II of the complaint filed herein, *inter alia,* alleges:

PARAGRAPH TEN: In the course and conduct of its business in commerce, as aforesaid, respondent has paid or contracted for the payment of money, goods, or other things of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished or agreed to be furnished by or through such customers in connection with the handling, sale, or offering for sale of respondent's dairy products and respondent has not made or contracted to make such payments, allowances, or consideration available on proportionally equal terms to all of its other customers competing in the sale and distribution of such products.

Respondent's Sealtest Food Division has an advertising fund made up out of corporate earnings which is used by respondent's Sealtest division to advertise Sealtest products in magazines of national circulation, such as *Time, Life* and the *Saturday Evening Post.* Respondent also advertises by other publicity media of national scope, including television and radio.

C.R. Roberts, president of Sealtest Foods and a vice president of National Dairy Products Corporation, *inter alia,* testified:

* * * Now, what about the sales advertising operations of these various divisions. Are they separately— are they entirely separate or not?

A. The entire organization for each of these divisions are entirely separate. In the case of Sealtest Foods we have our own complete organization, do our own selling, advertising distribution, and by the same token Kraft has their organization that handles all of their products, and there is no joint selling or joint advertising or joint distribution of these products one division as against the other. (Tr. 6172.)

* * * Q. What about advertising? Is there any joint advertising or joint collaboration on advertising policies at all?

A. There is none. We are in the position of maintaining in Sealtest Foods our own advertising department with entirely separate agency from the agency that is handling the Kraft's advertising. Our advertising is handled by N. W. Ayer, I believe there is—theirs is handled by J. Walter Thomson. I don't know of any other division of National Dairy that is using N. W. Ayer except Sealtest Foods. We have an advertising manager and in his organization he has other people. We prepare with N. W. Ayer our own advertising material, carry on our own television programs and carry on all of our own newspaper and magazine advertising.

Q. Without any joint collaboration with any of the other divisions?

A. That is correct.

Q. And confined to your Sealtest products?

A. And advertise only our own Sealtest products. (Tr. 6175-76.)

Even though Sealtest has such national advertising program for its products, it did make advertising and promotional payments to certain of its individual customers in the trade areas involved in this proceeding, during the relevant period, without making such payments available on proportionally equal terms to all of its other customers who competed, in the sale at retail of Sealtest products, with the customers to whom such promotional and advertising payments were made.

Glenn Whittaker, Sealtest's Toledo manager, and Robert A. Tice, Sealtest's Lansing plant manager, testified that respondent's advertising and promotional allowances were not offered or made known, or made available to all competing wholesale customers of respondent on proportionally equal terms. Certain favored customers of respondent were selected for the advertising and promotional allowances, which were paid to them.

By letter dated May 31, 1957, to the Federal Trade Commission (CX 51 A, B and C) from counsel for respondent, the following admissions, with reference to respondent's advertising and promotional allowances are made:

> * * * With respect to the practices of Ohio Clover Leaf regarding advertising, promotion and other allowances, the situation continues much the same as set forth in previous letters and statements to you. Ohio Clover Leaf has paid certain amounts of money to wholesale customers on grand openings, special anniversary events, and extensive advertising campaigns where such advertising includes Sealtest products. The advertising copy is prepared and paid for by the wholesale customer and Ohio Clover Leaf reimburses said wholesale customer on National Line rates for that portion of the ad occupied by listing of Sealtest products, (usually quite small in proportion to the entire ad). This has been a uniform practice of Ohio Clover Leaf Dairy with respect to its wholesale customers but has not been generally circularized or published by Ohio Clover Leaf or urged upon its wholesale customers. Such allowance has been made only upon request from the wholesale customer. In many instances, according to our observation, the wholesale customers in their daily and weekly advertising have included in such ads Sealtest products, but unless some special event or campaign was being carried out such wholesale customers did not request and did not receive payment from Ohio Clover Leaf Dairy for the inclusion of Sealtest products in such ads. * * *

Exhibits in the record indicate the following non-proportionalized advertising or promotional payments, at or about the dates shown, in the amounts indicated, to Sealtest customers named in the Toledo-Monroe; Jackson-Lansing trade areas:

Date	Customer	Amount of Advertising or Promotional Payment
3-8-57	Associated Grocers	$ 8.40
3-27-57		8.40
5-10-57		8.40
5-29-57		8.40
7-10-57		66.80
9-10-57		50.00
6-12-57	Circle M Market	56.80
8-9-57	Dick's Market	20.00
1-9-58	Foodtown Stores	89.04
2-7-57	Foodtown Supermarket	46.55
4-26-57		73.57
6-5-57	Food Town	39.80
7-12-57	Foodtown Stores	122.43
7-29-57		33.39
9-10-57		89.04
12-11-57	Dixie Foodtown	198.53
4-23-57	Joseph's Super Markets	752.08
5-1-57		980.00
1-24-57	Kroger Company	250.00
1-25-57		20.80
2-21-57		250.00
3-31-57		250.00
4-10-57		250.00
5-16-57		21.00
5-23-57		829.85
9-4-57		169.56
3-1-57	Lagos Food Market	10.35
3-27-57		15.12
4-24-57		16.92
5-10-57		16.69
6-7-57		50.00
6-13-57		17.76
7-24-57		25.15
8-28-57		25.61
9-18-57		23.60
10-16-57		33.68
11-13-57		34.97
12-18-57		41.72
5-23-57	National Food Stores, Inc.	167.40
1-2-57	Save Way Super Mkt, Inc.	50.00
2-6-57		50.00
3-4-57		50.00
3-27-57		50.00
5-16-57		50.00
5-29-57		50.00
7-18-57		50.00
8-8-57		50.00
9-12-57		50.00
10-16-57		50.00
10-30-57		50.00
9-18-57	Sears Super Market	123.90
1-31-57	Anthony Wayne Shopping Ctr.	26.05
1-25-57	Wrigleys Stores, Inc.	1250.85
2-18-57		981.34
3-21-57		975.71
4-24-57		1204.95
5-17-57		979.95
6-21-57		926.45

Date	Customer	Amount of Advertising or Promotional Payment
	Wrigleys Stores, Inc.—Continued	
7-22-57		$1154.25
8-14-57		878.94
9-13-57		1037.40
10-15-57		848.38
11-18-57		875.94
12-16-57		1168.24

Exhibits in the record likewise show the following advertising and promotional payments were similarly made by Sealtest to its customers named without being offered or made available on proportionally equal terms to other Sealtest customers who competed, in the retail sale of Sealtest products, with the customers to whom such payments were made:

Date	Customer	Amount of Advertising or Promotional Payment
7-16-58	Dutch Klees	$ 13.68
7-16-58	Putnam's Market	2.88
8-14-58	Nickoff's Grocery	25.00
8-26-58	Val-U-Way Stores	12.00
9-10-58		31.40
6-13-58	Wrigleys Stores, Inc.	1877.32
7-21-58		1685.19
8-14-58		1623.62

In May 1958, R. J. Fauson, a Sealtest Products manager, wrote to the Great Atlantic & Pacific Tea Company in Grand Rapids, Michigan,

> For a period of one week, preferably the grand opening week, we will sell our 1 lb. cartons of cottage cheese on the basis of 1 lb. free with each lb. purchased. Additionally we will have a lady demonstrator sampling and pushing sale of cheese for a 3-day period during the sale.
>
> *As offered before* we will also grant the services of one of our wholesale supervisors during the entire opening week. His services would consist of helping to keep your dairy case stocked, as well as, helping stock other products used in your dairy department. (Italic supplied; CX 62, App. A, Item 5, p. 22.)

In June 1958 a special advertising allowance in the amount of $483.52 was paid to the Great Atlantic & Pacific Tea Company by respondent's Detroit Creamery Division upon the opening of a new store, without being made available on proportionally equal terms to respondent's customers who competed with A & P in the resale at retail of its Sealtest food products.

Witnesses who testified in support of the complaint at Toledo and Lansing stated that they had never been offered an advertising or promotional allowance by respondent in accordance with the terms of the May 31, 1957 letter set forth, *supra*. Such witnesses included, among others, John Davis (Tr. 299); Ben Peterman (Tr. 422); Fred Burke (Tr. 454); Walter Salwitz (Tr. 486); Earl Boger (Tr. 497); Vincent Pecora (Tr. 1343); David Magliocco (Tr. 1371); Frank Paradise (Tr. 1395); Ruth Blackwell (Tr. 1402); Orlando Fabino (Tr. 1417), and Peter Forte (Tr. 1432). Mr. Forte testified as follows:

Q. Well, how about for advertising, do they ever offer you any money to put adds [*sic*] in the paper or anything like that?
A. No.
Q. No?
A. No.
Q. Do you notice that these chain stores advertise in the newspapers?
A. Yes.
Q. Do you think that has any effect on your business?
A. It all has an effect.
Q. What is the effect?
A. Lower prices.
Q. Well, does it cause more business to go to them than to you?
A. Well, yes. (Tr. 1432-33.)

Vaughn L. Ashenbrenner, general manager of the Memphis Sealtest Division, testified (Tr. 899, *et seq.*) that Sealtest had no regular plan for cooperative advertising between the company and its customers in Memphis. Promotional payments and other advertising allowances were made to certain selected Sealtest customers for special occasions and grand openings. These advertising and promotional arrangements were "an individually negotiated deal."

In Memphis, Sealtest paid a 2 percent advertising and promotional allowance to Malone & Hyde, National Tea and Food Center chains. This 2 percent allowance to Malone & Hyde, National Tea and Food Center was "individually negotiated" and was not made available on proportionally equal terms to all of the other Sealtest customers in Memphis who competed with the Malone & Hyde stores, National Tea and Food Center in the resale at retail of Sealtest products.

Charles E. Landreth, Sealtest New Orleans manager, testified (Tr. 1154) that whatever promotional advertising allowance Sealtest paid to its New Orleans customers was done "on an individual negotiated basis" and "confined to special cases." The witnesses further testified that Sealtest had furnished free samples of its products to the Winn-Dixie Stores for Winn-Dixie to use for advertising and promotional purposes.

Among others, non-proportionalized advertising and promotional payments by Sealtest-New Orleans are shown by exhibits in the record as follows:

Customer	*Amount*
La Roccas Pharmacy	$ 20.00
P.I.G. Super Market	24.00
Crosby's Store	10.60
Time Saver Stores, Inc.	65.00
	54.60
	32.50
National Food Stores of La., Inc.	120.00
Sal's Super Market	7.70

Complaint counsel has proven, by reliable, substantial and probative evidence, that in the course and conduct of its business in commerce, respondent's Sealtest Foods Division has paid, or contracted for the payment of, money, goods, or other things of value to or for the benefit of some of its wholesale customers located in the Toledo, Ohio-Monroe, Michigan, trading areas, in the Lansing-Jackson, Michigan, trading areas, in the Memphis, Tennessee, trading area and in the New Orleans, Louisiana, trading area, as compensation or in consideration for services or facilities, including advertisements and promotions in newspapers, new store openings, anniversary sales, the giving away of free merchandise, and other forms of advertisement and promotion, furnished, or agreed to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of respondent's fluid milk, dairy products and ice cream; and respondent has not made, or contracted to make such payments, allowances or considerations available on proportionally equal terms to all of its other customers competing in the resale and distribution of such products.

CONCLUSIONS

1. National Dairy Products Corporation, a Delaware corporation, respondent, whose principal office and place of business is 260 Madison Avenue, New York, New York, through its Sealtest Foods Division, manufactures, processes, sells and distributes in commerce, as "commerce" is defined in the Clayton Act, as amended, a variety of food and other products including fluid milk products, ice cream, butter, eggs, cottage cheese, yogurt, and orange juice.

2. Respondent's Sealtest Foods Division, in the manufacture, processing, sale and distribution of the Sealtest product line was and is in substantial competition with other manufacturers, processors, distributors and sellers of identical or similar food products, including fluid milk products, ice cream, butter, eggs, cottage cheese, yogurt, and orange juice.

3. Many of the customers to whom respondent's Sealtest Foods Division sells one or some or all of the items in its product line are in substantial competition with each other in the resale of Sealtest products to their customers.

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

5. During the years 1956 through 1960, inclusive, in its Toledo, Ohio-Monroe, Michigan, trade area; its Jackson-Lansing-Battle Creek, Michigan, trade area; Memphis, Tennessee, trade area; and New Orleans trade area, respondent's Sealtest Foods Division has, in the manner heretofore set forth herein, discriminated in price in the sale of one or some, or all of the items in the Sealtest product line, by selling products of like grade and quality at substantially different net prices to different competing customers.

6. The effect of the aforesaid discrimination in price by respondent's Sealtest Foods Division in the sale and distribution of its products has been, or may be substantially to lessen, injure, destroy or prevent competition between respondent and (a) its competitors, and (b) between Sealtest's favored and its non-favored customers.

7. The discriminations in price practiced by respondent's Sealtest Foods Division, as related herein, did not make only due allowance for differences in the cost of manufacture, sale or delivery, resulting from the differing methods or quantities in which Sealtest's food products were, or are, to its purchasers sold or delivered.

8. All of the price discriminations practiced by respondent's Sealtest Foods Division, which were not cost justified, were not made in good faith to meet the equally low lawful price of a Sealtest competitor.

9. The price discriminations practiced by respondent's Sealtest Foods Division, as aforesaid, violate subsection 2(a) of the Clayton Act, as amended, and should be proscribed.

10. In the course and conduct of its business in commerce, during the period of time, and in the four trade areas involved in this

proceeding and enumerated above in conclusion 5, respondent's Sealtest Foods Division has made substantial promotional payments and advertising allowances, and furnished goods, or other things of value to or for the benefit of some of its customers in connection with the sale or offering for sale of Sealtest products, without making or contracting to make such promotional payments and advertising allowances, goods, or other things of value available on proportionally equal terms to all Sealtest customers competing with the customers to whom such payments and allowances were made, and to whom such goods and services were furnished. These practices of respondent violate subsection 2(d) of the Clayton Act, as amended. Such violations of subsection 2(d) of the Clayton Act, proven in this record, were not committed in good faith to meet the equal or better offers of respondent's competitors.

11. Respondent's payments and furnishing of goods, and other things of value, as aforesaid, are proscribed by subsection 2(d) of the Clayton Act and should be enjoined.

ORDER

It is ordered, That respondent National Dairy Products Corporation's Sealtest Foods Division, and respondent's officers, representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale or distribution of any of the items in the product line of the Sealtest Foods Division, including but not limited to fluid milk, dairy products, ice cream and other food products, in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

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.

APPENDIX A TO INITIAL DECISION

Ruling On Respondent's Motion To Dismiss Proceedings Because The Challenged Transactions Have Not Been Proven To Be "Interstate Commerce" As Defined In Section 2 Of The Clayton Act

The complaint issued in this proceeding on December 31, 1957, alleges that respondent National Dairy Products. Corporation violated Section 2(a)[1] of the Clayton Act by of the Clayton Act by illegal price discrimination, and Section 2(d) of the same Act[2] by paying or contracting to pay something of value to or for the benefit of any of its customers without making such payment or payments available on proportionally equal terms to all other customers competing in the distribution of respondent's products or commodities.

The original complaint charged violations in respondent's Toledo, Ohio, and Monroe, Michigan, operations, but evidence has been received with reference to respondent's Memphis, Tennessee, and New Orleans, Louisiana, operations. Motions to strike the Memphis and New Orleans evidence have been denied. Proposed amendments to the original complaint to conform the pleadings to the proof were filed December 21, 1959, and have not yet been accepted by the Hearing Examiner.[3] Respondent is charged in the complaint with selling in interstate commerce through its Sealtest division milk, Vitamin D milk, homogenized milk, concentrated fresh milk, chocolate milk, buttermilk, cream, butter, eggs, cottage cheese, special milks, and other dairy products, as well as ice cream and orange juice, and in allowing quantity discounts which are violative of Section 2(a) and advertising allowances violative of Section 2(d).

---

[1] "(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . . ."

[2] 15 U.S.C. Sec. 13.

[3] The amendment to the complaint filed December 21, 1959, seeking to charge a violation of § 3 of the Clayton Act was not the subject of the motion herein ruled upon, but, insofar as this ruling decides whether respondent was and is engaged in interstate commerce so as to be subject to the jurisdiction of the Federal Trade Commission under the Clayton Act, this ruling also decides the interstate commerce issue for purposes of the § 3 amendment also if the § 3 amendment should subsequently be accepted by the Hearing Examiner.

At the close of the case-in-chief of counsel supporting the complaint, respondent made motions to strike certain evidence, and other motions, which the Hearing Examiner ruled upon on October 7, 1959, except those motions which have been considered as motions to dismiss the proceeding because:

1. The transactions here involved were not in interstate commerce as defined in § 2 of the Clayton Act; and

2. The evidence in the record has failed to prove that the effect of the quantity discounts and advertising allowances which respondent has made available to its customers may be substantially to lessen competition, or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who grants or knowingly receives the benefit of such discrimination or allowances, or with customers of either of them. The Hearing Examiner considers this motion as a demurrer to the evidence.

The instant ruling addresses itself solely to the interstate commerce issue.

Respondent's motion to dismiss the proceeding because interstate commerce has not been proven in the record is overruled and denied for the following reasons:

Respondent, National Dairy Products Corporation, is a Delaware corporation with its executive offices in New York, New York, and is the largest dairy corporation in the world with annual sales in excess of one and one-half billion dollars. It is a "single integrated company." (See transcript p. 879.) For the year ended December 31, 1958, the company had current assets exceeding $275,000,000 and total assets in excess of $550,000,000. The total assets of respondent for the year ended *December 31, 1948,* was $260,849,000. Respondent has plants, among others, in Liverpool, England; Hamburg, Germany; Melbourne, Australia; and in Montreal, Quebec, Canada. The company's plan of integration and simplification of its corporate structure became operative within the last two or three years.

Respondent has over 50,000 employees. Its operations in the United States are conducted through Divisions, of which the Sealtest Division and Kraft Foods are but two. Sixteen (16) of respondent's operating divisions are in the milk and ice cream business and the remaining of these twenty-two (22) divisions are in other phases of the business. There are divisions which sell ice cream only; divisions which sell milk and milk products and ice cream; and a few divisions which sell milk and milk products only. Sealtest is not an operating division but an administrative division through which the affairs of the operating divisions of respondent's milk and ice cream business are channeled. "Sealtest" is the brand name used nationally by respondent for its milk, and milk products, butter, cheese, and ice cream; but not all operating divisions of Sealtest use the "Sealtest" brand name. "Breyer" ice cream is one operating division of Sealtest which does not use the Sealtest name. There are sixteen (16) operating divisions under the Sealtest Division.

The Sealtest operating divisions do not process all of the products that they sell. Butter, eggs, and orange juice are transported freely by respondent across one, and in some instances, several state borders in moving from original producer to ultimate consumer.

Respondent does not endeavor to confine its operations by states, but moves its products freely across state lines if economy and efficiency of operations so indicate.

An operating division of Sealtest, in addition to selling the products which it itself processes, sells products processed by other divisions. Operating divisions of Sealtest do business in more than one State. Orange juice, butter, and other Sealtest products are transported across state lines by respondent before, and after, being processed. The operating divisions of respondent obtain financial assistance from the Sealtest Division in New York for capital expenditures, and other expenditures outside the day-to-day operations of the divisions. Respondent maintains major bank accounts in New York City. For major expenditures at the operating level, funds come from the National Dairy Products Corporation in New York, if the divisions do not have enough funds available in their own local accounts. The divisions require approval from National in New York City, through the Sealtest Division, to make certain expenditures, particularly capital expenditures.

Sealtest products are advertised in magazines of national circulation, such as *Time, Life,* and *The Saturday Evening Post,* and by other publicity media of national scope, such as television and radio programs. Individual operating divisions of Sealtest contribute to a fund which is used to pay for the national advertising and promotion programs.

As an example of the manner in which respondent operates: Its Ohio Cloverleaf division of Toledo, Ohio, is a unit of the Detroit Creamery Company of Detroit, Michigan, which in turn is an operating division of the respondent. Detroit Creamery reports to the regional office in Pittsburgh, Pennsylvania. The Sealtest Division of respondent in New York accumulates the figures from each one of the seven regions which make up the Sealtest Division. Sealtest in New York obtains consolidated reports from the regions.

The assets of each and all the Sealtest operating divisions are owned by respondent. The employees of the operating divisions are employees of the respondent. Respondent provides its operating units with national, and local, advertising, sales promotion programs, personnel procedures, accounting and fiscal procedures, and establishes overall policy. Thirteen (13) of Sealtest's sixteen (16) operating divisions sell milk, milk products and ice cream. Sheffield Farms in New York, Chestnut Farms in Washington, D.C., and Western Maryland in Baltimore sell milk only. Ten (10) of the sixteen (16) operating divisions of Sealtest do an interstate business in thirty-five (35) States of the Union. Some of the operating divisions acquire fluid milk in States other than the States in which the Sealtest processing plants are located. Such fluid milk is purchased in one State, shipped across a State border into another State where it is processed and, in some instances, sold wholly within the State in which it is processed and, in some instances transported across a State line for sale to the ultimate consumer. The products involved in such interstate operations of respondent, among others, are fluid milk, skimmed milk, fluid cream, flavored milks such as chocolate milk, cultured milk such as buttermilk, sour cream, cottage cheese, eggs, butter, orange juice (Tr. 38), and ice cream.

Sealtest sells frozen desserts; ice cream in its various forms, in bulk and in packages, and in the form of novelties. Novelties are ice cream units frozen with or without a stick which sell for 5 or 10¢, in cups, and in individual molds.

Funds in the local bank accounts of the operating divisions of Sealtest in excess of normal operating requirements move up through respondent's organizational structure across many State borders to respondent's principal bank accounts in New York City. Such funds are used for respondent's general corporate purposes, including the payment of dividends to stockholders.

Respondent's Lansing, Michigan, plant of its Detroit Creamery Division sells orange juice, which is packaged in Florida and sent to Lansing, Michigan. Ice cream mixes are brought into respondent's processing plant in Kalamazoo, Michigan, from a plant in

Huntington, Indiana. In Kalamazoo, this mix is used to make ice cream which is subsequently sold by respondent inside the State of Michigan and in States across the border of Michigan. In the Lansing, Michigan, plant, respondent processes milk, chocolate milk, buttermilk, half-and-half, and skim milk. One of the Sealtest divisions maintains a sales office and distribution branch in Monroe, Michigan, and respondent's products delivered to customers into Michigan by said Monroe branch are transported from the Toledo, Ohio, and Monroe, Michigan, plants of respondent, and thereafter ultimately sold in Ohio and Michigan, crossing and recrossing State lines in the process.

Respondent's Ohio Cloverleaf Dairy in Toledo, Ohio, purchases some of its raw milk from farmer producers in Michigan. The milk is brought into Toledo, commingled with milk from Ohio, processed and sold to ultimate consumers within Ohio and outside Ohio. Ohio Cloverleaf in its Toledo plant processes cream which is obtained from outside the State of Ohio, and transported into the State. It bottles the cream, standardizing, and pasteurizing it. Until about March 1957, sour cream was obtained in ten gallon cans and then packaged by Ohio Cloverleaf in its Toledo, Ohio, plant but was not otherwise processed. Since about March 1957, Ohio Cloverleaf obtained its soured cream in intra-division transfers. This soured cream comes pre-packaged. Ohio Cloverleaf obtains some of its butter from Midwest Creameries of Middlebury, Indiana, and some from National Butter Division of National Dairy Products of Dubuque, Iowa, by intra-division transfer. In each instance the butter comes pre-packaged and Ohio Cloverleaf does not put it through any processing.

Cottage cheese is obtained by intra-division transfer from Ovid, Michigan. Approximately 90 per cent of the cottage cheese comes to Ohio Cloverleaf already packaged. Approximately 10 percent of the cottage cheese comes to Ohio Cloverleaf in Toledo in bulk, to which the plant adds vegetables, or pineapple, or whipping cream, as the case may be. This product is packaged by Ohio Cloverleaf at its Toledo plant, and sold both within and outside the State of Ohio.

Sealtest operates in Memphis, Tennessee, under the name of Clover Farm Dairy Company, which is under the Sealtest Central Division. Sealtest Central Division, Memphis, services parts of Tennessee, Mississippi and Arkansas. The branches are served out of the Memphis headquarters and then distribution is made from the branches. There are branches in Milan, Tennessee;

Grenada, Mississippi; and up until May 1, 1958, at Paragould, Arkansas.

Trucks delivering respondent's ice cream from its Memphis plant for distribution cross State lines in so doing. Distributors also come to Memphis, pick up milk at respondent's Memphis "dock," and take it back to the territories in which they distribute it. Such distributors are located, among other places, in Tupelo, Mississippi; Clarksdale, Mississippi; Jackson, Tennessee; and Jonesboro, Arkansas. A distributor who comes to respondent's Memphis plant to pick up a load of milk does so in contemplation of transporting that milk back across the State lines and selling it in the area that he serves near his home. The management of the Sealtest Memphis plant knows that milk picked up by one of its distributors at its Memphis plant will be transported across State lines for sale in the distributor's territory. The Memphis plant sells its milk to the distributors f.o.b. dock in Memphis. Cottage cheese is sold by respondent at its Memphis plant in the same manner as respondent's milk is sold.

In respondent's Memphis operation the milk is sometimes sold to distributors who sell to the ultimate consumers and respondent's ice cream is, sometimes, sold by the company hauling it in its own trucks to its final customers.

The echelon above Sealtest's Memphis Central Division is Sealtest Central Division with headquarters in Chicago, Illinois. Both Memphis and Nashville, Tennessee, are under the same office. The Chicago office is called Sealtest Central Division Headquarters, and has jurisdiction generally over the Midwest and some Southern States.

The Sealtest bank account in Memphis is maintained in the name of Sealtest Central Division of National Dairy products, Memphis, Tennessee. The money from that bank account is transferred to New York City by drafts. Memphis can draw drafts on the money which it has transferred to New York. Generally, National Dairy of New York makes arrangements with the Memphis bank to transfer the money to New York. Respondent draws a draft to the Memphis account.

Inter-company transfers are made to respondent's Memphis plant. This plant purchases for resale, butter which has been processed by its other divisions. Some such butter comes from St. Paul, Minnesota. Ice cream is manufactured in Memphis. Ice cream novelties are obtained for the Memphis operation from Chicago.

Roughly 25 per cent of the milk which comes into the Memphis plant for processing comes from Kentucky. The remainder comes from Tennessee.

Respondent's Southern Dairies Division has a plant in Brookhaven, Mississippi; a sales branch in Baton Rouge, Louisiana; a branch in Jackson, Mississippi; and the main plant in New Orleans, Louisiana. A portion of the sales made by the New Orleans plant is made outside of the State of Louisiana.

Respondent's New Orleans plant buys the ice cream novelties which it resells from Atlanta, Georgia, and Birmingham, Alabama, and its butter from respondent's Brookhaven, Mississippi, plant.

Respondent's New Orleans plant packages its products for the Winn-Dixie chain stores under the name of Velva (Tr. 1092).

About 60 per cent of the raw milk for the New Orleans operation comes from the State of Mississippi, and the remainder comes from the State of Louisiana. It is brought in directly to New Orleans in bulk pick-up tanks. The milk is delivered to respondent's plant in New Orleans. The route man goes to each farm and picks up the milk from the farmers' tanks and puts it in a large tank and transports it to the respondent. Respondent doesn't take possession of this milk until it is received in its plant. The route man is an outside hauler who hauls milk for ten or twelve farmers. He is paid on a contract basis with each independent farmer. The route man has no contractual relationship with Sealtest. Some of the route men live in Louisiana and some live in Mississippi. Whether they live in Louisiana or Mississippi they haul the milk with the intention that it be bought by respondent at its New Orleans plant. The farmers co-operative in Tangipahoa is paid directly for the milk bought from its members. Purchases directly from farmers are paid with a separate check drawn on New Orleans funds. The Mississippi milk brought into the New Orleans plant is put in processing vats and commingled with the Louisiana milk, so as to become indistinguishable.

Respondent's New Orleans plant maintains a bank account there to finance its day to day operations. An account is maintained at each location where respondent does business. Respondent also maintains a transfer fund, and deposits made to that fund constitute a general account out of which respondent makes disbursements. These disbursements are reimbursed by a draft drawn on respondent's Charlotte, N.C. plant. Money that respondent collects is placed in the transfer fund and is transferrable every day to the home or division office in Charlotte, N.C. The Charlotte, N.C. office has the overall supervision of the New Orleans office, which office carries out whatever direction or orders are given to it by the head of the division office in Charlotte. The Southern Dairy Division of National Dairy is under the general supervision of the Charlotte, North Carolina, office.

The milk that comes from out of the State of Louisiana in a raw state to be processed in respondent's New Orleans plant constitutes an almost daily movement of the raw milk from the producer to the ultimate consumer.

The above facts, among others, are proven in the record by evidence introduced by counsel supporting the complaint. In addition, respondent, in its amended answer filed on June 13, 1958, admits that in the years 1956–57, it integrated into the corporation the properties and assets of more than forty (40) domestic subsidiary corporations, some of which have operated since that time as separate divisions and others of which became parts of divisions. Respondent admits that as of January 1, 1958, it held one hundred per cent of the voting stock in its remaining domestic subsidiaries which, as of that date, were four (4) in number. Respondent admits that its Sealtest Divisions sell dairy products, hereinbefore enumerated, to homes, restaurants, stores, hospitals, hotels, and other customers in certain areas in the Eastern, Midwestern, and Southern parts of the United States, including the District of Columbia. Respondent in its amended answer admits that certain of its Sealtest Divisions sell ice cream under several brand names in various parts of thirty-seven (37) States in the Eastern, Mid-Western, and Southern parts of the United States and the District of Columbia. In its amended answer respondent further admits that certain of its Sealtest Divisions sell a number of different kinds of dairy products to a large number of purchasers located in different States of the United States, including the Eastern, Southern, and Midwestern parts thereof, and in the District of Columbia, for use, consumption, or resale therein, and that some of such products sold to some of such purchasers are of like grade and quality. Respondent further admits in its answer that certain of its Sealtest divisions maintain and operate receiving stations, manufacturing and processing plants, and distribution depots, located in or near some of the cities, towns, and places where it sells its dairy products. Some of the dairy products distributed by the Sealtest Divisions are delivered to customers in respondent's own trucks.

Respondent further admits that for many years past certain of its subsidiaries shipped dairy products from the State or States where such products are manufactured, processed or stored to other States and other places under the jurisdiction of the United States, including the District of Columbia, in which they were subsequently sold to customers; and respondent admits that since 1956 certain of the Sealtest Divisions have shipped dairy products from the State or States where such products are manufactured, processed or stored to other States and the District of Columbia, in which locations they were subsequently sold to customers.

Respondent further admits in its amended answer that one of the Sealtest Divisions maintains a manufacturing and processing plant in Toledo, Ohio, where it manufactures or processes a variety of dairy products which are ultimately sold to customers in Ohio and Michigan. Some products manufactured or processed in other plants of respondent are shipped to the Toledo plant and are thereafter distributed and sold. Some of these products are shipped in packages ready for sale, and others are further processed or packaged before they are resold. Respondent admits in its amended answer that its Toledo, Ohio, plant purchases raw milk from farmer producers whose farms are located in Ohio and Michigan, which milk is processed at the Toledo plant and ultimately distributed to customers in Ohio and Michigan. Respondent further admits in its amended answer that one of its Sealtest Divisions maintains a sales office and distributing branch in Monroe, Michigan, and that all products delivered to its customers by said branch are first transported from the Toledo, Ohio, plant to the Monroe, Michigan, branch and ultimately sold in Michigan. The Toledo plant sells some dairy products to distributors who cause such products to be transported to customers, some of whom are located in Ohio and some of whom are located in Michigan.

The facts proven in this record, and respondent's admissions in its answer present such a clear and unequivocal picture of interstate commerce that the hearing examiner questions whether a very protracted discussion of the case law is required.

If respondent's sole product involved in this proceeding where fluid milk, the examiner might consider as a serious legal contention respondent's attempts to reason that its fluid milk does not flow in interstate commerce. However, even that product has been decisively ruled upon. See *U.S.* v. *Universal Milk Bottle Service*, 85 F. Supp. 622 [4] at page 626 where the court held:

> The flow of fluid milk from producers in Kentucky and Indiana through the defendants to consumers in the Cincinnati Area, described in the indictment, is a continuous day by day flow. Being a perishable commodity, fluid milk cannot be stored or warehoused until a ready purchaser happens along. Immediate sale is essential. It is obvious that the milk on hand must be sold and delivered each day by the distributors to make room for the milk going through the defendants' plants on the following day. Since "commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business" (Swift & Co. *v.* U. S., 1905, 196 U.S. 375, 398, [25 S.Ct. 276, 280, 49 L.Ed. 518]), it would seem that the mere description of the flow of milk establishes its interstate nature until it has been delivered by the distributors to consumers in the Cincinnati area. The pertinent decisions of the Supreme Court fully support this view. Swift & Co. *v.* U. S. supra. * * * The intention and expectation of a seller and a buyer that the commodity sold would be shipped in interstate commerce is a valid test in determining whether or not the sale is a transaction in interstate commerce, even though completed before the actual physical interstate transportation occurs. U.S. *v.* Reading Co., 226 U.S. 324, 367 [33 S.Ct. 90, 57 L.Ed. 243]; Lemke *v.* Farmers' Grain Co., 258 U.S. 50, 53, 54 [42 S.Ct. 244, 66 L.Ed. 458]; Interstate Natural Gas Co. *v.* Federal Power Commission, 331 U.S. 682, [67 S.Ct. 1482, 91 L.Ed. 1742]; Mandeville [Island Farms] *v.* [American] Crystal Sugar Co., 334 U.S. 219 [68 S.Ct. 996, 92 L.Ed. 1328]. * * * Sales of milk by producers in Kentucky and Indiana to the defendant distributors are made with the intention and expectation of both parties that the milk would be transported to Ohio and there immediately sold by the distributors. The price to be paid to the producers by the distributors depends upon the amount of that milk which is resold by the distributors to wholesale and retail customers in Ohio, and the price is not determined until after that resale. The resale in Ohio is as integral a part of the interstate commerce as is the sale by the Kentucky and Indiana producers to the distributors.

Moreover, and more importantly, not only fluid milk, but sour cream, butter, eggs, orange juice and ice cream are originated, processed or purchased by respondent and freely transported by respondent across state lines from origin to ultimate consumer. It is price discounts and advertising allowances with reference to the sales of all these products that have been charged, and proven in this record.

Moreover, adopting this Commission's position *in the Matter of J. H. Filbert, Inc.*, a corporation, Docket No. 6767, the Examiner declines, in this proceeding, to restrict himself to a "fragmented" view of respondent's business, in a "nice and technical inquiry into the non-interstate character of some of its necessary inci-

[4] *Affmd.* 188 F. 2d 959. See also *Peoples Gas Co.* v. *Public Service Commission*, 270 U.S. 550. *Pevely Dairy Company* v. *United States*, 178 F. 2d 363, 366.

dents and facilities" or to consider such isolated transactions alone and without reference to their association with the movement of which they are an essential but subordinate part.

The Examiner does not believe that respondent would seriously suggest that respondent's sale of fluid milk, and variations thereof, can be isolated or excised either in a business operating sense, or in an adjudicatory sense, from respondent's overall Sealtest operations. Nor would respondent wish to do so.

At the time the instant statute was being considered by the Congress, the following, *inter alia,* appears in its legislative history:

> The bill prohibits such discriminations where either or any of the purchasers involved in such discrimination are in interstate commerce. Where a manufacturer sells only to customers within the State, his business is beyond the reach of Federal authority and is not included within the provisions of this bill. This exemption, however, is not important for practical purposes. He may not sell to a mass buyer at discriminatory prices for delivery within the State and shipment then to other States, since such sales are, by longsettled law, interstate commerce. Moreover, the important discrimantions here forbidden are of a kind that can only be granted to some at the expense of the rest. The small manufacturers, operating purely within the State, ordinarily lacks the diversified list of customers which he must have in order to absorb from them his losses in price cuts to a favored few. Since his smaller customers can always go to the interstate seller, even within the same State, and demand the same prices granted to his larger interstate buyers, the small intrastate seller is precluded from raising his prices to his smaller customers sufficiently to absorb such losses.
>
> Where, however, a manufacturer sells to customers both within the State and beyond the State, he may not favor either to the disadvantage of the other; he may not use the privilege of interstate commerce to the injury of his local trade, nor may he favor his local trade to the injury of his interstate trade. The Federal power to regulate interstate commerce is the power both to limit its employment to the injury of business within the State, and to protect interstate commerce itself from injury by influences within the State.[5]

In this Examiner's opinion the language quoted above is unambiguous. Respondent falls within the concept of interstate commerce *enunciated* in such quotation. This concept was reaffirmed by the Supreme Court in *Moore* v. *Meads' Fine Bread Co.,* 248 U.S. 115, 120.

Interstate commerce is an intensely practical concept drawn from the normal and accepted course of business. (*United States* v. *Yellow Cab Co.*, 332 U.S. 218, 231.) It could not be effective if it

[5] 80 Cong. Rec. 9416–17.

were otherwise. Respondent is not in a position to demand all the business advantages of free and unrestricted commerce between states on the one hand, and at the same time, to seek asylum in the very web it has spun.

Respondent was ranked twenty-first among the largest industrial corporations in the United States in an article in Fortune magazine for July 1959.

The motion to dismiss the proceedings on the ground that the challenged transactions do not constitute interstate commerce under subsections 2(a) and 2(d) of the Clayton Act is, as previously stated, denied and overruled.

Another ruling issued simultaneously with this one will deal with other matters now pending before the Examiner.

OPINION OF THE COMMISSION

JULY 28, 1966

BY DIXON, *Commissioner:*

The complaint in this matter is in two counts. Count I charges respondent with discriminating in price in the sale of dairy products in violation of Section 2(a) of the Clayton Act, as amended. Count II charges discrimination in the granting of promotional allowances in violation of Section 2(d) of that Act. In his initial decision, the hearing examiner found that the charges were sustained by the evidence and ordered respondent to cease and desist from the practices found to be unlawful. Respondent has appealed from the findings and order under Count I of the complaint and counsel supporting the complaint has filed an appeal which places in issue the scope of the examiner's order.

Respondent, National Dairy Products Corporation, manufactures and distributes in interstate commerce a variety of food and other products. In 1958, it operated almost entirely through seven separate divisions: Sealtest Foods, Kraft Foods, Breakstone Foods, Sugar Creek Creamery, Humko Products, Metro Glass, and Research and Development. The evidence in this case under the Section 2(a) charge deals with the pricing practices of one of these divisions, Sealtest Foods. More specifically, to sustain this charge, complaint counsel introduced evidence dealing with Sealtest's sales of dairy products, including fluid milk and ice cream, in (a) the Toledo (Ohio)-Monroe (Michigan) area; (b) the Lansing, Jackson, Battle Creek (Michigan) area; (c) the Memphis (Tennessee) area as to ice cream only; and (d) the New Orleans (Louisiana) area.

The evidence establishes, and it is not seriously disputed, that respondent sold its dairy products to competing customers at different prices in each of these areas. Respondent, however, contends that the examiner erred in finding that its price differences in these areas have the required adverse competitive effects, either among its competitors or among its competing wholesale customers (principally retail grocery stores). Additionally, respondent argues that the examiner was in error in rejecting its affirmative defenses that its lower prices in each of these areas were either cost justified or were granted to meet the equally low prices of competitors.

Respondent also contends that the examiner erred in ruling that its sales of fluid milk products in the Lansing, Jackson, Battle Creek, Michigan, area are sales in interstate commerce as required by the statute. As this issue is not raised as to any other area, we will consider it first in this opinion.

There is no dispute that the milk and milk products sold in this area from respondent's Lansing plant are produced in dairy farms located in Michigan, processed in the Lansing plant, and sold exclusively to customers located in Michigan. The hearing examiner, in holding that sales by the Lansing plant were interstate sales, relies on certain evidence showing the relationship and the interdependence of respondent's various branches, zones and divisions.

The evidence relied upon by the examiner relates to the general over-all organization of respondent's business. However, it is our view that the theory adopted by the examiner would require detailed information as to respondent's internal operations, which is lacking in this record. The interstate commerce issue was not tried on the theory relied upon by the examiner and we conclude that the evidence is insufficient to support his holding.

We turn, therefore, to a consideration of respondent's pricing practices and its defenses in each of the other areas involved in this proceeding.

Toledo-Monroe Area (Milk)

Sealtest Foods operates a milk processing plant in Toledo, Ohio, and this plant maintains a milk distributing branch in Monroe, Michigan. The plant handles a general line of fluid milk products and the milk which it processes and bottles is sold both to wholesale customers and directly to the consumer at retail home delivery. Respondent has 22 wholesale milk distribution routes in Toledo and 5 in Monroe. Approximately 10 percent of the Toledo plant's volume of fluid milk products is shipped to Monroe where it is redistributed on wholesale and retail routes.

About November 1, 1954, the Toledo plant initiated a monthly quantity discount schedule. This schedule was based upon a "point system" whereby each fluid milk product sold by the plant was assigned a point value. The number of points accumulated during a month determined the percentage of rebate earned by the wholesale purchaser. Points were assigned as follows:

1 quart milk (all kinds)	1 point
1 quart half and half	2 points
1 quart whipping cream	8 points
1 quart coffee cream	4 points
1 quart sour cream	4 points
1 quart buttermilk	1 point
5 pound carton cottage cheese	5 points

Discounts ranging from 3 percent to 10 percent were allowed on all items in the plant's line of products except butter, yogurt, Reddi Whip and orange juice. In March, 1955, 11 percent and 12 percent brackets were added to the discount schedule. A 2 percent bracket was added to the schedule in August, 1956. Thus, in 1958 at the time of the hearing in this matter, respondent's Toledo discount schedule applicable to wholesale sales by the Toledo plant and the Monroe branch was as folows:

Points (per month)	*Percent*
0 – 699	0
700 – 999	2
1,000 – 1,499	3
1,500 – 1,999	4
2,000 – 2,999	5
3,000 – 4,999	6
5,000 – 6,999	7
7,000 – 9,999	8
10,000 – 14,999	9
15,000 – 24,999	10
25,000 – 39,999	11
40,000 and over	12

Evidence introduced by respondent in September, 1960, discloses that on August 1, 1960, the above schedule was superseded by another schedule also containing discount brackets ranging from 2 percent through 12 percent but with the monthly point requirement to qualify a customer for the 12 percent discount reduced from 40,000 points to 10,000 points, and with corresponding reductions in the point requirements for the 6 through 11 percent brackets. With certain exceptions, allegedly made for competitive reasons, respondent thereafter sold its fluid milk products in accordance with the 1960 revised schedule.

Respondent's principal wholesale customers in the Toledo-Monroe area are independent stores, multi-unit chains which include corporate, voluntary (wholesaler sponsored and supplied) and cooperative (served by retailer-owned wholesale house) chains, and stores under common ownership.

The record establishes the rate of discount granted to all of respondent's Toledo-Monroe customers for the month of July, 1958. Thus, of the independent stores, one hundred fifty-five received no discount; thirty-one received 2 percent; thirty-eight received 3 percent; twenty-six received 4 percent; ten received 5 percent; and seven received 6 percent. There were an additional nine independent stores, three of which were entitled to 2 percent under the schedule but were paid no discount due to oversight or clerical error, four of which received 10 percent and two of which received 12 percent.

Of the corporate chains, the following received 12 percent discounts: Big Bear, Joseph's, National Food, Kroger, Wrigley's and Seaway Foodtown, Inc. Two corporate chains, A & P and Bellmans, received 10 percent and one, Sears, received 7 percent. All of the voluntary and cooperative chains consisting of Associated Grocers, Red & White, Tri County Super Dollar and Saveway, were granted 12 percent discount. One of the three common ownership organizations received 12 percent and each of the other two received 10 percent.

The threshold question for decision with respect to respondent's pricing practices in the Toledo-Monroe area is whether the examiner erred in finding that the effect of its price differences was to lessen competition with respondent's competitors and among its competing wholesale customers. In this regard, the statute does not require a showing that injury has actually resulted, but simply that the effect of the discriminations "may be substantially to lessen competition * * * or to injure, destroy or prevent competition."

With respect to injury among respondent's competitors, complaint counsel introduced the testimony of the representatives of three small Toledo dairies. All three were engaged principally in the sale of milk at retail home delivery, this method of selling constituting 95 percent of one dairy's business, while another operated fourteen such routes and only one wholesale route. The examiner's finding of primary line injury is based on the testimony of these witnesses that they lost home delivery sales because of the low milk prices of local supermarkets.

While not disputing the loss of home delivery sales by these local dairies, respondent contends that the examiner was wrong in predicating competitive injury on this factor alone. It argues that there is substantial evidence in the record as to other factors which caused the losses of sales by these dairies which the examiner failed to consider.

We agree with respondent. Among other things, the evidence establishes that there has been a downward trend in home delivery sales in the Toledo area due to the introduction of half gallons of milk in paper cartons in supermarkets and due to the every day low prices of milk at "cash and carry" stores which began operating about three years prior to the hearings in 1958. In addition, one witness testified that general economic conditions in the market have contributed to his loss of sales. Respondent's home delivery business in the Toledo area declined about 29 percent from 1954 to 1959. Moreover, the witnesses testified that other brands of milk, in addition to Sealtest, were offered by supermarkets at the low prices. The record fails to disclose the extent of such sales of Sealtest milk as compared to competing brands. Under these circumstances, we conclude that the evidence fails to establish the likelihood of competitive injury among respondent's competitors in the Toledo-Monroe area.

Respondent strongly objects to the examiner's statement that it has admitted that secondary line injury may be inferred from its price discriminations. While we fail to find such an admission in this record, its absence is not the controlling factor on this issue. Substantial evidence fully supports the examiner's finding of potential injury among retail grocers competing in the sale of Sealtest milk.

The aforementioned discounts, ranging from 2 percent to 12 percent, were paid by respondent on the basis of its published wholesale list prices. In the period beginning November 4, 1956, to June, 1958, respondent's wholesale list prices for the Toledo-Monroe area ranged from 42 cents to 38 cents for half gallons of homogenized or regular milk and from 21 cents to 19 cents for quarts. At the time of the hearings in this area, the wholesale list price of the Toledo plant was 40 cents for the half gallon container and 20 cents for the quart.

It is conceded by respondent that no independent grocery store purchasing from the Toledo plant received more than a 6 percent discount, whereas virtually all of its chain store customers were receiving a discount of 12 percent. Several independent grocery store owners testified. They received either no discount or a discount of 2 or 3 percent on their purchases of Sealtest milk. Their retail prices to the public generally were from 41 cents to 43 cents a half gallon. The generally prevailing retail price of Sealtest milk at the chain stores was 37 cents. At regular intervals, either on weekends or each month, the chains offered Sealtest milk at three half gallons for one dollar.

The independent store owners named chain stores selling Sealtest milk as their competitors. All of them stated that they had lost business as a result of the chain stores' prices, one of them characterizing the effect of such pricing as "devastating" on his sales volume. Other owners testified that their customers were not willing to pay the price their stores charged for milk and would drive a substantial distance to take advantage of low milk prices. One Toledo grocer, in answer to a question as to whether his store was in competition with other stores selling Sealtest milk stated: "We can't be in competition with them the price we pay for it. We do try to run a special occasionally at a loss to ourselves to try to be competitive." A Kroger store, receiving a 12 percent discount, is located four blocks from his store.

There can be no doubt from this record as to the intensely competitive nature of the retail milk business in this area and that profit margins are extremely low. In this setting, respondent has continually discriminated in price in its sale of milk to the extent that chain store customers regularly *sell* Sealtest milk at a price *lower* than the price *paid* respondent for Sealtest milk by *all* of its independent store customers, including those receiving the highest discount (6%) granted to an independent under respondent's schedule. The discounts granted by respondent are clearly substantial and we find no error in the examiner's conclusion that the effect of respondent's price discriminations may be substantially to injure, destroy or prevent competition with persons receiving the benefit of such discriminations. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948); *United Biscuit Co. of America* v. *Federal Trade Commission*, 350 F. 2d 615 (7th Cir. 1965).

Having found that a prima facie case of price discrimination in the Toledo-Monroe area has been established, the next issue presented is whether respondent has justified these discriminations under any of the defenses afforded by the statute.

Subsequent to the issuance of the complaint, respondent conducted an extensive study to establish that its discount schedule is cost justified and that certain discounts, while not on the schedule (off-scale), are likewise justified by cost savings. The study took place in July, 1958, and was conducted by a management consultant firm with the advice and assistance of industrial engineers, accountants, statisticians and economists. The group, after analyzing respondent's operations, determined that unit costs of processing and manufacturing milk do not vary as between different customers. However, it believed that unit costs of selling and delivering do differ as between large and small volume purchasers, and the study was conducted on this hypothesis.

In substance, respondent proceeded on the basis that the cost of operating its delivery routes in very large part represents payment for the time of its deliverymen. Therefore, the time required by a deliveryman to make deliveries of different quantities of milk is of particular importance since, according to respondent's premise, time saved per unit in serving larger as opposed to smaller customers is money saved.

Respondent tested its hypothesis by time studies of delivery operations in the distribution of milk in the Toledo-Monroe area. Since about 85 percent of all Sealtest milk is delivered in this area in a standard wire case, the study group concluded that the best measure of the output of a route driver was the delivery of cases, and that time-volume relationship should be analyzed on the basis of minutes per case delivered.

The time studies covered all 27 of the regular wholesale milk routes operating out of the Toledo plant and the Monroe branch, each for a six-day period, resulting in 162 time studies. In these studies, representatives of the study group or respondent's employees recorded the drop time, that is, the time required by the drivers to deliver the product, place it in the customer's display case, and return empty containers to the truck.

The study group then analyzed the drop time data and determined that it takes more time for a driver to make a large volume delivery than a small one, but less time per unit. For example, respondent's exhibits show that deliveries of 5 to 5.99 cases took an average of 16.44 minutes, or 3.05 minutes per case; deliveries of 30 to 30.99 cases took an average of 37.16 minutes, but only 1.225 minutes per case. After determining this time-volume relationship, the study group's next step was to identify and segregate all expenses applicable to wholesale milk distribution from its Toledo plant. These expenses were then assigned to customers on the basis of the time studies.

The study group then took all of the time-volume observations recorded during the study and by use of a mathematical formula, obtained an equation for computing the normal, or most probable drop-time requirement for any given size of delivery. Using this computed time equation, the study group developed a time-volume curve which could be used in determining the most probable amount of direct labor time required to make delivery of any given size. Respondent tested this curve by sample time studies of direct labor time in other areas where physical distribution of milk was handled in the same manner as in Toledo.

Respondent developed and presented the results of its Toledo cost study in two steps which are set forth in its proposed findings to the examiner as follows:

Step One. First Sealtest computed the cost of serving each off-premise store, location by location, for the week studied; it then classified all such customer locations—on the basis of volume delivered during the study week—in brackets corresponding to those of its discount schedule * * * and computed the cost of serving locations in each bracket for the week in which they were studied.

Step Two. Sealtest secondly presented evidence with respect to the actual costs of serving, and the discounts it actually paid to, different "purchasers" at Toledo. It collected the costs of serving one-store customers (grouping them by volume bracket), and it collected the costs of serving voluntary and cooperative group and corporate chain customers, showing the cost of serving each such purchaser for all the store locations it operated.

The cost exhibits presented under the first step have been designated as "per location" exhibits and those under the second step as "per customer" exhibits. Respondent states that the per location exhibits were not offered as the ultimate proof of the discounts it allowed. Instead, it avers that these exhibits prove (1) the basic cost/volume relationship; (2) that, as administered on a per store basis, its volume *discount schedules* are cost justified; and (3) that the discounts actually paid to independent store customers in accordance with the schedules are cost justified, each as against the others.

The Commission has carefully considered these per location exhibits and finds that, to the extent that sales are made on a location-by-location basis, respondent has justified its Toledo milk *discount schedule*. These exhibits show that respondent has properly computed delivery time, properly allocated costs, properly applied expenses of selling to each location, and has assigned each location to its proper bracket on the basis of point purchases. These exhibits further established that, with the exception of a *de minimis* amount between the 11 percent and 12 percent brackets, the cost saving to respondent in serving each higher volume bracket as against the next smaller bracket is at least 1 percent. We conclude that the examiner's criticism of these exhibits on the grounds that respondent used computed time rather than observed time, and that it used a point basis rather than a dollar basis in establishing its volume brackets, is not justified.

We turn next to a consideration of respondent's second, independent line of cost exhibits. Respondent designates these per customer exhibits as its ultimate exhibits, taken directly from the cost data, and offered to show cost justification of the discounts it actually allowed to different *purchasers* in the Toledo-Monroe area.

As we have previously stated, all of respondent's independent store customers for whom cost justification is claimed fell within the 0–6 percent bracket on its schedule. Eleven of the sixteen multi-unit chains purchasing from respondent received 12 percent discounts, four received 10 percent and one received 7 percent. It is respondent's contention that its per customer exhibits show that the discounts granted to certain of these multi-unit chains were cost justified.[1]

Respondent calculated its costs of serving multi-unit chains as follows. First, it proceeded on a store-by-store basis, the same as for independent store customers. It took the time required for each delivery to each store unit of the chain and computed the cost. It then figured the other costs of selling and distributing to each store unit. The costs of distribution to each unit were then totaled and this total was divided by the total dollar purchases of rebatable products of all units in the chain.[2]

Basic to respondent's cost justification defense is its contention that the combined units of a chain, and not each individual store unit, is the purchaser. Thus, following this reasoning, it is re-

[1] Respondent granted discounts to other multi-unit chains as well as to certain independent stores, which were in excess of the discounts to which they would be entitled under respondent's discount schedule. Respondent defends the discriminatory prices resulting from these off-schedule discounts on the grounds that, in each instance, it was meeting the equally low price of a competitor. This defense will be discussed later in this opinion.

[2] For an independent store customer, respondent divided the store's rebatable purchases in dollars into respondent's cost of distributing to that store to determine its cost per dollar.

spondent's position that the calculation described in the above paragraph yields its cost per dollar of sales of serving the chain as a purchaser. On this basis, respondent's exhibits show that its costs of dealing with certain multi-unit chains receiving a 12 percent discount [3] were over 6 percent less than its costs of serving independent customers in the 6 percent discount bracket.

The foregoing discussion relates to respondent's method of computing distribution costs for multi-unit chains. As to respondent's method of determining rebate bracket for multi-unit chains, it states that its policy is to total the point purchases of all the units of the chain and divide by the number of units. Respondent contends that, in practice, averaging the purchases of multi-unit chains to determine discount bracket yields a discount rate which reflects the cost savings realized in serving such chains.

We have no doubt from this record that until convenient to do so after revision of its discount schedule in 1960, respondent did not determine discount brackets for multi-unit chains by averaging their purchases. Until 1960, a customer was required to purchase 40,000 or more points per month to qualify for the 12 percent bracket. It is undisputed that under respondent's alleged averaging procedure, before 1960, no chain would have qualified for the 12 percent discount. Despite respondent's arguments to the contrary, the evidence establishes that before 1960, respondent determined the discount bracket for a chain by aggregating the purchases of all the stores of that chain. The mere fact that respondent established a point requirement for a discount bracket that could only be attained by aggregating purchases is a clear indication of its policy. Moreover, respondent's own reasons as to why it added a 12 percent bracket to its schedule shortly after it was initiated confirms its policy of aggregating purchases.

In brief, respondent states that the 12 percent bracket was added after it conducted a special time study in 1955 for the Kroger stores and determined that a 12 percent discount would be warranted to an account with Kroger's volume. The 40,000 point requirement respondent then established for the 12 percent bracket could only be attained by aggregating the volume of all Kroger stores. The manager of respondent's Toledo plant testified unequivocally that the 12 percent discount granted to Kroger was

[3] The corporate chains receiving 12 percent discount, for which cost justification is claimed are Big Bear, Kroger, Joseph's, National Food, Wrigley's and Seaway Foodtown, Inc. The voluntary and cooperative groups were Red & White and Saveway.

based on the discount schedule (Tr. 3112). Moreover, he testified that all of the discounts granted in the Toledo area were in accordance with the schedule. The evidence discloses that none of the multi-unit chains could have attained the discounts they received under the schedule other than by aggregating purchases of all units. Other evidence of record fully establishes that it was respondent's policy to determine discount bracket for chains by aggregating purchases.[4]

Respondent vigorously denies that it aggregated the purchases of chain units to determine discount bracket, contending that it was forced to go off schedule (*i.e.*, grant a 12 percent discount to certain chains that did not attain the required 40,000 points by averaging) because of competitive pressures. In 1960, however, respondent rectified this off schedule situation for chains claimed to be cost justified by the simple expediency of reducing the point requirements for the 12 percent bracket to 10,000. Subsequent to that time, with respect to discount schedule administration, any chain could obtain a 12 percent discount under the schedule if the total point purchases of all of the units divided by the number of units, exceeded 10,000 points. As before noted, respondent argues that for cost justification purposes, this procedure yields a discount rate which reflects cost savings. In any event, whether the 12 percent discount is considered to be off schedule (prior to 1960) or on schedule, it is respondent's contention that for cost justification purposes, the cost that is to be considered in dealing with a chain is that derived from totaling the distribution cost to each store of a chain, whether large or small, and dividing by the total purchases of these units.

The hearing examiner rejected respondent's cost justification defense, in part, for the reason that discounts to multi-unit purchasers must be cost justified on a store-by-store basis. We agree.

Just as the practice of aggregating purchases of chain units to determine bracket has no relation to the costs of dealing with the chain, so the averaging of purchases has no relationship to the costs actually incurred in dealing with each store.

The perishable nature of the product involved, milk, precludes central warehousing. Therefore, with the exception of centralized billing for chains, which is not a significant factor in the cost study, respondent's milk is physically distributed to each store of a chain in identically the same manner as to an independent competitor. Thus, the largest independent customer respondent has in

[4] Tr. 149, 249, 283, 2434–35, 2970, 3033, 3063, 3066, 3071, 3141, 3181–82 and 3258–59.

this area received only a 6 percent discount whereas a competing chain store unit of the same volume receives 12 percent, not by virtue of any savings in cost to the store but solely by reason of its membership in the chain. In effect, each chain is considered as a separate class of purchaser apart from the independents. Obviously, mere membership in this class does not lessen the cost of dealing with a store.

Respondent's cost study is based on a time-volume relationship, *i.e.*, that it takes less time per unit to deliver a large volume of milk than a smaller volume. The cost savings which respondent allegedly realizes in dealing with a multi-unit chain arises principally from the time saved in making delivery to the large volume stores of the chain. In practice, therefore, respondent takes the *over cost justification* in delivery to the large stores of a chain and credits this time saved to the smaller stores.

In our view, this is not a valid costing procedure under the Robinson-Patman Act. The primary purpose of this statute is to curb excessive concessions secured by chain buyers in competition with independent stores. It was designed to limit discounts as "instruments of favor and privilege and weapons of competitive oppression." To permit the cost procedures advocated by respondent defeats this purpose. From the standpoint of competition, respondent's method of determining costs for a chain is not related to the realities of the market. An independent store competes in the sale of Sealtest milk with the individual stores of a chain unit, not a hypothetical "average" store.[5]

In support of its argument that it should be permitted to average the volume of a chain to determine discount bracket, respondent relies in part on the legislative history of the statute. Specifically, it quotes from that part of a House Judiciary Committee report[6] which states that physical economies that are to be found in mass buying by a chain are not disturbed by the bill. It is obvious, however, that when taken in full context, the Committee's report did not have reference to economies in mass buying in the sense employed by respondent. The report deals with mass purchasing in the sense of a large delivery to a central location with consequent savings over small deliveries to many locations. We find nothing in the reports or the debates on this bill which lend support to respondent's contention that Congress intended that a seller could apply any economies in dealing with a large store of a

[5] *In the Matter of Thompson Products, Inc.*, 55 F.T.C. 1252 (1959).
[6] H.R. Rep. No. 2287, 74th Cong., 2d Sess. 17 (1936).

chain to its cost of distributing to a smaller chain unit to justify a discriminatory discount to the chain.

In summary, respondent, by its costing procedure, would justify two discount schedules in the Toledo-Monroe area. One, with discounts ranging from zero through 6 percent, applies to independent stores while the other, with higher brackets through 12 percent, benefits the chains. Since the competition with which Section 2(a) is concerned is between the individual stores, whether independent or a unit of a chain, such costing procedure cannot be accepted. Accordingly, we hold that respondent has failed to cost justify the discounts it has allowed to multi-unit chains in this area.

In defense of those prices resulting from the granting of discounts in excess of those to which a customer was entitled under the discount schedule, respondent contends that each of these lower discriminatory prices was granted in good faith to meet the equally low price of a competitor.[7]

It is respondent's argument that it was meeting a competitor's price within the requirements of Section 2(b) by matching the competitor's discount.[8] In its appeal brief (p. 87) respondent states that "* * * when Sealtest met a competitor's rebate, it no more than met the 'equally low price of [the] competitor' on a net price basis."

Obviously, this argument is valid only if, as further contended by respondent, the wholesale list prices of the competitors whose lower prices respondent claimed to be meeting were similar to respondent's. The hearing examiner held that respondent failed to make this showing. We recognize, in this regard, that the examiner's ruling imposes too strict a burden upon respondent by requiring that it show the actual list prices of its competitors. The good faith requirement of Section 2(b) does, however, impose upon respondent the burden of showing the existence of facts which would lead a reasonable person to believe that the wholesale list price from which respondent granted its discount was no lower than the wholesale list price of the competitor whose price it was allegedly meeting. *Federal Trade Commission*

---

[7] These customers include Associated Grocers (AG), Sears, Bellman's, Tri County Super Dollar, Foodtown (Monroe), Casper-Miglore's, People's, La Plant, Country Market, Save Mor, Segur, Prescott, Mullen's, Nancy's, Hoffman's, A & P and New Beer Stop-State Park Beer Stop-Golden Drumstick.

[8] Section 2(b) of the Statute provides that a seller may rebut a prima facie case of price discrimination "by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low *price* of a competitor * * *" (emphasis added).

v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945). Respondent has failed in this burden.

We first point out that respondent's defense differs from that recently considered by the court in the *Callaway Mills* case. *Callaway Mills Co.* v. *Federal Trade Commission*, 362 F.2d 435 (5th Cir. 1966). In that case, Callaway adopted an annual quantity discount schedule ostensibly to meet discount schedules offered by its competitors. The evidence established that Callaway sold only a tufted line of carpeting whereas its competitors sold both woven and tufted lines. Additionally, Callaway's line was smaller and less expensive that its competitors'.

In determining the validity of Callaway's defense under Section 2(b), the court examined in detail the manner in which carpeting is sold. It referred to the fact that each manufacturer makes a wide variety of carpeting of different quality and that often there is a difference in construction, design, patterns, colors, or materials between carpets selling at the same price level. Moreover, the court found that the Callaway discount schedule, and that of its competitors, applied to their full line of carpets, regardless of the type or price.

It was the court's conclusion that "In the circumstances and under the facts of this case, Callaway * * * could in 'good faith' attempt to meet the competition by granting similar volume discounts especially since no workable alternative is evident."

In the case before us, which involves the sale of milk, none of the marketing factors which the court found to be significant in the sale of carpeting, has any application. And here, respondent does not rest its Section 2(b) defense on the granting of discounts under its discount schedule, as did Callaway. Instead, respondent argues that, in individual situations, it was meeting a competitor's equally low price, and that it was doing so by matching that competitor's discount. Therefore, as part of its good faith burden, respondent must show the existence of facts which would reasonably lead it to believe that its wholesale list prices were no lower than that of the competitor whose price it was allegedly meeting.

In support of its position, respondent relies on evidence showing a similarity of certain costs among the different dairies in this market. First, respondent points to the fact that the price of raw milk is fixed by government order so that all dairies purchase raw milk at the same price. Second, respondent states that labor costs tend to be the same for all dairies due to the existence of marketwide labor contracts. However, contrary to respondent's contention, the similarity of these two cost items does not provide a reasonable basis for assuming that wholesale list prices are the same, a fact of which respondent should have been well aware.

While the cost of raw milk and labor may account for a uniform cost of producing milk at the plants of the various dairies, these items fail to take into account a cost item which would substantially influence a dairy's wholesale list price. We refer to the cost of distribution. As respondent has well documented in this record, there are numerous items of expense which must be considered in determining distribution costs.

Respondent relies to some extent upon a statement by its Toledo plant ice cream manager, in commenting on list prices for ice cream in that area, that there is an industrywide labor contract which spells out the commission paid to drivers. Assuming that the commission paid to drivers for milk delivery is also fixed by labor contract, this is the only item of distribution cost of a competitor of which respondent could be at all certain. However, this showing is of little, if any, significance as to competitors' distribution costs. First, the commission paid to drivers accounts for less than 50 percent of the total wholesale delivery costs. Second, knowledge as to the rate of commission paid to drivers is of no consequence in the absence of information as to the competitor's volume of sales. Respondent does not claim to know the sales volume of any competitor nor does it claim to have knowledge of any facts upon which it could reasonably make this determination.

Under the circumstances, we find that respondent has failed to demonstrate any reason to believe that the wholesale list prices of competitors whose prices it claims to have met were the same as its own. Not only has respondent failed to make this showing, but the evidence clearly and convincingly discloses that the wholesale list prices of certain of these competitors were higher than respondent's.

The quantity discount schedules of certain competitors evidence this difference in wholesale list prices. Respondent states that it knew these discount schedules, and it has placed the schedules of two competing dairies in the record. One of these is Babcock Dairies, a competitor whose lower price respondent claims to have met in selling to several of its off-schedule customers.

We set forth the full Babcock discount schedule (RX 166A):

Monthly Sales Points	
900	3%
1000	4

Monthly Sales Points

1250	5%
1500	6
1750	7
2000	8
2500	9
3000	10
5000	11
7000	12

Using the 10% bracket as an example, only 3,000 points monthly are required under the Babcock schedule while the respondent's schedule required 15,000 points. Even after respondent revised its schedule in 1960, which revision respondent contends was necessary to bring its point requirements into line with competitors' schedules, 7,000 were required.

Respondent, of course, does not claim to have met a competitor's price in the granting of discounts from its discount schedule. Instead, respondent states that in granting discounts to meet a competitor's lower price, it went off schedule. Thus, a customer who claimed to have been offered a 10 percent discount by Babcock may have purchased enough points to justify that discount from Babcock. Its purchases would not be sufficient to warrant a 10 percent discount on respondent's schedule. Respondent would then go off schedule to grant the 10 percent discount.

The vital point to keep in mind in considering the different point requirements of respondent's and Babcock's schedules is that price is the one crucial item in the sale of milk at wholesale. Retailers must carry milk and this record is replete with evidence that competition is cutthroat, to the extent that one or two cents difference on a half gallon will mean the difference between a profit or loss on milk to the grocer. Although complaint counsel attempted to establish a preference for nationally and heavily advertised brands such as Sealtest, there can be no question from this record that as to milk, a basic homogeneous product, it is the net price to the grocer which determines whether he will continue to buy or will change suppliers.

It is in this context that the various discount schedules must be considered. And it is in this context that the disparity between wholesale prices becomes obvious.

Let's assume, as respondent contends, that wholesale list prices are the same—using as a basis, 40 cents a half gallon. Under the Babcock schedule, a customer would be entitled to a 10 percent discount if he purchased 3,000 points a month, a net price of 36 cents. Under respondent's schedule (p. 186 of this opinion), he would just barely rate 6 percent, giving him a net price of 37.6 cents. The evidence firmly establishes that this net price difference in most instances is sufficient to divert a retailer's purchases to Babcock. We do not believe that respondent and Babcock competed on that basis. Rather, we think it obvious that Babcock's discounts were granted from a higher wholesale list price than respondent's and that Babcock competed on a net price basis by maintaining lower point requirements on its discount schedule. One thing is abundantly clear from this record, a dairy could not sell milk in this market at net prices which were consistently one or two cents above its competitors'.

There is direct testimony that there is a two cents a half gallon difference between respondent's list price and that of one competitor, Page Dairy. Page's price was two cents less a half gallon and there is no evidence as to point requirements for obtaining a discount under the Page schedule. In any event, this testimony clearly refutes respondent's basic premise upon which its Section 2(b) defense rests, *i.e.*, that wholesale list prices of those competitors whose lower prices respondent claims to have met were the same as respondent's. With the Page wholesale list price admittedly two cents less a half gallon than respondent's, there is no justification on this record for inferring, as respondent argues, that the wholesale list prices of these competitors were the same as respondent's.

While it is true that a seller claiming the meeting competition defense is not required to prove that its prices were in fact equal to those of its competitors, it must show the existence of facts which would lead a reasonable person to believe that its lower discriminatory price would in fact meet the equally low price of a competitor. (*Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, *supra.*)

Respondent states that it knew the requirements of its competitors' discount schedules. However, the fact that respondent knew its competitors' discount schedules does not mean that it knew, or that it had any reasonable basis to assume, that the wholesale list prices of these competitors were the same as its own. It is obvious that if respondent's milk is normally competitive at a 3 percent discount with a competitor's milk at a 6 percent discount, respondent by granting a 10 percent discount to meet the 10 percent discount on the competitor's schedule, could not claim to be meeting the competitor's lower price. In such a case, respondent would be substantially undercutting the price of its competitor by granting the same discount.

In the *Continental Baking* case (Docket 7630, Dec. 31, 1963) [63 F.T.C. 2071], we dismissed a complaint charging a violation of Section 2(a) upon the grounds that respondent had sustained its burden under Section 2(b). In that case, respondent was meeting discount offers of its competitors. We pointed out in our decision that not only were the competitors' discounts equal to or larger than Continental's but that in every instance of record, Continental's "net price to the customer was no lower than its competitors' net prices." This holding is well documented in the hearing examiner's initial decision wherein he made explicit findings as to the similarity of list prices based on the testimony of many purchasers. Thus, the factual situation in that case is far different from the case before us where we are asked to sustain a Section 2(b) defense on an inference of the identity of list prices when the facts, known to respondent, indicate to the contrary.

We hold that respondent has failed to show that there is reasonable basis for believing that it was meeting the equally low price of a competitor, as contended. We cannot now infer from a showing of similarity of certain costs that competitors' list prices were the same as respondent's and, on the basis of such an inference, further infer that respondent was either aware of this price identity at the time it granted the discriminatory price or that it at least attempted in good faith to satisy itself that it was meeting an equally low price.

Respondent has failed to meet its burden under the meeting competition defense in still other respects. Thus, many of the discounts it seeks to justify were those in the amount of 10 and 12 percent which it granted to multi-unit chains. Much of the testimony that respondent relies upon to establish its defense is to the effect that it believed the customer because it knew that the 10 or 12 percent offered by a competitor was the highest discount bracket on the schedule of the particular competitor. In those instances where a voluntary or cooperative chain was involved, respondent had been serving stores of the chain on an individual basis. In many instances, respondent knew that the volumes of the individual stores were small and it should thus have known that the competitor's offer was based on aggregating purchases to establish discount bracket. In fact, respondent's Toledo plant manager testified that he was told by certain of these customers that the competitors' offers were based on aggregating sales to determine bracket on the competitors' schedules. Knowing this and knowing that these competitors were selling to different customers at different prices, respondent was aware that the prices it was allegedly meeting were discriminatory and should have been placed on notice that such prices might not be justified by savings in cost to the competing sellers. It was therefore incumbent upon respondent to come forward with evidence showing that under the circumstances, it had no reason to believe that the prices of those competitors who were aggregating purchases were not lawful. Respondent has failed in this burden.

Specific reference is made in the initial decision to two accounts which respondent contended were granted discounts to meet competition. These were Associated Grocers (AG) and Saveway. Both of these are grocer's cooperatives, the former consisting of 55 to 60 stores, while there are 6 stores in the Saveway group. Respondent introduced testimony of representatives of both these groups in support of its defense.

In brief, respondent argues that its discounts to these two groups were granted to meet the same or higher discount offers by Meadowgold. Respondent had been serving individual stores of each group before the Meadowgold offer. At least with respect to the AG group, these were practically all small stores and respondent should have been well aware that it could not cost justify a 10 percent discount, which was the amount of the Meadowgold offer. Moreover, Meadowgold had the additional distribution expense of serving the Toledo area from Lima, a distance of some 80 miles. Therefore, we think that the Section 2(b) proviso is not satisfied by a mere showing of the Meadowgold offer. In our view, good faith in these circumstances requires an additional showing by respondent of circumstances which would lead it to believe that the Meadowgold offer could have been justified on a cost savings or some other basis.

One other aspect of respondent's discounts to AG and Saveway must be noted. Representatives of both accounts testified that they had difficulty with Meadowgold milk due to the distance it was being transported. Both testifed that they intended to replace Meadowgold and that, in fact, their purchases from respondent were increasing *before* respondent offered a lower price. This, coupled with the express testimony of the Toledo plant manager (tr. 283–84) that the purchases of AG and Red & White [9] were

[9] Saveway, which was a corporate chain, disbanded in 1958 and the stores became members of the Red & White voluntary group.

aggregated to determine discount bracket, strongly indicates that the discounts which respondent granted these two accounts were not to meet the Meadowgold offer but were the result of respondent's determination to aggregate purchases of cooperative units.

In any event, counsel supporting the complaint conclusively rebutted the evidence introduced by respondent as to its discount to Saveway by establishing that Meadowgold, whose offer respondent allegedly met, withdrew entirely from the Toledo market within about six months after its offer and that, thereafter, respondent continued its discount at the same rate. Respondent failed to introduce any further evidence in support of its meeting competition defense as to this customer.

Under all of the foregoing circumstances, we find that respondent has failed to establish the good faith requirement of the Section 2(b) defense.

Memphis, Tennessee (Ice Cream)

The evidence dealing with the Memphis area relates to respondent's sale of ice cream under a monthly quantity discount schedule which was initiated in February, 1957, and to certain discounts respondent allowed which were off schedule.

The schedule, which applied to the sale of packaged ice cream, was as follows:

Gallons	*Discount per Gallon*
0 – 49	0
50 – 79	2¢
80 – 109	3¢
110 – 139	4¢
140 and over	5¢

At the time this schedule went into effect, respondent was selling two brands of ice cream from its Memphis plant. Sealtest brand, with a butterfat content of 11 percent had a wholesale list price of $1.32 per gallon. The secondary brand was Fro-Joy which had a 10 percent butterfat content and sold at $1.19 per gallon. In February, 1958, the per gallon price of Fro-Joy was reduced to $1.15.

Apart from sales under its discount schedule, respondent also sold to certain customers at a net price lower than the net price charged customers in its highest discount bracket. Respondent contends that these were specially negotiated discounts.

Most of the evidence in the Memphis area relates to the special discount respondent allowed to stores affiliated with the Malone &

Hyde organization. It is respondent's argument that Malone & Hyde is a wholesaler and the rebates it received constitute a lawful functional discount. The hearing examiner rejected this argument and we agree with the examiner.

There is very little dispute as to the facts concerning the Malone & Hyde transactions. It is established that Malone & Hyde has been engaged in wholesale food distribution in the Memphis area for over 50 years. In 1944, it organized the Malone & Hyde Cooperative Stores. At the time of the hearing, 335 independently owned retail grocery stores belonged to the organization. To qualify as a member, a retailer must do a certain volume of business and pay Malone & Hyde an annual membership fee of $364. Malone & Hyde maintains warehouses from which it supplies these stores with a full line of grocery products. Mr. Hyde testified that he sells to the member stores at the Malone & Hyde cost plus a fee of 3 percent for handling and delivery in Memphis.

In 1951, Malone & Hyde entered into an arrangement with respondent whereby it agreed to promote, sell and advertise Sealtest and Fro-Joy ice cream in the member stores. This agreement was verbal and the understanding was that on the volume of business that Malone & Hyde could produce, it would be paid 5 percent of dollar sales. Malone & Hyde retained 2 percent for credit and accounting work and for promotion, and passed 3 percent to the member stores. Under this arrangement, Malone & Hyde accepted the credit risk on all shipments to its stores and respondent billed Malone & Hyde for total deliveries.

In 1954, respondent voluntarily increased the discount to 7 percent, 5 percent of which was returned to the individual stores. Finally, in 1956 (and again verbally) respondent increased the discount to 7 cents per gallon plus a 2 percent allowance on total dollar purchases (excluding novelty ice cream items). The 7 cents was returned to the member stores and Malone & Hyde retained the 2 percent allegedly as compensation for advertising, to handle billing and for assumption of credit risk incurred by respondent in selling to the stores.

There were at least 190 Malone & Hyde stores receiving ice cream from respondent. The 7 cent discount applied to their purchases of both Sealtest and Fro-Joy ice cream. Subsequently, at the request of Malone & Hyde, respondent began furnishing these stores with a private label ice cream known as Hyde Park, which was of the same grade and quality as Fro-Joy. Although the exact date on which this delivery began is not in evidence, the record establishes that the stores were receiving Hyde Park in 1959 at a wholesale price of $1.05 per gallon less 7 cents per gallon discount, at which time the wholesale price of Fro-Joy was $1.15. The record discloses that in a one month period in 1959, respondent sold over 8,600 gallons of ice cream to Malone & Hyde stores. Of this total, which constituted over 70 percent of respondent's volume in Memphis, 40 percent represented sales of Hyde Park.

The circumstances are such that there is very little difference between the manner in which a Malone & Hyde member store is serviced by respondent as compared to a non-member retail customer. In both cases, respondent receives orders directly from the store, delivers the ice cream directly to the store and services the cabinets. Whereas an independent store owner may pay the deliveryman, the Malone & Hyde store is furnished with a copy of the invoice and the original is sent to Malone & Hyde headquarters. Once a week, respondent bills Malone & Hyde for all stores and receives a check drawn on the Malone & Hyde account.

In arguing that Malone & Hyde is the purchaser and thus entitled to a functional discount, respondent alleges that it has nothing to do with the price at which its ice cream is sold to the stores. However, the record contains numerous copies of invoices to Malone & Hyde stores and on each, the price per gallon of both Sealtest and Hyde Park ice cream is specified. Moreover, respondent regularly sends to Malone & Hyde headquarters a recapitulation sheet which shows not only the number of gallons each member store purchased (by name) but also the amount of refund due each store. Likewise, the 10 cents per gallon equipment allowance which respondent grants to stores having their own ice cream cabinets, is paid directly to the member stores. And, finally, the fact that part of the 2 percent which respondent grants to Malone & Hyde is for assuming the credit risk of the member stores is consistent only with the fact that the parties themselves regard the member stores as the purchasers. Obviously, were Malone & Hyde the purchaser, there would be no risk involved to respondent insofar as the credit of the stores is concerned.

Considering the facts of record, the Commission concludes that respondent's sales of ice cream were made to the member stores of the Malone & Hyde organization and that these stores performed no function different from that performed by their competitors who purchased respondent's ice cream. This is not to say that Malone & Hyde could not perform services for respondent and be reimbursed therefor. Presumably, 2 percent allowance received by Malone & Hyde was payment for such services and such payment is not included in our finding of a price discrimination in sales to Malone & Hyde stores.

In addition to the Malone & Hyde stores, respondent allowed the 7 cents per gallon discount to three other Memphis customers: Food Center, a corporate chain with six stores; four or five stores of the National Food chain; and one Kroger store.

The evidence establishes the intense competition which exists in the resale of respondent's ice cream in Memphis. There is testimony that, at the time respondent's wholesale list price for Fro-Joy ice cream was $1.15 per gallon, the retail price in the Memphis area varied from 53 cents to 59 cents a half gallon. The testimony of respondent's competitors in this area indicates the competitive importance to retailers of a few cents difference in price. The three who testified placed the amount which would cause a retailer to switch suppliers as between 2 cents and 4 or 5 percent per gallon. The testimony of several retailers, introducd by respondent to the effect that they needed a discount in order to effectively compete, confirms the significance which they attached to lower net prices. Furthermore, the highly competitive nature of the retail ice cream business is reflected in the testimony of respondent's officials who stated that certain of their customers threatened to quit purchasing unless their discounts were raised three or four cents a gallon.

Over 200 independent stores, constituting over 50 percent of respondent's customers, received no discount. In this regard, Mr. Hyde testified that he wanted Hyde Park ice cream in order to sell at 53 cents a half gallon at a time when these 200 customers were paying $1.15 per gallon for ice cream of the same grade and quality.

Considering the facts of record, we conclude that the discounts granted by respondent, and particularly the 7 cents per gallon granted to chain customers, were substantial and had the probable effect of lesssening competition between respondent's retail purchasers.[10]

We next consider respondent's argument that the discounts which it granted under its quantity discount schedule were cost

[10] The court in the *United Biscuit* case, in commenting on a monthly quantity discount schedule, has stated that "The apparent purpose of a graduated discount system is to afford some customers greater profits. * * * There would be no purpose for United to burden itself with maintaining its pricing practices unless it believed that the discounts are sufficiently attractive to induce a greater volume of purchases from its customers. It follows that if the discounts are intended as an inducement, necessarily they must be considered of a substantial character." *United Biscuit Co. of America* v. *Federal Trade Commission*, 350 F. 2d 615, 621 (7th Cir. 1965).

justified and that its off schedule discounts were either cost justified or were granted to meet competition.

Respondent conducted an extensive time study of its wholesale ice cream distribution routes in Memphis during the period from October 19 to November 18, 1959. As in the Toledo milk study, the ice cream study was made on a location-by-location basis, regardless of whether the location was that of an independent store or a store of a chain. Nine routes were studied for fifty route days, covering slightly more than 1,000 deliveries to more than 500 store locations. The time-volume relationships were analyzed on the basis of minutes per gallon delivered, total ice cream distribution expenses were determined, and these expenses were assigned or allocated to customers on the same bases as that used in the Toledo study.

We have carefully reviewed respondent's cost study exhibits and we conclude that respondent has cost justified its Memphis ice cream discount schedule *on a per location basis*. As in the Toledo study, respondent has properly computed and assigned delivery time and costs, and has assigned each location to its proper bracket on the basis of purchases. Respondent's exhibit, based on these cost studies, shows its distribution cost per gallon sold was $.6543 for the 0 bracket; $.5193 for the 2 cents bracket; $.5042 for the 3 cents bracket; $.4279 for the 4 cents bracket; and $.3394 for the 5 cents bracket. However, we reject respondent's argument that certain of its off schedule discounts are cost justified.

The two off schedule discounts for which respondent claims cost justification are those granted to the Malone & Hyde stores and to Food Center. In both instances, respondent claims cost justification on the basis of totaling distribution costs of all stores of the group and dividing by the total purchases. For the reasons stated with reference to the Toledo cost justification defense, this procedure is rejected. Moreover, the cost justification defense is invalid as to both of these groups for other reasons. As to the Malone & Hyde stores, the evidence [11] establishes that the average volume of purchases of the stores of that group was less than the average volume of the purchasers in the 5 cent bracket on respondent's schedule. Thus, it is obvious that there were independent stores in respondent's 5 cent bracket which had volume purchases larger than the average of the Malone & Hyde stores. In condemning this same method of classification of purchasers, the Supreme Court has stated that "Such a grouping for cost justifi-

[11] RX 109-A.

cation purposes * * * created artifical disparities between the larger independents and the chain stores. It is like averaging one horse and one rabbit." [12]

With reference to Food Center which received a 7 cents per gallon discount, respondent's own cost exhibits [13] disclose that its distribution cost per gallon to stores of that chain is practically identical with its distribution cost per gallon to customers in the 5 cent bracket on its schedule. Thus, it costs respondent $.3840 per gallon to distribute ice cream to Food Center stores while its cost per gallon to customers in the 5 cent bracket is $.3869. Clearly, this cost difference of $.0029 cannot justify a 2 cents per gallon difference in price.

We hold that respondent has failed to establish that its lower net prices to Malone & Hyde stores and to Food Center were cost justified.

Respondent has presented a meeting competition defense with respect to discounts granted to certain independent stores, which discounts were in excess of those warranted by the stores' volumes on the discount schedule. Respondent's officials testified as to reports they received from customers of higher discount offers from competitors. These officials stated that they personally contacted the store owners whom they named, and they gave the time and place of the conversation, the amount of the competitor's offer, and, in most instances, the name of the competitor. Additionally, respondent introduced evidence in verification of these reports, including the testimony of certain of the customers. Counsel supporting the complaint failed to rebut this evidence and we hold, therefore, that respondent has sustained its burden of showing that its discount to each of these independent store customers was made in good faith to meet the equally low price of a competitor.

Respondent also contends that the 7 cents per gallon discount which it granted to Malone & Hyde stores, Kroger and Food Center were made to meet competitors' offers.

With reference to the Malone & Hyde stores, respondent introduced two letters dated in January, 1958, from Santi Ice Cream Company to Malone & Hyde offering to sell a private brand ice cream at $1.18 per gallon less 10 cents per gallon discount. As pointed out by the examiner, the discriminatory discounts were granted by respondent to Malone & Hyde stores long before these

---

[12] *United States* v. *Borden Co.*, 370 U.S. 460 (1962).

[13] RX 117–A.

letters were sent. Moreover, the net price offered by Santi was higher than the net price respondent charged the Malone & Hyde stores for its Hyde Park ice cream, which brand accounted for nearly 40 percent of the ice cream purchased by these stores from respondent.

On this appeal, respondent now relies on the testimony of Mr. Hyde that, prior to the Santi offer, he had received similar offers from other companies which he named. Nowhere in this record is there any testimony by respondent's officials or by Mr. Hyde that either the Santi offer or any other offer by a competitor was reported to respondent. In fact, Mr. Hyde testified that he had no desire to change suppliers because of Sealtest's national advertising and consumer preference in the area. This evidence stands in sharp contrast to the evidence relied upon by respondent in support of its meeting competition defense in the granting of off schedule discounts to independent stores.

The evidence clearly establishes that respondent initiated discounts to Malone & Hyde stores and voluntarily continued and increased these discounts without regard to competitive offers. Respondent's failure to allege that it was even aware of any competitors' offers is sufficient to invalidate its argument that it was acting in a good faith effort to meet an equally low price of a competitor in granting discriminatory discounts to Malone & Hyde stores.

With regard to its discounts to the Kroger store and to Food Center, although respondent generally states on this appeal that these discounts were granted to meet competition, it cites no evidence in support of this defense and we find none in this record.

Accordingly, we hold that respondent has failed to establish that its 7 cents per gallon discounts to Malone & Hyde stores, to the Kroger store and to Food Center were granted in good faith to meet an equally low price of a competitor.

New Orleans (Milk)

Respondent's New Orleans plant processes and sells fluid milk products in the New Orleans metropolitan area and had distribution branches in Baton Rouge, Louisiana, and Jackson, Mississippi. It did not have in effect any quantity discount schedule in the sale of milk during the period covered by this record. However, the record establishes that respondent granted discounts ranging from 5 percent to 10 percent off wholesale list price to at least five wholesale customers in the first seven months of 1958.

During this period, respondent had over 600 wholesale customers who received no discount.

In addition to these discounts, respondent for a number of years has sold milk to its largest wholesale customer in this area at a net price lower than its net price to any other customer. The undisputed facts concerning this favored customer are as follows.

On May 21, 1951, respondent entered into a contract with H. G. Hill Stores, Inc., a chain of food stores in New Orleans, whereby it agreed to furnish that customer with fluid milk products under a private label, "Velva." By the terms of this contract, the price charged for Velva milk, which at that time was packaged only in quarts, was the Federal Milk Market Order price of raw milk plus 6 cents per quart. The contract further provided that Hill stores would use respondent's milk exclusively, except for milk supplied by St. Charles Dairy, in all of its retail stores.[14] In addition, the contract provided that respondent would sell Hill stores its Sealtest brand of milk at published wholesale list prices. The record establishes that there is no difference in grade or quality between the homogenized vitamin D and pasteurized lines of the Sealtest brand and the respective Velva private brand line.

In 1954, respondent's New Orleans plant began packaging milk in half gallon containers. Shortly thereafter, respondent entered into negotiations with the Hill stores as a result of which it began furnishing that customer with half gallons of milk under the Velva label at a price of 11 cents per half gallon over the Federal Milk Market Order price of raw milk.

About July 1, 1956, the Hill stores were acquired by Winn-Dixie Stores, Inc. Respondent continued to supply Velva brand milk to Winn-Dixie at the same price as it had to Hill stores. On October 1, 1956, the arrangement was modified and, thereafter, the price to Winn-Dixie for Velva milk became 7 cents per quart and 12.8 cents per half gallon above the Federal order price of these respective quantities.

The wholesale list prices of Sealtest brand homogenized vitamin D and pasteurized milk from respondent's New Orleans plant were as follows, beginning on the dates indicated:

	10/28/57	6/2/58	8/1/58	9/26/58
H.V.D.	49¢	47¢	49¢	49¢
Pasteurized	47¢	45¢	47¢	47¢

[14] St. Charles Dairy had been the Hill stores' supplier. The record establishes that shortly after this contract, St. Charles Dairy discontinued business, leaving respondent as the exclusive supplier.

During this same period of time, respondent's price to Winn-Dixie for half gallons of Velva milk, based on its contract, varied from 39 cents to 36.7 cents for homogenized vitamin D milk and from 38.9 cents to 36.5 cents for pasteurized. Thus, respondent maintained a net price of about 10 cents per half gallon less to Winn-Dixie than to its numerous other customers who received no discount.

Winn-Dixie has at least 25 stores in New Orleans and respondent's plant manager testified that Winn-Dixie "pretty well blankets this area" competitively in the retail distribution of milk. Respondent's sales of Velva brand milk and milk products to Winn-Dixie for the first seven months of 1958 totaled about $386,000.

The probable adverse competitive effect stemming from respondent's lower prices to Winn-Dixie is readily apparent from this record. The testimony of one of respondent's officials establishes that the generally prevailing retail price of half gallons of milk in the New Orleans area was 49 cents. This is about the price which most of respondent's customers paid for milk. Moreover, the evidence discloses that Winn-Dixie stores regularly ran weekend specials in which they sold Velva milk at 39 cents.

Three of respondent's wholesale customers testified in this case. Their testimony establishes that milk is a very vital item in their stores, that they make only about 2 cents profit on a half gallon and that it is their experience that the housewife will shop where milk is a few cents a bottle cheaper. These retailers testified that they had lost sales due to Winn-Dixie's lower prices on milk and, in this regard, one retailer stated that a Winn-Dixie store across the street from him sold Velva half gallons at the 39 cents price for an entire two-week period.

There can be no doubt from this record that milk is a highly competitive and very low profit item in the New Orleans area. We think it obvious that the difference between the prices which respondent sold to most of its wholesale customers and the lower prices accorded Winn-Dixie was substantial. We hold, therefore, that the effect of respondent's price discriminations may be substantially to lessen competition among respondent's wholesale purchasers.

Respondent argues that the hearing examiner erred in holding that it had failed to establish that its lower prices in the New Orleans area were granted to meet equally low prices of its competitors.

As we have noted, respondent granted discounts off list prices to a few wholesale milk customers in addition to Winn-Dixie in New Orleans. With respect to these customers, respondent's officials testified as to their conversations with the owners, giving the times and places of the conversations. Respondent also identified the competitors making the offers and stated the amount of these offers. Respondent's officials testified to additional facts in verification of these reports, including the fact that in at least one instance, the competitor actually replaced respondent before respondent agreed to give the discount. Complaint counsel made no attempt to rebut this evidence. On this record, we conclude that, with respect to favored customers other than Winn-Dixie, respondent's lower prices were granted in good faith to meet the equally low prices of competitors. We hold, however, that respondent has failed to establish its meeting competition defense in the granting of discriminatory prices to Winn-Dixie.

As to the contract negotiated in 1951, respondent states that it relied upon competitors' bids to public institutions such as hospitals, schools and naval bases. However, these bids could give very little, if any, indication as to a competitor's offer to Winn-Dixie since the sale to public institutions involved delivery to one location whereas the Winn-Dixie sale involved separate delivery to each store. It is well established that the cost of delivery is a very significant item in determining price. Moreover, the testimony of respondent's official establishes that its offer of 6 cents per quart over the Federal Milk Market Order price was based on studies made by its accountant "of the kind of goods that were to be sold and the services to be rendered." [15]

When respondent first introduced milk in half gallon containers in New Orleans in 1954, it was contacted by the owner of Hill stores, a Mr. Penick, who demanded Velva half gallons on the same price basis as Velva quarts, *i.e.*, at 6 cents above the Federal order price for a half gallon of raw milk. The representative testified that, when he told Mr. Penick this was not possible, he was told "to go back and get my costs and come back to see him." [16] Respondent's official testified that he did this and that the figures he got from his accountant showed a saving of about one and two-tenths cents for a half gallon as compared to two quarts.

When respondent's official was contacted by Mr. Penick's assistant, he did not inform him of this exact savings but offered to

[15] Tr. 6143.
[16] Tr. 5864.

sell at a one cent saving for half gallons, *i.e.*, one cent less than the twelve cents above raw milk cost for two quarts. Mr. Penick then joined the negotiations and after learning of this offer, told respondent's official that a Co-op at Franklinton, Louisiana, had stated they would sell Hill stores at 4 1/2 cents per quart and 8 cents per half gallon above the respective raw milk prices.

Respondent relies on this evidence to support its defense that its price to H. G. Hill Stores and its successor, Winn-Dixie, for half gallons of milk was granted to meet the Co-op offer. We disagree.

In the first place, we think this evidence establishes that the offer to Hill stores was the result of the study by respondent's accountant and was made irrespective of any other offer. Moreover, as contrasted to the evidence respondent introduced concerning its discounts to other purchasers, it has made no showing of an attempt to verify the reported Co-op offer. That such attempt is essential to a good faith showing is evidenced by the testimony. Respondent was aware that the Co-op had been a by-product plant which "hadn't been doing so well" and was just trying to expand into the bottling field for wholesale delivery. Respondent had just completed an accounting study which showed the lowest price it could charge. Thus the alleged price offer by the Co-op should have been suspect on its face, particularly since the Co-op was located outside of New Orleans and would have the additional delivery costs. Moreover, the Co-op offer was allegedly made in 1954 in an effort to develop a new line of business. Respondent offered no evidence that this was a continuing offer to Hill stores nor is there any evidence that respondent believed the Co-op offer extended to Winn-Dixie after it succeeded the Hill stores.

On this record, we find that respondent failed to show that its lower prices to Winn-Dixie were made in good faith to meet the equally low price of a competitor.

Respondent has raised two additional defenses with respect to its pricing in the New Orleans area. It refers first to a Louisiana statute known as the Louisiana Orderly Milk Marketing Act. The evidence does not go beyond the effective date of this statute, which was August 1, 1958. As enacted, this statute banned all rebates, discounts and price concessions in the sale of milk. The statute was amended in 1962 to provide for the regulation of milk pricing by the State Milk Commission.

Second, respondent states that subsequent to the hearings in

New Orleans, Winn-Dixie built its own milk plant and respondent lost the private label business.

It is respondent's contention that these two developments render moot the issue of price discrimination as to its fluid milk sales in New Orleans. The hearing examiner rejected both of these arguments, pointing out as to the first that there was no assurance that the state statute would achieve that which a federal statute has failed to accomplish. As to the second, he held that loss of Winn-Dixie does not constitute assurance that respondent will not discriminate in favor of another customer.

We agree with the examiner. Moreover, our order will not be limited to the State of Louisiana but will extend to any area in which respondent may engage in similar price discriminations in its sale of milk.[17]

One other issue is raised by respondent relating to all of the areas covered in this proceeding. It is respondent's contention that the examiner erred throughout this proceeding in holding that its fluid milk products and its ice cream products constitute a single product line so that respondent could be enjoined from discriminating in price in the sale of both products if a violation were proved as to only one. However, since we have found a violation as to both products, we conclude that it is unnecessary to rule on this issue for the purpose of the order to be entered.

The appeal of counsel supporting the complaint places in issue the scope of the order as to both the Section 2(a) and the Section 2(d) charge of the complaint. Specifically, complaint counsel contends that the examiner erred in limiting the order to the product line of respondent's Sealtest Foods Division. It is his contention that the order should be broadened to include all food products of respondent's entire organization.

This record establishes that, prior to 1956, respondent carried on its various lines of business through subsidiary corporations. By the end of 1957, it had integrated its subsidiaries so that it was operating through seven separate divisions. Each of these divisions is separately organized and under separate management.

[17] It is interesting to note that in a very recent action, a Florida state court issued a temporary restraining order against this respondent under a Florida statute which prevents unfair discrimination in the sale of milk. In its brief in support of its interlocutory appeal from this action, respondent argues in part that the subject matter has been preempted by Federal regulation, stating that:

"Examination would indeed reveal that the Federal regulation in this field has stretched its tenacles into every nook and cranny of commercial free enterprise and no room could be left for state supplementation. The Federal interest is so dominant and all inclusive as to preclude enforcement of state law on the same subject."

Each manufactures and distributes its own distinct product lines, Sealtest being the only division engaged in fluid milk and ice cream operations. Due principally to the different types of products handled, the various divisions employ different distribution systems. There is no joint use of trademarks nor is there joint advertising among the divisions.

On these facts, we conclude that an order limited to the products of the Sealtest Foods Division is sufficient to afford effective relief from the practices we have found to be unlawful. Accordingly, complaint counsel's appeal is denied.

Respondent has also appealed from the hearing examiner's finding of primary line injury in each of the products in each of the areas involved in this proceeding. We have examined the evidence and we are in agreement with respondent that complaint counsel has failed to adduce sufficient evidence to establish circumstances from which it may be reasonably inferred that injury among respondent's competitors may be a result of respondent's pricing practices in any of these areas.

Respondent has not appealed from that part of the initial decision relating to the Section 2(d) charge. The only issue under this charge is the scope of order, raised by complaint counsel's appeal which we have denied. Accordingly, we are adopting the hearing examiner's findings and conclusion on the Section 2(d) issue.

On the basis of the foregoing, respondent's appeal is granted in part and denied in part, and the appeal of counsel supporting the complaint is denied. To the extent that the findings of the hearing examiner are deficient or in error, they are modified to conform to the factual findings together with the reasons and bases therefor embodied in this opinion. An appropriate order will be entered.

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.

DISSENTING OPINION

JULY 28, 1966

BY ELMAN, *Commissioner:*

In the leading case of *F.T.C.* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 759, the Supreme Court held that the meeting competition defense afforded by Section 2(b) "does not place an impossible burden upon sellers." Emphasizing "the good faith requirement of the statute," the Court stated that "Section 2(b) does not require the seller to justify price discriminations by showing that in fact they met a competitive price." The entire course of judicial interpretation has reflected an emphasis on realistic and common-sense applications of the defense. In the most recent case on the subject, *Callaway Mills Co.* v. *F.T.C.*, decided by the Court of Appeals for the Fifth Circuit on June 13, 1966 [8 S. & D. 195], the court reiterated that a seller asserting the defense need not show that his prices were in fact equal to those of competitors, but only that they reflected the response of a reasonable and prudent seller to what was believed in good faith to be the exigencies of competition.

In *Continental Baking Co.*, Docket No. 7630, decided December 31, 1963 [63 F.T.C. 2071, 2163], the Commission discarded the rigid, unrealistic approach which had been taken in some earlier cases. The Commission's opinion stated:

> At the heart of Section 2(b) is the concept of "good faith". This is a flexible and pragmatic, not technical or doctrinaire, concept. The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity. *F.T.C.* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 759–60. see *Standard Oil Co.* v. *F.T.C.*, 340 U.S. 231, 249–50. Such a standard, whether it be considered "subjective" or "objective", is inherently *ad hoc*. Rigid rules and inflexible absolutes are especially inappropriate in dealing with the 2(b) defense; the facts and circumstances of the particular case, not abstract theories or remote conjectures, should govern its interpretation and application. * * * Where, as here, a seller has affirmatively shown justification for selective price reductions, as "good faith" responses to the exigencies of competition, Congress provided the shelter of Section 2(b).

The approach taken in *Continental Baking* finds strong support in the decision of the First Circuit in *Forster Mfg. Co.* v. *F.T.C.*, 335 F. 2d 47 (1964). In that case the Commission had held that a seller must affirmatively show that he knew the exact prices of competitors that he was meeting. In reversing the Commission's decision, the court stated (335 F. 2d at 55–56):

> We may not be in as intimate touch with the ways of commerce as the Commission, but we would be naive indeed if we believed that buyers would have any great solicitude for the welfare of their commercial antagonists, sellers. The seller wants the highest price he can get and the buyer wants to buy as cheaply as he can, and to achieve their antagonistic ends neither expects the other, or can be expected, to lay all his cards face up on the table. Battle of wits is the rule. Haggling has ever been the way of the market place. The Commission's requirement is unrealistic.

The "way of the market place" is familiar to the Commission as well as the courts. Especially where competition is most intense, sellers may have to determine or adjust price offers quickly and on the basis of imperfect knowledge or unverified information concerning their competitors' price offers. The Commission purports to accept the holding of *Staley, Forster,* and *Callaway Mills* that a seller invoking the 2(b) defense is not required to prove that his prices were in fact equal to those of his competitors. It states (p. 196) that "the examiner's ruling imposes too strict a burden upon respondent by requiring that it show the actual list prices of its competitors." The Commission insists, however, that respondent must satisfy the burden of showing that its list prices were the same as, or no lower than, those of competitors whose prices it was allegedly meeting (pp. 186–201). For all practical purposes, the Commission is thus imposing on respondent a burden of proof no less strict and unreasonable than that imposed by the hearing examiner.

The Commission recognizes "the intensely competitive nature of the retail milk business in this area" (p. 189). It states that the "vital point to keep in mind * * * is that price is the one crucial item in the sale of milk at wholesale. Retailers must carry milk and this record is replete with evidence that competition is cutthroat, to the extent that one or two cents difference on a half gallon will mean the difference between a profit or loss on milk to the grocer. Although complaint counsel attempted to establish a preference for nationally and heavily advertised brands such as Sealtest, there can be no question from this record that as to milk, a basic homogeneous product, it is the net price to the grocer which determines whether he will continue to buy or will change suppliers. * * * One thing is abundantly clear from this record, a dairy could not sell milk in this market at net prices which were consistently one or two cents above its competitor's." (Pp. 199–200.)

As the Commission also recognizes, the record shows that bargaining between sellers like respondent and their retail customers revolves around discounts off wholesale list prices, not net prices. When respondent was told by customers that it had to match the discounts being offered by other sellers, its choice was either to meet such competition or "get out." [1] Since "price is the one cru-

[1] For example, and it is only one of many in the record, respondent's Toledo area zone manager testified with reference to a conversation he had with the Big Bear supermarket's buyer at the latter's office in Columbus, Ohio:

"A. He was a buyer for the company and he said that he had been offered a discount and cial item in the sale of milk at wholesale" and "it is the net price to the grocer which determines whether he will continue to buy or will change suppliers" (p. 199), the only reasonable and realistic conclusion respondent could have drawn was that it was meeting the competitive prices of other sellers when it matched the discounts which the latter were offering its customers.

To be sure, matching a competitor's discounts would not be meeting his net price where the competitor's list price from which the discount is given is lower than respondent's list price. And, of course, buyers may indeed seek to induce sellers to beat, rather than meet, one another's prices. However, the validity of a competitive response under the meeting competition defense is not to be tested by hypothetical possibilities but in the light of actual market situations. The only relevant question here is whether respondent, in the circumstances of this particular market situation, had reason to believe that in being asked to match its competitors' discounts or "get out" it was being asked to meet its competitors' prices. As the majority opinion points out, net price is determinative in this market. In the transactions here involved, it is simply not credible that respondent would have been told to "get out" where it in fact *met* but did not *beat* a competitor's net price.

Under the majority view, respondent had a duty to "call the bluff" of the buyer. If it did so and it turned out that the buyer was not bluffing and in fact had a lower price offer from a competing seller, respondent would be "out." In that event, however, respondent—even though it lost the customer—might perhaps find some consolation in the knowledge that it was living up to the Commission's extraordinary standards of conduct for sellers in competitive markets—under which a seller in this kind of situation must run the risk of losing either a customer or an antitrust case.

By imposing on respondent the burden of showing as to each individual transaction that it knew or had reason to believe that its wholesale list prices were the same as, or no lower than, those of its competitors, the Commission is demanding the sort of evidence which, as a matter of commercial reality, will frequently be unavailable to a seller operating in the hurly-burly of the marketplace. As the court recognized in *Forster*, a buyer playing off one seller against another may hold his cards very close to the chest

from the other two dairies and, therefore, we had to at least meet the discount or we went out.

"Q. Did you meet the discount that he told you he had.

"A. Yes, sir." (Tr. 2997.)

and not disclose the specific terms of the competing offer or the identity of the competing seller. Even if respondent had knowledge of all of its competitors' list prices, presumably that would still not satisfy the Commission unless respondent could also prove that it knew which specific competitor was making the rival price offer in the particular transaction. This is a demand for the kind of proof which the courts have held to impose an impossible burden on sellers. As a practical matter, the Commission is imposing a burden of proof on respondent which, like that imposed by the hearing examiner and which it purports to reject, is not satisfied without a showing of the actual list prices of specific competitors.

In this case, as in *Tri-Valley Packing Association,* Docket Nos. 7225 and 7496, decided July 28, 1966 [p. 223 herein], the Commission requires proof by a seller that he "used reasonable diligence in verifying the existence of a lower price of a competitor." (*Tri-Valley,* p. 285) 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 this 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.[2]

[2] The sweeping and onerous burden on sellers which the Commission imposes in this case and in *Tri-Valley* is neither compelled nor supported by the Supreme Court's decision in *Staley.* The finding of the seller's lack of good faith in *Staley* was based on a whole variety of circumstances, including some "which strongly suggested that the buyers' claims [of lower

Another regrettable aspect of the Commission's decision in this case is that it appears to resurrect the notion, interred *sub silentio* in Continental Baking, that a seller claiming the 2(b) defense must affirmatively show that he had reason to believe that the competitive prices he was meeting were lawful, *i.e.*, that "these prices could be cost-justified or otherwise excused under any of the exceptions to the prohibitions of Section 2(a)." *Tri-Valley Packing Association*, 60 F.T.C. 1134, 1173 (1962); see also *American Oil Company*, 60 F.T.C. 1786, 1812 (1962). The imposition of so rigorous and exacting a burden of proof on sellers claiming the meeting competition defense seems to be contrary to the course of judicial interpretation reflected in *Staley, Callaway Mills,* and *Forster*. As I wrote in dissent in *Tri-Valley Packing Association, supra* (p. 1176):

> The law should not be construed as forcing a seller to compete at his peril. A "sales manager who is trying to compete * * * is not, of course, required to become a detective or a judge."* A businessman who must operate in the pressures of the marketplace cannot be expected to conduct a survey into his competitor's costs or to prophesy whether the competitor's lower price will later be held unlawful.

CONCURRING OPINION

JULY 28, 1966

BY REILLY, *Commissioner:*

According to the Staley decision [1] a seller is not required to justify price discriminations by showing that in fact it met a competitive price. It must show only the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor. A showing that a seller met a competitor's discount, however, does not necessarily prove that the seller had reason to believe that it was meeting a competitor's price or that it believed that it was responding defensively in a situation of competitive necessity. A simple illustration will explain what I mean: suppliers A and B regularly sell the same or comparable products at discount off wholesale list prices. The list price of seller A is $1.00 and that of seller B 95¢. Because of this difference in the prices, the net prices of the two sellers are approximately the

prices offered by competing sellers] were without merit," and which, "all taken together," demonstrated a lack of good faith. (324 U.S. at 759.)

* Corwin D. Edwards, "The Price Discrimination Law" (1959), p. 567.

[1] 324 U.S. 746.

same when supplier A sells at a 10% discount and supplier B at a 5% discount, *i.e.*, 90¢. Assume further that A and B normally compete in the sale of their products when A sells at a 10% discount and B at a 5% discount. Under these circumstances, B could not increase his discount from 5% to 10% to a particular customer and justify the discrimination under 2(b) by claiming that he was meeting A's discount. This would be true even though B testified that the customer had told him to meet the discount or "get out."

By increasing the discount to 10% the discriminator in the illustration above would have reason to believe that his lower price would in fact undercut the price of his competitor. Certainly under these circumstances proof that he met the competitor's higher discount would not establish that he was responding in good faith to what he reasonably believed was a situation of competitive necessity or that he thought his reduced price would meet that of his competitor.

Consequently, we do not believe that we are asking too much of respondent in the present matter to show not only that it met a discount but that in meeting the discount it had reason to believe that it was meeting or responding defensively to a lower price of a competitor. In other words, respondent must, as required by *Staley*, "show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor."

The dissent sharply criticizes the majority's holding that a price discriminator must show that he "used reasonable diligence in verifying the existence of a lower price of a competitor." [2] But this criticism comes more than 20 years too late. One of the reasons given by the Commission for rejecting the 2(b) defense in *Staley* was that respondents had granted discriminatory prices "without taking any steps to verify the existence of a lower price of a competitor." In that case, the Commission commented upon "the entire lack of a showing of diligence on the part of the respondents to verify the reports which they received, or *to learn of the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact be meeting the equally low price of a competitor.*" (Emphasis added.) 324 U.S. at 759. The Court held that these circumstances,

[2] The majority so held in its opinion *In the matter of Tri-Valley Packing Association*, Docket Nos. 7225 and 7496, decided July 28, 1966 [pp. 223, 274 herein].

together with respondents' failure to prove that they had taken precaution to conduct their business in such manner as to prevent unwarranted discriminations required the conclusion that respondents had not sustained the burden of showing that their price discriminations were made in good faith to meet the lower prices of competitors.

The dissent holds that "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" (dissent, page 219). To my knowledge, no price discriminator has yet gone to jail because he made an effort "to learn of the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact be meeting the equally low price of a competitor." Moreover, I can only assume that if the position expressed in the dissent had any merit it would have occurred to the Supreme Court and influenced its holding in *Staley*.

Final Order

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

The Commission having determined, for the reasons appearing in the accompanying opinion, that respondent's appeal should be granted in part and denied in part, and that the appeal of counsel supporting the complaint should be denied; and

The Commission having modified the initial decision to the extent necessary to conform to the views expressed in its opinion:

It is ordered, That the following order be substituted for the order to cease and desist set forth in the initial decision:

ORDER

It is ordered, That respondent National Dairy Products Corporation, a corporation, and its officers, employees, agents and representatives, directly or through any corporate or other device in or in connection with the offering for sale, sale or distribution of any of the items in the product line of its Sealtest Foods Division, including but not limited to fluid milk, dairy products, ice cream and other food products, in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

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-