IN THE MATTER OF

PUREX CORPORATION, LTD.

Docket 6008. Complaint, July 14, 1952—Decision, Aug. 24, 1954

Dismissal for lack of substantial evidence of complaint charging a manufacturer in California with discriminating in price in violation of subsec. 2 (a) of the Clayton Act as amended in the sale of its "Purex" household bleach and "Trend" detergent through offering deals, allowances, rebates, and other special discounts in certain sales territories which were not offered in other contiguous areas.

Before *Mr. John Lewis*, hearing examiner.

Mr. Austin H. Forkner, *Mr. William C. Kern*, *Mr. Andrew C. Goodhope*, *Mr. Eldon P. Schrup* and *Mr. Francis C. Mayer* for the Commission.

Gibson, Dunn & Crutcher, of Los Angeles, Calif., and *Halfpenny, Hahn & Cassedy*, of Washington, D. C., for respondent.

ORDER OF THE COMMISSION

The hearing examiner having filed his initial decision herein and counsel supporting the complaint having seasonably filed a notice of their intention to appeal from said initial decision, and the time within which counsel supporting the complaint could file their appeal brief having been extended by orders of the Commission to and including August 23, 1954; and

Counsel supporting the complaint having filed on August 23, 1954, a notice of their determination not to perfect their said appeal; and

No appeal brief having been filed within the time so provided:

Now therefore, pursuant to Rules XXII and XXIII of the Commission's Rules of Practice, the attached initial decision of the hearing examiner did automatically, on August 24, 1954, become the decision of the Commission.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

STATEMENT OF THE CASE

The Federal Trade Commission issued its complaint against the above-named respondent on July 14, 1952, charging it with having violated Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, by discriminating in price between different customers of its product, Purex bleach, with resultant injury to competition in both the primary and secondary lines of commerce. Said re-

spondent, after being duly served with the complaint herein, filed its answer in which it admitted, in substance, having charged certain prices as alleged in the complaint, but denied having engaged in any discrimination in price between different purchasers and denied that its pricing practices resulted in any injury to competition. Said answer also sets forth certain affirmative defenses under Section 2 (a) and (b) of the Act.

Pursuant to notice, hearings were held before the undersigned hearing examiner, duly designated by the Commission to hear this proceeding, as follows: From October 15, 1952, to October 25, 1952, at Los Angeles, California; from March 3, 1953, to March 7, 1953, at Minneapolis, Minnesota; and from March 11, 1953, to March 14, 1953, at Memphis, Tennessee. At said hearings testimony and other evidence were offered in support of the allegations of the complaint by counsel supporting the complaint, which testimony and evidence were duly recorded and filed in the office of the Commission. Respondent was represented by counsel at said hearing, and, together with counsel supporting the complaint, received full opportunity to be heard and to examine and cross-examine witnesses.

At the close of the evidence offered in support of the complaint, further hearings were suspended pending the filing by respondent of motions to strike certain testimony and to dismiss the complaint herein for insufficiency of evidence. Said motions were thereafter filed, on June 15, 1953, together with a brief in support thereof. A brief in opposition to said motions was filed on July 31, 1953, by counsel supporting the complaint, and counsel for respondent, pursuant to leave granted, filed a reply brief on September 15, 1953. Said motions are disposed of in accordance with the findings and conclusions hereinafter made.

Upon consideration of the entire record herein and from his observation of the witnesses, the undersigned hearing examiner makes the following:

FINDINGS OF FACT

I. The business of respondent

Respondent is a California corporation with its principal office and place of business in South Gate, California. It has been engaged since 1936 in the manufacture and sale of a number of household products, the principal one of which is a bleach called "Purex." Respondent owns or leases plants for the manufacture and sale of Purex bleach at South Gate and San Leandro, California; Tacoma, Washington; St. Louis, Missouri; Dallas, Texas; New Orleans, Louisiana; Atlanta,

Georgia; and Memphis, Tennessee. Its product, Purex bleach, is distributed generally in approximately 75 percent of the territory of the United States, embracing about 33 states having about 52 percent of the population of the United States, with little or no distribution in the Eastern and Atlantic Seaboard states. As of June 30, 1951, its net yearly sales of all its products totalled $19,476,366.

Respondent distributes and sells its products to grocery jobbers, cooperative buying organizations and retail stores, located in various States of the United States. In the distribution of its products respondent operates through brokers appointed by it in most of the areas where it operates. It divides the areas where it operates into separate territories with a broker in each territory, except that it employs no broker in its South Gate or St. Louis territories. Each brokerage territory is drawn along geographic lines to conform as nearly as possible to natural marketing areas. Thus, where a natural marketing area includes sections of more than one state, respondent endeavors to include all of such sections within the same brokerage territory. An example of this is its Davenport territory, which includes Davenport, Iowa, and Rock Island and Moline, Illinois, and the marketing areas contiguous to these three cities.

Sales are promoted by salesmen of respondent's brokers, and also by a corps of so-called specialty salesmen employed by respondent, who call upon various jobbers and retail outlets. Where sales are made by respondent's specialty salesmen directly to the retail stores, the particular jobber through whom the retailer normally buys receives credit for the sale.

The bleach industry is characterized mainly by small and medium-sized companies. The only company having a national distribution is the Clorox Chemical Company of Oakland, California. Respondent is the second largest manufacturer in the industry. Of the remaining companies, some are purely local in character, operating in a single trade territory, while some of the medium-sized companies operate in a number of trade territories and states. Although respondent has been a significant competitive factor in most of the markets where it has operated, it has been outranked by its smaller competitors in a number of the markets. Thus in the Des Moines territory the dominant bleach company has been and is S & S Cleanser Company, which is a purely local company. In the Minneapolis territory, the predominant bleach is manufactured by the Hilex Company, which is a medium-sized company operating in a number of mid-western states.

II. Background and issues

The gravamen of the discrimination charged in the complaint is that respondent has offered certain price reductions from its list prices, mainly in the form of special deals, in certain of the territories where it sells, which have not been offered in other territories. Many of the so-called deals are in the form of "free goods," i. e., respondent offers to sell a case of bleach without any charge with each purchase of a given number of cases. This has varied from a free case with each 10 cases purchased to a free case with each two cases purchased. (In discussing such deals hereafter they will be referred to in abbreviated form, as e. g., "one free with nine" or "1–9," meaning one free case with each nine purchased.) Some deals do not involve any offering of free goods, but are in the form of stipulated reduction from the list price, usually varying from 10 cents to 25 cents per case, and, in a few instances, to as much as 50 cents per case.

Some of the deals are arranged so that only the wholesaler (or large direct retail account) receives the deal, the customer having the discretion whether to pass on the price reduction accruing from the deal. Other deals are arranged so that the consumer and retailer also receive the benefit of the deal. An example of the latter is the so-called 5–3–2–1 deal, in which the consumer receives a reduction of 5 cents on purchase of a gallon of Purex, 3 cents on a half-gallon, 2 cents on a quart, and 1 cent on a pint. The jobber receives an equivalent reduction per case as follows: 20 cents per case for gallons, 18 cents for half-gallons, 24 cents for quarts and 24 cents for pints. Some deals are strictly retail dealers, in which orders are obtained from the retail stores by respondent's specialty salesmen, and the jobber through whom the sale is billed receives a nominal fee for the handling of the free goods, usually amounting to 10 cents a case. An example of a consumer-type deal is one in which the consumer will receive a quart free or for one cent, upon purchase of a half-gallon at the regular retail price. In this type of deal, the retailer is supplied with a case of quarts free with each two cases of half-gallons purchased. Sometimes a coupon is distributed which must be presented at the retail store. The coupons are redeemed by respondent at one cent over the dealer's regular retail price.

Some of the deals have been offered for brief periods of time, such as a month or two. Some of such deals have been reoffered in the same or a different form, after an interval of several months. Other deals have remained in effect for over a year. Although respondent has not yet offered its evidence, it seems apparent, from the record

thus far, that competitive factors and consumer acceptance are the determining factors in the extent and duration of such deals.

Whenever a deal is offered by respondent, all customers in a given territory are offered the deal without distinction. However, the same deal is not offered simultaneously in all territories. Thus, one territory may have a 1–9 deal, another a 1–3 deal, and another may have no deal at all. The basis of the discrimination charged in the complaint is, in essence, that respondent does not offer the same deal simultaneously in all of its territories.

The record at the close of the case-in-chief of counsel supporting the complaint consists of approximately 3,000 pages of testimony and several thousand pages of exhibits. Although the complaint alleges injury to competition in both the primary and secondary lines of commerce, the great bulk of the evidence relates to primary-line injury. Such evidence, adduced mainly through competitors of respondent and wholesalers, relates particularly to the following brokerage territories or divisions: Minneapolis, Omaha, Sioux Falls, Sioux City, Davenport, Des Moines, Memphis and Dallas. Certain evidence, mainly in the form of correspondence, was also offered in an effort to show injury between customers of respondent along the fringes of brokerage territories where a customer in one territory received the benefit of a deal and a competitor in the adjacent territory did not. Although the complaint refers to another product of respondent, a detergent called "Trend," and counsel supporting the complaint offered evidence showing that respondent had offered deals on "Trend" similar to those on Purex, no evidence of actual or probable injury to competition with respect to the sale of Trend was offered.

The main issue in this case is whether respondent's pricing practices have adversely affected, or may reasonably be expected to have such an effect on, competition between respondent and its competitors. In connection with the disposition of this issue, there are a number of preliminary questions which must first be disposed of: (1) whether respondent's pricing practices are discriminatory, (2) what is the proper test of injury in a primary-line case, and (3) whether the commerce requirements of the Act have been satisfied with respect to the alleged discrimination charged in the Dallas, Texas area. There must also be disposed of respondent's motion to dismiss a considerable portion of the testimony of some of respondent's competitors on the ground that such testimony is unreliable hearsay. The final question for decision is whether the evidence of secondary-

line injury in a few fringe areas is sufficient to justify a finding of violation of Section 2 (a).

III. The legal questions

A. *The question of discrimination*

Respondent contends that since the unlawful conduct referred to in Section 2 (a) is the *discrimination* in price between different customers, something more than a mere *difference* in price between customers must be shown in order to establish such discrimination; namely, there must be a competitive relationship between the purchasers, entitling them to equal treatment. Respondent, accordingly, argues that while there may have been differences in the net prices in its different territories resulting from the operation of different deals, this did not result in any discrimination among its customers, since the customers in its different territories were not, with minor exceptions, in competition with one another and therefore were not entitled to equal treatment.

Respondent's position finds some support in the legislative history of the Robinson-Patman Act. Thus, we find the following statement by Congressman Utterbach, one of the managers of the bill in the House:

> * * * a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that *some relationship exists between the parties to the discrimination which entitles them to equal treatment*, whereby the difference granted to one casts some burden or disadvantage upon the other. If the two are competing in the resale of the goods concerned, that relationship exists. Where, also, the price to one is so low as to involve a sacrifice of some part of the seller's necessary costs and profit as applied to that business, it leaves that deficit inevitably to be made up in higher prices to his other customers; and there, too, a relationship may exist upon which to base the charge of discrimination. But where no such relationship exists, *where the goods are sold in different markets and the conditions affecting those markets set different price levels for them, the sale to different customers at those different priees would not constitute a discrimination* within the meaning of this bill [italics supplied] (80th Cong. Rec. 9416).

Further cited by respondent in support of its position is the following colloquy between Congressmen Boileau and Miller, the latter being one of the managers of the bill in the House:

> Mr. BOILEAU. * * * Mr. Chairman, for the purpose of clarifying the congressional intent, I have taken this time to get the opinion of the distinguished gentleman from Arkansas as to his understanding of the meaning of the language at the beginning of section 2 (a), page 5, of the bill. * * *
>
> *My understanding of that language is that the sellers may not discriminate, but they may, nevertheless, charge different prices in different communities to*

persons who are not competitors. In other words, as I understand it—and I ask the gentleman whether or not this is his opinion—a seller may sell a commodity in one community at one price and sell it in another community at a different price, because those two purchasers, even though they are purchasers for resale, are not competitors, and therefore, there is no discrimination in price. Is that the understanding of the distinguished gentleman from Arkansas [Mr. Miller]?

Mr. MILLER. *They are operating in different markets.* I do not think there is any doubt about the language.

Mr. BOILEAU. I am asking these questions at the request of certain farm organizations, and I want to show the Congressional intent.

Mr. MILLER. As indicated by the gentleman from Nebraska [Mr. McLaughlin], the gentleman from Iowa [Mr. Utterback], the gentleman from Nebraska [Mr. McLaughlin], the gentleman from Michigan [Mr. Michener], and some others were appointed as a special subcommittee to work on this bill. That was our understanding. We undertook to draft a bill that would deal with the three principal things with which we are all familiar. It was not our intention to injure the organizations about which the gentleman is speaking. The gentleman has the right interpretation of the bill.

Mr. BOILEAU. In this particular letter, which refers to this particular section, I quote as follows:

"We are fearful that this section, viewed in the light of the committee report, *might be construed to mean that different prices could not be charged by the same seller in different markets.*"

Is it the gentleman's opinion that their fears in this respect are without foundation?

Mr. MILLER. They are entirely unfounded [italics supplied] (80th Cong. Rec. 8229).

While the foregoing are indeed persuasive, as are the other authorities cited by respondent, the examiner cannot agree with respondent's position on this issue. Such statements must be read in the light of the general purposes of the Robinson-Patman Amendment, which, as respondent itself points out, was "aimed at abuses in buying power rather than at selling power." Insofar as the Robinson-Patman Act makes it unlawful "to discriminate in price between different purchasers," the language used is identical with that in the original Clayton Act. Congress having used identical language in this respect as that contained in the original Clayton Act, it must be assumed, in the absence of clear evidence to the contrary, that it intended to give it the same meaning which it had under the original Act. The statements from the legislative debates, above quoted, merely reflect the concern with the evil of price discrimination between large and small purchasers. However, there is no convincing evidence that Congress, while endeavoring to strengthen the Act with respect to abuses of buying power, intended to weaken it insofar as the Clayton Act attempted to address itself to certain abuses of selling power, one of

which was selling at different prices to noncompeting customers in different parts of the country in order to drive out or minimize competition. That the latter was an evil at which the Clayton Act was aimed is apparent from the following statement in the report of the House Judiciary Committee:

> Section 2 of the bill is intended to prevent unfair discrimination. It is expressly designed with a view of correcting and forbidding a common and widespread trade practice whereby certain great corporations and also certain smaller concerns * * * have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country (H. R. Rep. No. 627, 63d Cong. 2d Sess., p. 8).

Whatever merit there may be in respondent's position, as an original proposition, it seems to be now well settled by court decisions that differences in price in different sections of the country between noncompeting customers may constitute discrimination. This interpretation has been applied in cases arising under the Robinson-Patman Amendment, as well as those arising under the original Act. The classic example of such price differences between noncompeting customers being considered discrimination is the *Porto Rican American Tobacco Company* case,[1] which involved a price differential between customers in Puerto Rico and those in the United States. The court referred to the American Tobacco Company as having, by such price difference, "discriminated in price between different purchasers—those of the United States and of Porto Rico." Clearly the different purchasers were not in competition or in "some relationship" entitling them "to equal treatment," but the price differences were nevertheless regarded as discriminatory. More recently in *Muller vs. F. T. C.*, 142 F. 2d 511 (C. A. 6, 1944), arising under the Robinson-Patman Act, a difference in price between customers in the New Orleans area and those in other parts of the country was assumed to be discriminatory, the main issue being whether such discrimination had resulted in injury to competition. That a mere difference in price may constitute discrimination under the Robinson-Patman Act seems to have been accepted by a number of the authorities in the field. Thus Congressman Patman, in his book "The Robinson-Patman Act" (1938), addressing himself to the precise question of whether "the word 'discrimination' [is] synonymous with 'different' as applied to prices," gave the following answer (p. 24):

[1] *Porto Rican American Tobacco Company vs. American Tobacco Company*, 30 F. 2d 234 (C. A. 2, 1929), Cert. den. 279 U. S. 858.

The statement that it shall be unlawful to discriminate in price is of the same effect as to say that it shall be unlawful to make a different price.

To the same effect, see Cyrus Austin, *Price Discrimination under the Robinson-Patman Act* (March 1952), pp. 18–20, 86.

While a mere difference in the prices charged to customers in different areas may be regarded as discrimination, even though the customers are not in competition with one another, this does not necessarily make such differences illegal. Aside from the fact that such differences may be justified under Section 2 (a) and (b) of the Act, it must be established that the discrimination has resulted, or may reasonably be expected to result, in injury to competition of the type set forth in Section 2 (a). The nature of such injury is the subject to which the examiner now turns.

B. *The question of injury to competition*

A more serious question presented has to do with the criterion to be followed in determining whether a discrimination in price has injured or may reasonably tend to injure competition. It is the position of respondent that where a seller charges different prices to noncompeting purchasers in different geographic areas, the test of whether there has been or may be injury to competition is whether there exists a "predatory intent, collusion or monopolistic practices." [2] Counsel supporting the complaint, on the other hand, argues that the Robinson-Patman Act was intended "to reach discriminatory practices resulting in injury to a single individual [competitor] * * *" and that it is not necessary to show injury to "competition generally" as it was under the original Clayton Act. Thus, we find respondent contending for a test which would require a showing that the difference in price was part of a purposeful scheme to drive competitors out of business or that it tended substantially toward the creation of a monopoly, while counsel supporting the complaint argues for a test which would require a showing merely that a single competitor had been injured. Since the voluminous evidence on injury to competition must be evaluated in the light of some proper legal criterion, it is necessary to determine which of these tests is the correct one, or, in fact, whether either of them is accurate.

[2] Although respondent contended initially that there could be no discrimination unless there was some relationship between the purchasers entitling them to equal treatment, it apparently concedes for purposes of this discussion, that a price difference between noncompeting customers may be discriminatory, providing the necessary showing of injury is made.

Price discrimination is within the prohibition of the statute:

> * * * where the effect of such discrimination may be substantially to lessen competition or tend to create 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 the customer of either of them* * * * [italics supplied].

The italicized language is the portion added to the original Clayton Act by the Robinson-Patman Amendment of 1936. It is this portion which counsel supporting the complaint claims liberalized the test from one of showing injury to "competition generally" to merely requiring the showing of injury to a "single individual" competitor.

An examination of the legislative history discloses that there is some support for the position taken by counsel supporting the complaint. Thus, we find the following statement by Congressman Utterbach, as part of the same explanation of the bill to which reference has previously been made:

> The discriminations prohibited by this bill are those whose effect may be:
> 1. Substantially to lessen competition in any line of commerce; or,
> 2. To tend to create a monopoly in any line of commerce; or,
> 3. To injure, destroy, or prevent competition:
> (a) With any person who either grants or knowingly receives the benefit of such discrimination; or,
> (b) With customers of either of them (i. e., the grantor or grantee).
>
> Effects nos. 1 and 2 above correspond to those required to be shown under the old section 2 of the Clayton Act. Generally speaking, they require a showing of effect upon *competitive conditions generally* in the line of commerce and market territory concerned, *as distinguished from the effect of the discrimination upon immediate competition with the grantor or grantee.* The difference may be illustrated where a nonresident concern opens a new branch beside a local concern, and with the use of discriminatory prices destroys and replaces the local concern as the competitor in the local field. Competition in the local field generally has not been lessened, since one competitor has been replaced by another; *but competition with the grantor of the discrimination has been destroyed. The present bill is, therefore, less rigorous in its provisions as to the effect required to be shown in order to bring a given discrimination within its prohibitions* [italics supplied] (80th Cong. Rec. 9417).

The illustration given by Congressman Utterbach suggests that injury to a single competitor of the seller may be sufficient to injure competition with the latter. However, it is possible to interpret the Congressman's reference to "the use of discriminatory prices" as contemplating a situation where the seller is selling at different prices to competing buyers in the same local area rather than at the same price to all buyers in the area.[3]

[3] See Congressman Utterbach's definition of discrimination, *supra,* as involving a situation where there is a competitive relationship between the purchasers.

Counsel in support of the complaint further cites, as upholding his position, a statement in the Committee Report of the Senate Committee on the Judiciary to the effect that the change in the language of Section 2 referred to above—

* * * accomplishes a substantial broadening of a similar clause now contained in section 2 of the Clayton Act. The latter *has in practice been too restrictive, in requiring a showing of general injury to competitive conditions* in the line of commerce concerned; *whereas the more immediately important concern is in injury to the competitor victimized by the discrimination.* Only through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower [italics supplied] (Sen. Rep. No. 1502, 74th Cong., 2d Sess. (1936), p. 4).

Substantially identical language appears in the Report of the House Committee on the Judiciary (H. R. Rep. No. 2287, 74th Cong., 2d Sess., p. 8).

Respondent argues that such expressions of legislative intent must be viewed in the light of the general objective of the Robinson-Patman Act, viz., to prevent abuses by large buying groups which the original Clayton Act was not thought effectively to prevent, and that there was no intent to change the law insofar as competition among sellers is concerned. This position also has considerable support in the legislative history. Thus, in the same Report of the Senate Committee quoted by Counsel supporting the complaint, we find the following statement with respect to the general purpose of the Act.

The bill proposes to amend section 2 of the Clayton Act so as to suppress more effectively *discriminations between customers of the same seller* not supported by sound economic differences in their business position or in the cost of serving them (Senate Rep. No. 1502, 74th Cong., 2d Sess., p. 3) [italics supplied].

Further supporting respondent's position is the following statement by Congressman Patman, co-author of the bill:

What are the objectives of this bill? Mr. Chairman, there has grown up in this country a policy in business that *a few rich, powerful organizations by reason of their size and their ability to coerce and intimidate manufacturers have forced those manufacturers to give them their goods at a lower price than they give to the independent merchants* under the same and similar circumstance and for the same quantities of goods. Is that right or wrong? It is wrong. We are attempting to stop it, recognizing the right of the manufacturer to have a different price for a different quantity where there is a difference in the cost of manufacture. [Italics supplied.] (80th Cong. Rec. 8111).

Congressman Patman further stated that the proposed bill was:

* * * designed to accomplish what so far the Clayton Act has weakly attempted, namely, to protect the *independent merchant*, the public whom he serves, *and the manufacturer* from whom he buys *from exploitation by his chain competitor.* [Italics supplied.] (79th Cong. Rec. 9078).

It is apparent from the foregoing that what Congress was concerned with was the evil of the large buyers forcing manufacturers to give them favored price treatment as against their smaller competitors, rather than with territorial price differences initiated by manufacturers for their own purposes.

In support of its argument that the Robinson-Patman Amendment was not intended to change the test under the Clayton Act, insofar as competition between sellers is concerned, respondent cites statements made by Congressman Patman in his book, *The Robinson-Patman Act.* While the Congressman's book is not technically a part of legislative history, his views are significant as reflecting the understanding of a co-author of the bill. Thus, at page 59 of the book there appears the following answers to questions submitted to the Congressman, involving the question at issue:

> Question. Can I sell at different prices to different customers in different cities who are not in competition with each other?
>
> Opinion. Yes, so long as the sale is not below cost. There would be no discrimination within the application of the Act, *unless a deliberate attempt were made to destroy, or substantially lessen, competition in some locality, or in primary lines of commerce.*
>
> * * * * * * *
>
> Question. Is it a price discrimination under the Act for a manufacturer to sell either to a wholesaler or retail buyer, at a point say in Vermont, at a different price than a buyer doing a similar type of business in Miami, Florida?
>
> Opinion. If the two stated customers do not regularly overlap in their normal trading areas, there would be no discrimination within the provisions of the Act, *unless purposefully low prices were maintained in order to destroy competition.* [Italics supplied).

In the opinion of the hearing examiner, the legislative history does not sustain the position of counsel supporting the complaint that the Robinson-Patman Amendment was intended to protect individual competitors from injury. While some of the statements referred to by counsel do give some support to this position, they must be viewed in the light of the fact that the attention of Congress was focused on protecting the independent merchant from his larger competitors. At one time there had been some question whether the Clayton Act was even applicable in a secondary-line injury case. While this question has been settled by the *American Can Company* case,[4] there still appeared to be some question as to how much of a showing of injury was required to establish injury in a secondary-line case. It was in the light of this background that the Robinson-Patman Act was enacted.

[4] *George Van Camp & Sons Co.* v. *American Can Company,* 278 U. S. 265.

However, while Congress intended to insure that the enforcement of the act was not frustrated by the requirement for a generalized showing of injury, it was not its intention, in the opinion of the examiner, to liberalize the test of injury to the extent of making it one of injury to an individual competitor. The language used in the amendment, it may be noted, refers to injury to "*competition*" with the grantor or grantee of the discrimination and to injury to a "*competitor*" of the grantor or grantee of the discrimination. The fact that a competitor has been injured in a local price-cutting case may tend to show that competition with the grantor has been affected, but it does not follow in every case that because a competitor has been injured, competition has been affected.

It may be argued that to interpret the added language as requiring a showing of injury to competition, rather than to a competitor, is to give the language an interpretation not substantially different from that part of the original Clayton Act which (in addition to the test of tendency to "monopoly") refers to discriminations which may "substantially * * * lessen competition * * * in any line of commerce". While this may be true, it does not prove that Congress intended to make the test one of injury to a "competitor". In the opinion of the examiner, the new language was added out of an abundance of caution, because of Congress' concern that the requirements under the old Act that there must be a substantial lessening of competition "in any line of commerce", coupled with the reference to monopoly, had been or might be subject to too strict an interpretation.[5] The language used in the amendment reflects the then current mood for liberalization of the Act, but yet does not evidence an intent of establishing, as the applicable test, injury to an individual competitor. Whatever may have been its intent in secondary-line injury cases with which it was primarily concerned, it is the opinion of the examiner that it was not the intent of Congress to proscribe price differences in different geographical areas merely because of injury to an individual competitor of the grantor.

More recent developments in the dichotomous debate on the subject of injury to competition versus injury to a competitor reflect a crystallization of views in favor of the former concept, as being the controlling one under the Robinson-Patman Act. In considering amendments to the Act as a result of the furor created by the so-called basing-point cases, the House Conference Committee stated its views as follows:

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[5] See, e. g., the reference in Sen. Rep. No. 1502, 74th Cong., 2d Sess., p. 4 (quoted *supra*) to the effect that the original language "has in practice been [subject to] too restrictive [an interpretation] * * *".

Competition is a contest between sellers for the business of a buyer. In such a contest one seller gets the order while other sellers lost the order. That is competition. The seller who did not get the order may feel injured, but that does not mean that competition has been injured. In any competitive economy we cannot avoid injury to some of the competitors. The law does not, and under the free enterprise system it cannot, guarantee businessmen against loss. *That businessmen lose money or even go bankrupt does not necessarily mean that competition has been injured.* "Competition," Mr. Justice Holmes observed, "is worth what it costs."

We must always distinguish between injury to competition and injury to a competitor. To promote and protect *competition* is the primary function of the antitrust laws. However, we cannot guarantee *competitors* against all injury. This can only be accomplished by prohibiting competition (H. R. No. 1422, 81st Cong., 1st Sess., 1949, p. 5) [italics supplied].

In a letter to the Commission dated June 26, 1950, the Senate Committee on Interstate and Foreign Commerce addressed a series of questions to the Commission, including several on the question at issue. Question 11 of these questions specifically asks whether the Commission concurs in the above-quoted statement of the House Committee on the "meaning of the word 'competition'." The reply of the Commission was:

Yes. Insofar as the distinction between injury to competitors and injury to competition is concerned, see answer to Question 10.

Question 10, to which reference is made in the Commission's reply, and the Commission's answer thereto are as follows:

Question 10: Does the Commission regard the purpose and the function of the Clayton Act to be protection of "competition" against injury by price discriminations, or does it regard the purpose and function of that act to be protection of individual competitors against such injury?

Answer: As you know, the applicable language of Section 2 is to condemn discrimination in price "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." Thus the controlling statute deals with the protection of "competition." Because of particular factual situations which may exist, the Commission cannot make the distinction implied in your question in such sweeping terms. To illustrate this point, you might consider the case of E. B. Muller & Company, et al. v. Federal Trade Commission (142 F. (2d) 511), in which the Court of Appeals for the Sixth Circuit affirmed an order of the Commission prohibiting certain discriminations in price. This was a case in which two allied but separately incorporated companies were operated as a unit and had but one domestic competitor. They sought to drive this competitor out of business, and one of the means used was sectional price discrimination. *Injury to this competitor sufficient to threaten its continued existence was obviously injury to competition, for this single competitor furnished the only competition the respondents had. The Commission does not wish to be understood as stating that injury to a com-*

petitor in all cases constitutes injury to competition. The loss of a single sale as a result of price discrimination obviously constitutes an injury to the competitor who lost the sale, but it does not automatically follow that competition is injured thereby [italics supplied] (Letter of Aug. 14, 1950, to Chairman, Senate Committee on Interstate and Foreign Commerce, by Federal Trade Commission).

The *Muller* case, upon which counsel supporting the complaint places reliance, is not authority for the proposition that injury to a competitor is the controlling test under the statute since, as the Commission's answer quoted above indicates, the competitor was the *only* competition in the area, and injury to it "was obviously injury to competition." The Court, in sustaining the Commission's order and findings, referred to the fact that the Commission had made a finding that the defendant had sold below cost "*with intent to injure competition, principally in the New Orleans territory* * * *" [italics supplied].

Counsel supporting the complaint also places considerable reliance on *Moss* v. *FTC*, 148 F. 2d 378 (C. A. 2, 1944), as sustaining his concept of injury. The Court there held that after the Commission had shown sales to different customers at different prices, the respondent then had the burden of justifying the discrimination. If the holding of this case were to be literally accepted, it would go beyond even the extreme position urged by counsel supporting the complaint in this case, since all that would be required would be a showing of sales to two different purchasers at two different prices, and respondent would then have the burden of showing that there had been no injury or no reasonable probability of injury to competition. The Court's decision in the *Moss* case must be read in the light of the findings actually made by the Commission on the evidence before it. The Commission had found that respondent's prices to some of its customers were such that its "competitors could not meet such prices without suffering a loss on such business and in one instance a competitor was forced out of business as a result of such acts and practices of the respondent". On the basis of this finding, the Commission concluded that the effect of such price differences "upon competition with the respondent was and may be substantially to lessen competition with respondent in the sale and distribution of rubber stamps * * *". In a memorandum to the Commission on the subject of primary-line injury, the Commission's General Counsel has expressed the view that the Court's decision in the *Moss* case has "beclouded" the issue of what constitutes proof of injury in such cases. After taking note of the proof of injury offered and the Commission's finding based thereon that the discriminatory prices of respondent "had a substantially injurious effect upon competition", the General Counsel states that the Court, "apparently mis-

understanding the Commission's position, stated that the Commission's argument was that having proved sales at different prices this 'put upon * * * (Moss) the burden of justifying the discrimination' * * * *". "This, however," says the General Counsel, "is a view which the Commission has never adopted * * *."[6]

While the examiner finds himself in agreement with respondent that the test is not one of mere injury to a competitor, the examiner does not agree with respondent's contention that there must be a showing of "predatory intent, collusion or tendency to monopoly". In support of its position, respondent cites the following expression of the Commission's policy in geographic pricing cases:

> Injury to competition which one seller imposes upon another raises few problems since it is a conception which can be traced back to the beginnings of the antitrust laws. It usually arises when the discriminating seller quotes low prices to the customers of his competitors in such a way that he jeopardizes the continuance of effective competition by these competitors and thus tends to acquire a monopoly of the commodity sold. *Except where such a tendency toward monopoly appears,* the Commission does not regard an effort to get business from a competitor by sporadic price reductions as illegally injurious to that competitor. Injury to competition through common use of a discriminatory pricing pattern by sellers appears, as in the *Cement* case, when discrimination is an inherent part of the *collusive arrangement* through which competition is set aside. *Thus the test of injury on the selling side of the market is to be found in collusion or in tendencies toward monopoly* (Emphasis supplied) (Commission Policy Toward Geographic Pricing Practices, 3 CCH Trade Reg. Rep., par. 10,412).

While the views thus expressed do tend to support respondent's position, they must be interpreted in the light of the problem the Commission was discussing, namely, certain geographic pricing systems such as basing-point systems, f. o. b. price systems, and similar systems there discussed. The Commission was evidently seeking to allay fears which had been created that certain court decisions would result in outlawing all delivered pricing systems, even though there was no collusion between the parties using them, and no tendency toward monopoly. In the opinion of the examiner, the type of geographic pricing involved in respondent's territorial pricing system was not within the contemplation of the Commission in the above memorandum, and the examiner does not regard the views there expressed as entirely controlling here, except insofar as they suggest that injury to individual competitors is not the test under the Act. Certainly there is nothing in the Act requiring any showing of collusion in a primary-line injury case. While the Act does establish a tendency-to-monopoly

[6] Memorandum, General Counsel to Commission, dated Sept. 26, 1952, p. 6.

test, this is the severest of the alternative requirements for showing injury.

Respondent also cites in support of its position the following expression of opinion by judge Yankwich:

* * * the object of the antitrust law is to encourage competition. Lawful price differentiation is legitimate means for achieving the result. It becomes illegal only when it is tainted *by the purpose of unreasonably restraining trade or commerce or attempting to destroy competition or a competitor*, thus substantially lessening competition, or when it is so unreasonable as to be condemned as a means of competition [italics supplied] (*Balian Ice Cream Co. v. Arden Farms Co.*, 104 F. Supp. 796, 807).

While the examiner finds himself in agreement with the learned court that the existence of a purpose to destroy competition may be illegal, he does not regard the showing of such a purpose as a *sine qua non* to a showing of injury in a primary-line injury case. It should be noted that the court was there dealing not only with an alleged Clayton Act violation but one involving the Sherman Act as well and was expressing himself generally with respect to the "antitrust law." That an intent or purpose to injure or destroy competition is not a necessary element of proof under the Clayton Act seems evident from the fact that such a requirement appeared in the first draft of the bill and was stricken out in the Senate (Sen. Doc. No. 584, 63d Cong., 2d Sess., 1914, p. 4; Sen. Doc. No. 585, 63d Cong., 2d Sess., 1914, p. 3).

Turning to the actual wording of the statute, it will be noted that the requirement for showing of injury is satisfied if the effect of the discrimination charged "may be to substantially lessen competition * * * in any line of commerce, or to injure, destroy, or prevent competition with" the grantor or grantee of the discrimination. The difference between these two concepts, if there be one, is slight since the Commission has interpreted the word "substantially" as modifying both phrases in this portion of the Act.[7] The examiner has already indicated above his views as to why the latter test was inserted in the Act. While the line of demarcation between the concept of substantial injury to competition in any line of commerce, and that of substantial injury to competition with the grantor of a discriminatory price may

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[7] In the memorandum of the Commission's General Counsel, referred to above (Footnote 6), the statement is made (p. 2):

"* * * in the Commission's view, the standard of *substantiality* of effect in both the primary line and the secondary line * * * was the correct one to follow *also under* the statute, as amended *by the Robinson-Patman Act* * * *" [italics supplied].

See also Austin, *Price Discrimination under the Robinson-Patman Act*, where the author states (p. 42):

"The word 'substantially', carried over from old Section 2, also limits the words added by the Robinson-Patman Act. The discrimination must be one the effect of which may be *substanitally* to injure, destroy or prevent competition."

be difficult to precisely define, certain it is that the latter involves something more than a showing of injury to a competitor. It is in the light of this concept of injury that the evidence hereafter considered will be examined.

C. *The commerce question*

This problem is limited to the alleged discrimination which occurred in the Southern (Dallas) Division. Prior to November 1946, the bleach which respondent sold in this area had been shipped from its plant in St. Louis. However, in November 1946, it completed a plant in Dallas, and all the bleach sold in the area was thereafter shipped from Dallas. It is the position of respondent that the record fails to establish any sales after that date from the Dallas plant to points outside the State of Texas at prices different from those charged within the state and that, accordingly, there has been no showing of any discrimination "in the course of * * * commerce," as required under the Act.

Counsel supporting the complaint argues that respondent's contention is based on an incorrect version of the facts, and, further, that respondent has erroneously applied the law insofar as the commerce requirement of the Act is concerned. With respect to the facts, counsel supporting the complaint points out (1) that respondent has admitted engaging in commerce in the Texas area for the ten-year period prior to November 1946, and (2) that even after the latter date, sales from the Dallas plant were made in commerce. Insofar as the first point is concerned, it is sufficient to note that while the shipments from St. Louis to the Dallas area prior to 1946 were undoubtedly made in the course of commerce, the bulk of the evidence with respect to alleged discrimination in price and injury to competition in the Texas area relates to the period after 1946. The second point made by counsel supporting the complaint is based on a misunderstanding of respondent's position. Respondent's position is not that there were no sales made from the Dallas plant to other states, but that there was no showing of any price differences between sales made in Texas and those made in the other states served by the Dallas plant. Counsel cites various exhibits purporting to show that respondent's Southern or Dallas Division included parts of New Mexico, Colorado and Oklahoma, as well as the State of Texas. While this may be true, the exhibits referred to do not disclose any sales in these territories at net prices different from those in Texas, except during the month of June 1949. Most of the exhibits merely show that the Dallas Division included territories in other states (CXs 4, 5, 6 and 56). While two of the exhibits do reflect actual sales and deals between April 1949 and

October 1949, in the various territories of the Southern Division, they disclose a different deal in only a single territory and only for a period of one month. Except for the month of June 1949 when the Oklahoma territory had no deal and the other territories had a 1–9 deal, the exhibits refered to by counsel disclose that the deals in Albuquerque and Oklahoma territories were identical with those in the Texas territories (CX 27 and 55).

However, while it may be true, as respondent contends, that the record is lacking in substantial evidence of interstate sales at different prices from the Dallas plant after November 1946, it is the opinion of the examiner that the commerce requirements of the Act have been satisfied insofar as this area is concerned. While, admittedly, the Act requires that the discriminator shall be "engaged in commerce" and that the discrimination shall have occurred "in the course of such commerce", it is not necessary that all sales shall have occurred "in the course of such commerce", but it is sufficient that "either or any of the purchases involved in such discrimination are in commerce". Thus it is clear, from the language of the statute, as well as the legislative history, that the Act was intended:

* * * to extend its scope to discriminations between interstate and intrastate customers, as well as between those purely interstate (Senate Report No. 1502, 74th Cong., 2nd Sess., 1936, p. 4).

While it may be that the record fails to show sales in commerce at different prices from the Dallas plant after November 1946 (except for the month of June 1949), it does appear that sales and shipments from other plants of respondent were made in commerce after November 1946, at prices different from those charged in the Dallas area. This, in the opinion of the examiner, is sufficient to satisfy the commerce requirements of the Act. The undersigned does not understand these requirements to be applicable only on a plant basis. In determining whether discrimination has occurred in the course of commerce, consideration need not be limited to a single plant of the offending party. If a respondent with a plant in California makes sales in various parts of the country at prices different from those charged in the State of Texas, the fact that the sales from its Texas plant are all made at the same price does not, in the opinion of the examiner, prevent the price differences between the two plants from being considered as discrimination occurring in the course of commerce.

In opposition to this position, respondent relies on the case of *Myers* vs. *Shell Oil Co.*, 96 F. Supp. 670, where the plaintiffs, operators of service stations in the Los Angeles area, brought an action

for treble damages against the defendant oil company, charging it with having discriminated against them in the prices at which it sold its petroleum products in the Western States area. Plaintiffs failed to show that they were in competition with service stations outside of California. It further appeared that all the gasoline delivered to plaintiffs by the defendant was refined in the State of California. The court held that the transaction between plaintiffs and defendant was wholly intrastate, and that there could be no recovery since "it is essential that * * * the transactions of which they complain were made in the course of such commerce". Assuming the correctness of the court's holding there, it is distinguishable from the instant situation. As private litigants, it was deemed necessary for plaintiffs there to show that they were damaged by a discrimination which occurred in the course of commerce. The Commission, however, is not in the position of a wholesaler-private litigant in the State of Texas, which must show that it was damaged by virtue of a sale made at a lower price in commerce. It is in the position of proceeding in the public interest to stop alleged discrimination in price between Texas and areas outside of Texas, which discrimination has allegedly injured respondent's local competitors. Unlike plaintiffs in the *Myers* case, who were not in competition with favored service stations outside the state, those allegedly injured here (respondent's competitors in Texas) are in competition with respondent, which operates in other states and sells at different prices in those states.[8] It is therefore concluded that the difference in prices between the Texas territories and other areas may be regarded as discrimination occurring in the course of commerce, even though all of the shipments from the Texas plant were made at the same price.

D. *The motion to strike*

Respondent has moved to strike portions of the testimony of seventeen witnesses on the ground that such testimony constitutes inadmissible hearsay evidence. The testimony in question was given by representatives of a number of competing manufacturers of bleach, who testified concerning statements made by buyers or other representatives of wholesale grocery customers to the effect that they were going to cease doing business with the particular manufacturer, or were going to order less merchandise from him, because they were getting a better deal from Purex. This testimony fell into two

[8] See *Sun Cosmetic Shoppe* v. *Elizabeth Arden Sales Corp.*, 178 F. 2d 150 (C. A. 2), cited by the court in the *Myers* case, where the fact that the alleged injured plaintiff was in competition with a retailer in another state was held sufficient to establish a cause of action.

categories. The first consisted of testimony by a representative of the competing manufacturer who, himself, talked to the buyer or other representative of the wholesaler and was personally told why the wholesaler was ceasing to do business with, or was decreasing its orders from, the witness' company. In the second category the witness had not himself talked to the wholesale customer, but testified as to information reported to him by one of his salesmen or brokers, or some other representative of his firm, regarding a conversation which the latter had had with the wholesaler, in which the wholesaler had given his reasons for declining to do business with the witness' firm.

Respondent, in its main brief, contended that both of these categories of testimony were inadmissible, the first being hearsay, and the second being hearsay upon hearsay. In its reply brief, respondent apparently concedes that the first category of testimony may be admissible, as an exception to the hearsay rule, to show the state of mind of the declarant (the buyer), but argues that such testimony would be admissible only after other requisite facts had been established by independent reliable, probative and substantial evidence, such as the fact that respondent had sold merchandise to the witness' company, the price at which such merchandise was sold, the extent of any deals offered, and other similar facts. Counsel supporting the complaint contends that all of the testimony in question is admissible under recognized exceptions to the hearsay rule, and that, in any event, the Commission is not bound by the technical rules of evidence.

While it may be that the technical rules of evidence do not apply in Commission proceedings,[9] the Administrative Procedure Act requires that findings must be based on evidence which is "reliable, probative, and substantial".[10] Uncorroborated hearsay, which deprives respondent of the basic right of cross-examination, does not constitute reliable or substantial evidence, and should not be made the basis of any findings in an administrative proceeding.[11] Since findings cannot be based on such evidence, it is ordinarily not desirable to admit such evidence into the record, since a claim might later be made that the findings of the examiner or the Commission were based, at least in part, on such evidence.

With respect to the first category of testimony objected to, it is the opinion of the examiner that it is admissible, as an exception

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[9] *FTC* vs. *Cement Institute,* 333 U. S. 683, 706; *Phelps-Dodge Refining Corp.* vs. *FTC,* 139 F. 2d 393, 397; *U. S.* vs. *United Shoe Machinery Corp.,* 89 F. Supp. 349, 355.

[10] Section 7 (c), Administrative Procedure Act.

[11] *Consolidated Edison Company* vs. *N. L. R. B.,* 305 U. S. 197, 329; *Tri-State Broadcasting Co., Inc.* v. *F. C. C.,* 96 F. 2d 567, 566.

to the hearsay rule, to show the state of mind or motive of the buyer in refusing, or as part of the *res gestae* of the act of refusing, to continue business relations with the witness' firm.[12] While, as respondent correctly points out, the facts stated in some of the conversations with the buyers as to what Purex's price was, or what deal Purex was offering the buyer's firm, must be established by other independent evidence, to the extent that the statement of the buyer reflects his state of mind or motive in refusing to deal with the witness' firm, it is material, and is admissible for that purpose. Such testimony is not, of course, conclusive, and respondent may offer other testimony, either through the buyer, or through other witnesses, to contradict such testimony, or to show that there were other reasons for the refusal to deal with the witness' firm. Although, as respondent points out in its reply brief, counsel in support of the complaint, despite his disclaimer to the contrary (Answering Brief, p. 37), has sought in a number of instances to use the information related to the witness by a customer, testimonially, to establish the prices and deals of respondent, the examiner will not give the testimony in question any weight for that purpose. The examiner's rulings in this regard will appear from the discussions of the evidence concerning injury to competition in a succeeding section of his decision.

With respect to the second category of testimony, where the witness testified, not as to statements made directly to him by a customer, but as to information received from one of his salesmen, or some other third person, concerning statements made by a representative of the customer to such third person, it is the opinion of the examiner that such testimony is clearly hearsay evidence, and is not within the exception discussed above. Although counsel supporting the complaint has suggested that such testimony may be admissible as being in the nature of reports made to the witness in the regular course of business by a salesman or other representatives of his company, the examiner does not regard this testimony as falling within that category. While written reports made by salesmen contemporaneously with the occurrence of an event, when the motive for falsification is at a minimum, might have testimonial value, the testimony of a witness in 1952 as to what a salesman orally reported to him several years ago regarding the latter's conversations with third persons does not fall within this

[12] *Lawlor* vs. *Loewe,* 235 U. S. 522; *Hubbard* vs. *Allyn,* 200 Mass. 166, 86 N. E. 356, 360; *Brannen* vs. *Bouley,* 272 Mass. 67, 172 N. E. 104; *Carpenters Union* vs. *Citizens Committee,* etc., 333 Ill. 225; 165 N. E. 393, 404; *Greater New York Live Poultry C. of C.* vs. *U. S.,* 47 F. 2d 156, 159, *cert. den.* 283 U. S. 837; *American Cooperative Serum Ass'n* v. *Anchor Service Co.,* 153 F. 2d 907, 912.

category.[13] Where the witness himself has talked to the buyer, respondent has the opportunity to cross-examine him in order to ascertain to whom he spoke and to otherwise check the correctness of the reported conversation. This safeguard is lacking where the witness is testifying as to information received orally from third persons as a result of alleged conversations with unnamed representatives of a customer.

While the examiner believes that the testimony in the second category is inadmissible, no action will be taken at this time to strike such testimony. The motion filed by respondent to strike the testimony does not designate the portions of the record to be stricken, except in a general way. In view of the fact that this proceeding is being disposed of by an order of dismissal, the hearing examiner considers it unnecessary to remand the matter to respondent with a request that it designate by page and line the portions which it considers objectionable. However, as will appear from the discussion of the evidence in a succeeding portion of this decision no reliance will be placed upon such testimony in the evaluation of the evidence.

IV. Primary line injury.

Counsel supporting the complaint sought to show injury to a number of respondent's competitors in various midwestern and southern markets. Despite its bulk, it is the opinion of the hearing examiner that the record is lacking in reliable, probative and substantial evidence of injury to any of respondent's *competitors*, and that, in any event, the evidence does not establish a prima facie case of injury to *competition* with respondent in any of the markets where it operates.

In view of the fact that the dismissal of this charge is based largely on the lack of reliability or substantiality of the evidence offered by counsel supporting the complaint, it is necessary to discuss this evidence somewhat in detail in order to make clear the basis of the examiner's conclusion in this regard. This discussion is necessarily prolonged because of the number of competitors and territories involved. Set forth below is an analysis of the evidence offered as to primary line injury in each of the territories and with respect to each of the competitors as to whom evidence of injury was offered.

A. The Twin Cities and Dakota markets (including parts of Iowa and Nebraska)

Counsel in support of the complaint endeavored to show injury to competition with respect to the manufacturers of the following

[13] It may be noted that while the testimony of at least one witness indicated that it was based upon written reports made by broker-representatives of his company (R. 1229), no effort was made to produce such written reports at the hearing.

bleaches in this territory: "Kleen-ez", "Save-a-day", "Hilex", "Linco", "Hercules" and "Clorox". Most of the evidence involved alleged injury to competition in the so-called Twin Cities area of Minneapolis and St. Paul, but some evidence was offered with respect to alleged injury to some of the companies manufacturing the above bleaches in adjacent areas and states. Respondent's list prices during the period in question varied from about $1.40 on cases of half-gallon size to $1.50 on quart and gallon cases and $1.65 on cases of pint size. Beginning on April 14, 1947, and continuing for most of the period until December 1950, respondent offered a series of deals, mainly in the form of free goods. Two of the deals involved an offer of a case of quarts free with each three cases of gallons purchased, and another offered a case of quarts free with each two cases of half-gallons purchased. The effect of these deals was to reduce only the price of the gallon and half-gallon sizes. However, on July 1, 1948, and continuing until December 16, 1950, respondent offered a deal of one case free with each two cases purchased, irrespective of size, thereby resulting in an across-the-board reduction of 33⅓% for all sizes. The evidence offered to show injury to the manufacturers of each of the above brands of bleach by these deals is discussed below.

1. "Kleen-ez" bleach

This product was manufactured by Continental Laboratories of Minneapolis, Minnesota, which operated from about 1934 until it went into bankruptcy in 1952.[14] The company was originally a partnership consisting of Louis Shapiro and Joseph Goldman until 1938, at which time the latter left the business. Shapiro continued on as sole proprietor. The operation was a relatively small one, employing about four men in the manufacturing of bleach, and Shapiro himself did most of the selling. For the most part the company sold directly to the retail stores, but had a few jobber accounts. Its sales averaged from 45,000 to 50,000 cases a year which, on the basis of an average selling price of about $1.20 per case, would amount to less than $60,000.00 in gross sales per year. The company's plant and main market was in the Twin Cities area which, it was testified, accounted for about 65% of its sales. It also alleged to have had a number of accounts in and around Omaha, Nebraska, until about 1937–1939, and in the Sioux City, Iowa, and Sioux Falls, South Dakota areas until about 1945–1946. From 1946 until the company's bankruptcy in 1952,

[14] Although the time of this company's cessation of operations was at one point in the testimony fixed as 1951 (R. 1385), it was subsequently stated to be 1952 (R. 1656, 1643).

its sales were confined primarily to the Twin Cities area and the vicinity of Fargo, North Dakota.

Counsel supporting the complaint endeavored to show that Kleen-ez' retirement from the above markets and its eventual bankruptcy were due to Purex's competition and, more particularly, to the various deals which Purex allegedly offered and which Kleen-ez could not meet. Counsel relies primarily on the testimony of the witness, Shapiro, and to a minor extent on that of his partner, Goldman. This testimony is analyzed below in relation to each of the areas where it is claimed that Continental Laboratories was injured as a result of Purex's competition:

a. *Omaha, Nebraska*

Shapiro testified to having been pushed out of the Omaha market by Purex at dates which he fixed variously as 1939 (R. 1396), 1937 (R. 1655) and "37 or the first part of '38" (R. 1658). In his direct examination he claimed that his company had about "fifty or sixty retail accounts in Omaha" which it lost (R. 1398), but on cross-examination he increased the number of accounts lost to "about seventy-five to a hundred retail stores" (R. 1657). While testifying on direct examination that he did business with *retailers* in Omaha and "didn't have any jobber accounts" (R. 1398), Shapiro testified on cross-examination that "he didn't do any business [with retailers] in Nebraska," but sold to a jobber in Sioux Falls (Kaplan Wholesale Grocery), which, in turn, did business in Nebraska (R. 1634). Although counsel supporting the complaint claims that Shapiro's volume of sales in the Omaha market, allegedly lost because of Purex, was 10,000 to 12,000 cases per year, reference to Shapiro's testimony reveals that he gave this as a figure of what he "might have lost" and that he finally conceded he "really [didn't] remember how many cases we sold in the area, because I haven't any records" (R. 1658).

A comparison of Shapiro's and Goldman's testimony reveals a divergence of opinion as to the area in which Purex competition affected them during the period in question and further raises serious doubt as to whether it did have any material effect on them. Thus, while Shapiro testified that the difficulty with Purex was restricted to the Omaha area since Purex was "pretty fair competition" in the Sioux City market during the 1937 period and that they "never had no bad deals there [Sioux City]" (R. 1401), Goldman claimed that the area of injury included not only Omaha but also the Sioux City market (R. 1432). However, despite Shapiro's claim of injury in the Omaha market and Goldman's claim that they were also driven out of Iowa, Goldman admitted on cross-examination that his leaving the partner-

ship in 1938 was due to an accident in which he had been involved, and that the "business was a profitable business and [his leaving] was not because the business was going down or losing money" (R. 1448).

Aside from the confusion and contradiction revealed by the above testimony as to where and to what extent Purex was causing injury to Kleen-ez, the fatal weakness in the evidence offered with respect to injury competition in the Omaha market is the complete absence of reliable evidence as to what deals, if any, Purex had in this area during 1937–1939. The earliest reliable evidence in the record of any Purex deal in this area is a deal which went into effect from April 8, 1947, almost ten years after the time Shapiro claimed Purex had forced him out of the Omaha market (CX 7). Counsel supporting the complaint refers in his brief to testimony by Shapiro and Goldman as to what various customers told them with respect to Purex's prices and deals in this area.[15] However, such testimony is purely hearsay, insofar as establishing the fact of what Purex's prices and deals were at that time, and no reliance can be placed upon such testimony for that purpose. Lacking reliable evidence of discrimination in the Omaha market during the 1937–1939 period it becomes superfluous to consider the testimony of alleged injury, although such testimony is not without significance in reflecting on the weight which should be given to the testimony of the witness Shapiro.

b. *Sioux Falls, South Dakota, and Sioux City, Iowa*

Shapiro testified to his being forced to quit the Sioux Falls, South Dakota, and Sioux City, Iowa, territories during 1945 or early 1946, so that by 1946 he had lost about 80% of his territory outside of the Twin Cities area, which loss he attributed to the fact that he "couldn't sell merchandise on account of Purex" (R. 1392, 1402). Although Shapiro named a number of accounts whose loss counsel seeks to attribute to Purex, Shapiro's testimony reveals that in some instances he didn't know whom he lost these accounts to and that in others the loss was due to the competition of Hilex and Clorox bleach as well as Purex (R. 1645, 1402). Thus, in the case of his main account in Sioux City (Kaplan Wholesale Grocery), he conceded that he didn't know whom he lost the account to, "I just lost him" (R. 1645).

However, irrespective of whom Shapiro lost these accounts to or whose competition was responsible for his losing them, the evidence offered with respect to the Sioux Falls and Sioux City areas is subject to the same fatal infirmity as that pertaining to the Omaha territory,

[15] Shapiro testified that a grocer in Omaha had reported Purex's price to him as 80 cents per case (R. 1397), while Goldman claimed that customers informed him the price was 90 cents per case (R. 1431).

viz., there is no reliable evidence in the record as to what deals, if any, Purex had in these areas during the 1945–1946 period. The earliest reliable evidence in the record of any deals in the Sioux City area is a deal of one free case with three from April 8, 1947, to April 15, 1947 (CX 7). This could not have had any effect on Kleen-ez' departure from this area, since, according to Shapiro, he lost the Sioux City area in "'45 or maybe '46, early '46" (R. 1402). Similarly, in the Sioux Falls territory, the earliest reliable evidence of any Purex deals is a deal involving one free case of quarts with three cases of gallons purchased, which was in effect from April 14, 1947, to August 15, 1947 in the Minneapolis territory, with which the South Dakota territory was merged in 1946. However, Shapiro had quit this "market entirely in 1945, between '45 and '46" (R. 1392). Other than some hearsay testimony by Shapiro that a customer in the Sioux Falls area told him that Purez was giving him a "terrific deal" and that the customer was reselling the bleach at 29 cents per gallon, there is no other evidence of Purex's prices and deals during the 1945–1946 period.

c. *The Twin Cities area*

The remainder of Shapiro's testimony related primarily to the Twin Cities area, to which his business was mainly confined from 1946 until 1952. In this area he claimed that he sustained a deficit of $4,000 to $5,000 a year for four or five years, until he finally went into bankruptcy in 1952 (R. 1391, 1655). His testimony with regard to this area was characterized by the same contradiction and confusion as that involving the Omaha, Sioux City and Sioux Falls territories. During his direct examination he named a number of accounts which allegally "*cut [him] out altogether*" in the Twin Cities area due to Purex's competition, and testified, in addition, that he had "to weaken my price" in order to retain other accounts in the market (R. 1414). On cross-examination, he testified, "*I didn't say I lost any customers*—I said all I had to do was to *weaken the price* in order to meet Purex competition; that is where I broke my neck" (R. 1671). However, at still another point in his cross-examination, he claimed that he "*maintained [his] price*" but granted an advertising allowance in order to meet competition (R. 1638). While claiming that his price was never lower than $1.10 to $1.20 a case between 1946 and 1952 (R. 1643) and that he had never sold any "dollar stuff" (R. 1638) his testimony reveals that in 1946 he sold to Kaplan Wholesale Grocery and to Grocers Warehouse for "a dollar to a dollar ten" (R. 1647), that he also sold another brand of bleach under the name "Brightex" to various accounts in the Twin Cities area at from 80¢ to $1.00 a case (R. 1653), and sold some "secondhand merchandise" to one jobber for between

80¢ to 90¢ (R. 1655). After insisting that he had maintained a single price policy, Shapiro finally conceded that he, along with all the others in the market, did a little "price chiseling" (R. 1672).

Shapiro's testimony with respect to having lost accounts in the Twin Cities area is in direct contradiction to the testimony and evidence adduced through other witnesses. Thus, he testified that he was cut out altogether "by Applebaum's in St. Paul [which] was a terrific outlet" (R. 1414), whereas the testimony of an official of Applebaum's, who was also called as a witness by counsel supporting the complaint, reveals that they didn't start to buy from Purex until 1950 or 1951 (at which time the price was $1.32 per case plus a 2% fee to the jobber), and that they didn't drop any other product at the time they took on Purex (R. 1897). At one point in his testimony Shapiro claimed that he lost the wholesale account of Hancock-Nelson in 1947 because of Purex (R. 1670), while at another point he stated that he had only sold to that account in 1945, some "second-hand merchandise" (R. 1654), this being prior to the time of any trouble with Purex. An examination of the figures supplied by Hancock-Nelson reveal no purchases of Kleen-ez between 1947 and 1951 (CX 107A–E). Another account whose loss Shapiro attributed to Purex was one of the largest wholesalers in Minneapolis, May Brothers (R. 1670). Yet the figures supplied by the buyer for that account revealed no purchases whatsoever of Kleen-ez during this period (CX 106A & B).

The fact that Shapiro's company went into bankruptcy in 1952 is indicative of the fact that it was involved in some financial trouble. However, it cannot be determined, on the basis of the evidence in this record that the deals offered by Purex were a material factor in its demise. Shapiro produced no books or records showing what customers he had, what his prices were, the extent and trend of his sales, and the various items of profit and loss in his business operations, which could serve as the basis for a reasoned judgment as to the cause of his financial difficulties. While he sought to attribute to Purex the major responsibility for his difficulty, the nature and quality of his testimony and his demeanor as a witness were such as to engender a complete lack of confidence in his reliability as a witness. His glibness concerning events going back as much as 15 years involved him in numerous contradictions and inconsistencies. Much of his testimony was based on hearsay and surmise. In the absence of corroborating documentary evidence or other reliable testimony, the examiner can place no reliance on his unsubstantiated claims of injury by Purex. It is also not amiss to note, in evaluating Shapiro's testimony, that he was not a disinterested witness, having purchased

from his trustee in bankruptcy a cause of action against the respondent for violation of the Antitrust Laws.

2. Sav-a-day bleach

This bleach was manufactured and distributed in the Minneapolis area by the Barton Chemical Company until 1951, when that company ceased operating and leased its business to Christman Chemical Company. Although the full extent of Barton's operations do not appear from the record, it apparently had its head office in Chicago and also operated a plant in Memphis, Tennessee. Its Twin Cities operation appears to have included the states of Minnesota, North Dakota, and part of Wisconsin. Its plant was located in St. Paul, where it employed three employees in the manufacture of its bleach, a plant manager, and an office girl.

The case of injury to Barton is based largely on the testimony of two former Barton plant managers, on a former Purex salesman, and on Barton's successor, Christman. Although the head of the Barton Company was present in Minneapolis during at least part of the hearing and conferred with some of the witnesses, he was not himself called to testify.

One of the witnesses upon whom counsel relies is Arthur Cunnien, who was plant manager for Barton from 1945 to 1948. Cunnien testified that during the spring of 1947 business became so quiet that it was necessary to shut down the plant completely for a few weeks and to operate on a part-time basis for a period thereafter (R. 1831). He testified to having called on a number of retail customers of the jobbers to whom he sold and finding them stocked with Purex, which they allegedly told him they had bought as a result of a Purex deal (R. 1832). Cunnien's testimony with respect to this decline in the Spring of 1947 was apparently based solely on his recollection, and no records of Barton were produced to substantiate his claim. His testimony is in conflict with the records of Barton's wholesale customer, Hancock-Nelson, whose purchases of bleach Cunnien testified dropped from 75 or 100 cases a week down to 15 or 20 cases. These records disclose very substantial purchases of Sav-a-day during April and May of 1947, as compared with considerably smaller purchases in January, February and March.[16] The records of another of Barton's wholesale customers, May Brothers, do reflect some decline in the purchases

[16] The figures of case sales for this period were as follows (CX 107–E):

January	130	May	168
February	50	June	0
March	50	July	590
April	500	August	1,200

of Sav-a-day during March, April and May of 1947.[17] However, the record fails to disclose any evidence from which it may be inferred that Purex was responsible for this decline. May Brothers' records disclose that while it purchased 200 cases of Purex in May of 1947, it made no further purchases of that product until October 1947. The alleged decline of Sav-a-day sales during the Spring of 1947 would appear, therefore, to have no connection with Purex, at least insofar as the May Brothers account is concerned. It may be noted, in this connection, that Purex's first deal in this area which was one free case of quarts with each three cases of gallons purchased, went into effect on April 14, 1947, while May Brothers' purchases of Sav-a-day had already begun to drop sharply in February and March. It may also be noted that the Purex deal resulted in a net price of $1.13 per case for the gallon size, with the price of the other sizes remaining $1.50, while Sav-a-day's prices (according to May Brothers' records) were 91¢ per case for the quart size and $1.05 per case for the gallon size, thus making its prices lower than Purex's, despite the latter's deal.

Cunnien further testified that after the decline in the Spring of 1947, business improved for a while in the Fall of 1947, and then began to decline again until he left Barton's employ on May 1, 1948. He referred particularly to a rapid dropping off of sales in the North Dakota area, and to a decline of sales to the Hancock-Nelson account in Minneapolis. The basis of his claim that Purex was responsible for the North Dakota decline was information given to him by salesmen of his jobber customers that competition from Purex was "tough" (R. 1833). No reliance can be placed on this hearsay testimony. Cunnien's claim that Purex was responsible for the decline in his company's sales to the Hancock-Nelson account in Minneapolis was based on the fact that his broker, who sold to Hancock-Nelson, had informed him that the latter had suddenly started buying large quantities of Purex (R. 1837). Aside from the fact that this is unreliable hearsay, reference to Hancock-Nelson's figures discloses that the latter's purchases of Sav-a-day far exceeded those of Purex during 1947 and 1948, and that it was not until 1949, after Cunnien's connection with Barton had ceased, that there was any marked increase in Hancock-Nelson's purchases of Purex.[18] Furthermore, Hancock-Nelson's fig-

[17] The figures of case sales for the first half of 1947 are as follows (CX 106):

January	360	May	93
February	98	June	120
March	21	July	214
April	42		

[18] The figures of case purchases from the two companies by Hancock-Nelson during the two-year period about which Cunnien testified were as follows (CX 107–A, –E):

	Purex	*Sav-a-day*
1947	340	3,058
1948	813	3,231

ures show that up to the time Cunnien left the Barton Company on May 1, 1948, Hancock-Nelson had purchased from Barton, during the first four months of the year, approximately three times more than during the comparable period in 1947. It seems apparent that Cunnien's claim of injury to Barton by Purex must have been based upon events which occurred after he left the company's employ and which had been reported to him by others.

The main witness upon whom counsel relies in support of his claim of injury to Barton is A. Frank Norton, who was employed as Barton's plant manager during 1949 and 1950, and has been employed in a similar capacity by Barton's successor, the Christman Chemical Company, since October 1952. Norton's testimony was to the effect that as the result of Purex competition, Barton lost 90% of its business in the North Dakota market (being practically pushed out of the area) and also suffered a 30% loss of business in the Minneapolis area. Norton submitted the names of a number of accounts in the North Dakota territory which he claimed were lost because of Purex competition. However, very little, if any, reliance can be based on this testimony with respect to the North Dakota area, since it appears that Norton had no personal knowledge of why these accounts were lost. The basis of his testimony that Purex was responsible for the loss of these accounts was letters from Barton's brokers in North Dakota, which he had apparently seen but which were not produced during the hearing (R. 1227–1229), and "mainly from Mr. Barton who made periodic visits to North Dakota and talked directly to the brokers, and he related the information to me" (R. 1264). Such third-hand hearsay as to what Mr. Barton had told the witness regarding conversations with his brokers, who in turn had related to Mr. Barton what unknown persons (possibly customers) had related to them, and unproduced letters from brokers reporting conversation with third persons, is hardly a reliable basis for a finding that Purex took 90% of Barton's business in North Dakota. It may also be noted that some of the accounts that Norton listed as having ceased buying from Barton on account of Purex were accounts that had been lost prior to his own employment by the Barton Company in 1949, and consequently the reason for their loss could not possibly be within Norton's personal knowledge.[19]

[19] Among the accounts lost prior to 1949 are the following:

Dickinson Grocery	1947
Gamble Robinson, Jamestown	1947
Gamble Robinson, Aberdeen	1946
Gamble Robinson, Fargo	1948
Gamble Robinson, Grand Forks	1948

(CX 81, R. 1237–1240).

With respect to the 30% alleged loss of business in the Minneapolis area, the witness professed to have a more personal basis for his claim that Purex was responsible for the decline. Despite his testimony that most of his time was devoted to production, and the suggestion in his testimony that his contact with customers was mainly through the brokers who sold Baron's bleach (R. 1281), Norton, nevertheless, claimed that in the Minneapolis area he was in personal contact with some of the customers there, and that they advised him that Purex's competition was responsible for their dropping of his bleach (R. 1231). The only two accounts with which he claimed to have been in contact were May Brothers and Hancock-Nelson. According to Norton, the Hancock-Nelson account was lost in December 1949, and he was told by Mr. Gerlich, the buyer for that account, that the reason for this was that Purex had offered them a better deal (R. 1231, 1233, 1234). Although it is not particularly important whether Gerlich did or did not advise Norton what the Purex deal actually was (since there is documentary evidence in the record with respect to Purex's deals during this period, and Norton's testimony with regard to the nature of the deal would be pure hearsay anyway), counsel in support of the complaint persisted in endeavoring to get the witness to testify with respect to the deal, and the following colloquy gives an interesting insight into the quality of this witness' testimony:

A. He [Gerlich] told me that Purex Company offered a more consistent better deal in the form of price than we could.

By Mr. FORKNER:

Q. Did he mention what that deal or that price was?

A. *He didn't mention what the price was, he just mentioned they could offer a better deal or price.*

Q. You knew what that deal was?

A. *Yes.*

Q. What was that deal?

A. *It was one free with two.*

Mr. VON KALINOWSKI: I move to strike that on the grounds of hearsay.

Trial Examiner LEWIS: Motion granted.

Mr. FORKNER: Well, it is in the evidence.

Trial Examiner LEWIS: How did you know it was one free with two?

The Witness: *From past records.*

Trial Examiner LEWIS: What records?

The Witness: *The court records, for one.*

Mr. VON KALINOWSKI: Court records?

Trial Examiner LEWIS: What court records?

The Witness: *The records that Mr. Forkner has.*

By Mr. FORKNER:

Q. You knew at the time it was a low price, didn't you?

Trial Examiner LEWIS: It is not a question of whether he knew. We are just trying to find out how he knew it was one free with two.
The Witness: I knew the deal was one free with two.
Trial Examiner LEWIS: How did you know?
The Witness: That I knew, the deal was one free with two.
Trial Examiner LEWIS: He told you that?
The Witness: Yes, sir.
Trial Examiner LEWIS: *Mr. Gerlich?*
The Witness: *Yes, sir* [italics supplied] (R. 1234–1235).

Thus we find the witness stating in rapid succession that he was *not* told by Gerlich what the Purex deal was, that he did know from other sources what the deal was, that one of the other sources was "court records", that his idea of "court records" was something shown him before the hearing by counsel supporting the complaint, and finally when there was some question as to the reliability of his other sources, the witness completely reversed himself and stated Gerlich *did* tell him what the Purex deal was.

Although Norton claimed that the Hancock-Nelson account was lost in *December 1949*, that allegedly being the date of the last order from that firm and presumably being the time he talked to Gerlich (R. 1231, 1233), the records of Hancock-Nelson which were introduced in evidence by counsel supporting the complaint disclose that the last purchase of Sav-a-day bleach was in *September 1948* (CX 107–E), which antedates the time of Norton's employment by Barton. Gerlich, who was also called as a witness by counsel supporting the complaint, had no knowledge of any conversation with Norton regarding the dropping of Sav-a-day because of any better Purex deal (R. 1960). According to Gerlich's testimony, the reason for the discontinuance of Sav-a-day in September 1948 was that it was not selling (R. 1946, 1947, 1960). Gerlich testified that the wholesale price of Purex was higher than Sav-a-day until August 1948 (R. 1948). The record does not reflect what the relative retail prices of Purex and Sav-a-day were in 1948 in the stores which purchased from Hancock-Nelson.[20] However, it does not seem reasonable to assume that a Purex price advantage, if any, at the retail level for a period of approximately one month (between August and September 1948) was responsible for the fact that Sav-a-day was not selling in the retail stores and that this was the reason Hancock-Nelson dropped the product. On the contrary, the record discloses that, despite the difference in the wholesale price between the two bleaches, Hancock-Nelson placed a large order for 546 cases of Sav-a-day bleach in September

[20] The only Hancock-Nelson price list of suggested retail prices, offered in evidence by counsel supporting the complaint, was one for the week of April 21, *1952* (CX 108).

1948, and that the total purchases of Sav-a-day for the year up until the time of its discontinuance were 3,231 cases (exceeding the purchases of Sav-a-day for entire year 1947), as compared with Purex purchases totaling 813 cases for the year 1948. Furthermore, Hancock-Nelson's records show that the dropping of Sav-a-day did not result in any marked increase in the purchase of Purex bleach during the balance of 1948 and that it was not until the Spring of 1949 that Hancock-Nelson began to buy Purex, in anything approaching substantial quantities.[21] There would thus appear to be no connection between the dropping of Sav-a-day and any deals of Purex.

In the case of May Brothers, the other wholesale account which Norton claimed was lost due to Purex competition, he was unable to identify the buyer from this concern who was alleged to have told him that his account was being dropped because of Purex, and there is no way to verify his testimony. The May Brothers account was lost in May 1950, the date of the last purchase of Sav-a-day being in April 1950 (R. 1232). The May Brothers' buyer who testified in this proceeding gave as the reason for the discontinuance of Sav-a-day the fact that the sales of the product were too small to justify handling it (R. 1928). Whether this was due to any price advantage which Purex had as a result of its deals is something which cannot be determined from the record. It is significant that in January 1950 the price of Purex to May Brothers, as a result of its deal of one free case with two, was $1.13 for quarts and $1.07 for gallons, while the price of Sav-a-day was $1.10 a case for both sizes (CX 106–B). This hardly gave Purex any competitive advantage pricewise. However, in April 1950, the price of Sav-a-day was increased to $1.24 a case for both sizes, thus making it more expensive than Purex. Since May Brothers discontinued Sav-a-day in May 1950, it is just as reasonable to assume that this price increase was a factor in the decision to drop Sav-a-day as it is to assume that Purex's price affected this action. It may be noted, in this connection, that while Purex's best deal of one free case with two began in July 1948, it had no marked effect on the purchases of Purex by May Brothers. It was not until March 1949, some eight months later, that there was any marked increase in the purchase of Purex bleach by May Brothers. On the other hand, its purchases of Sav-a-day bleach had already begun to decline in May of 1948 before the Purex 1–2 deal went into effect.

[21] Hancock-Nelson purchases of Purex for the balance of 1948 were:

September	51 cases	November	54 cases
October	192 cases	December	None

There thus appears to be no correlation between the increase in the purchases of one bleach and the decline in the purchases of the other.

In view of the unreliability of Norton's testimony and its failure to square with the testimony and documentary evidence adduced through other witnesses called in support of the complaint, no finding of injury can be based thereon, particularly in the absence of corroborating evidence from Barton's own books and records. The absence of such records renders it impossible to determine what accounts Barton sold to, the extent of his sales to them, the exact period when such sales ceased or began to decline, and the various items of profit and loss which affected his business. Thus, Norton testified that about 40% of Barton's capacity was devoted to private-label bleach (R. 1278), some of it selling for as low as $1.00 a case (R. 1269). It is possible that losses on this part of his operations rather than on Sav-a-day bleach were responsible for Barton's difficulties. This is something which could be cleared up only by an examination of Barton's books of account. The record also suggests that other factors may also have had a bearing on Barton's difficulties. Thus, a representative of the National Tea Company testified that his company dropped Sav-a-day in 1946 (before any Purex deals) due to Barton's inability to supply them with all sizes, the slowness of deliveries, and because he had heard the company was giving competitors better deals (R. 1966, 1979).

Counsel in support of the complaint sought to bolster Norton's testimony by that of Ray Olson, who had worked for Purex as a salesman for about a year beginning September 1947, and later left Purex to work for Barton until 1949. Although Olson claimed that when he went to work for Barton he had difficulty selling its product due to Purex's deals, his testimony reveals that Hilex was also offering deals at that time, and that this too was a factor in the sales resistance which he met (R. 1907). Olson conceded that Hilex was the dominant factor in the Minneapolis market and that even when he was with Purex he found competition "pretty rough" because of Hilex (R. 1906). Despite his claim that he was unable to sell Sav-a-day because of Purex, Olson was unable to name a single store where he had met such sales resistance and conceded that he had pretty much forgotten what had happened during this period (R. 1915). After testifying that he had left Purex for "personal reasons" (R. 1906), he admitted on cross-examination that it was because he didn't get along with the broker and felt animosity toward him although he denied that this animosity extended to the Purex Company itself (R. 1911). Olson impressed the examiner as a disgruntled employee seeking to

vent his spleen on his former employer. In any event, his vague testimony is such that it has very little value.

In addition to former Barton employees, counsel in support of the complaint called as a witness Richard J. Christman, Barton's successor. Christman, operating under the name Christman Chemical Company, leased Barton's facilities and building, beginning January 1, 1951, and continued manufacturing Sav-a-day bleach. Christman's testimony reveals that when he entered the market in January 1951, he found it "was dominated by a well known, well advertised bleach, namely Hilex" (R. 1348), and that Hilex is "synonymous with bleach, in this area" (R. 1368). In the lower price range, he testified his own bleach competed with Purex, Hylo and Kleen-ez bleaches, and, of the three, he claimed Purex had the greatest public acceptance. While claiming that this was due to Purex's price, based "principally" on what he had been told by his broker, and also from information obtained from salesmen and as a result of contacts with customers (R. 1351), Christman admitted that advertising was also a factor in public acceptance (R. 1354). His testimony reveals that while his competitors engaged in various types of advertising and promotional work, he has not done so (R. 1352). However, according to his own testimony, his price is actually 4¢ lower than Purex's, and the records produced by him reveal that his business has increased since he took over from Barton, both in dollar volume and in the number of cases sold (R. 1364, CX 83).

Despite the fact that it appears that Barton Chemical Company ceased operating and leased its business to Christman, the record, as a whole, fails to justify a finding that Purex competition resulting from the deals which it offered in this area was responsible for the alleged decline of Barton's fortunes. The confused, contradictory and unreliable testimony of witnesses who gave piece-meal accounts as to what occurred during the period in question, 1947–1950; the absence of Barton, who admittedly determined his company's sales policy (R. 1852), and would presumably have a better over-all familiarity with the events that occurred during this period; and the lack of corroborative documentary evidence from Barton's books and records render it impossible to arrive at any definite conclusion with respect to the reasons for his company's alleged loss of business.

3. Hilex bleach

This bleach is manufactured by the Hilex Company, which operates plants in the Twin Cities area and in Denver, and, prior to 1950, also operated a plant in Dallas, Texas. Its main plant in the

Twin Cities area employs 150–200 people. The record discloses that despite the fact that Hilex is the highest-priced bleach in the Minneapolis area, it is the dominant figure in the market and its sales exceed those of all other bleaches combined, including Purex (R. 1105, 1349, 1599).

In support of his claim that Hilex was injured by Purex's deals, counsel cites the testimony of Hilex's broker, John Grace, who complained that Purex was "stifling" Hilex in obtaining a greater volume of business than it now has (R. 1104). Grace conceded, however, that despite Purex's competition, Hilex's sales had increased "a fair amount" from 1946 to 1952 (R. 1142), and that he knew of no customers lost to Purex (R. 1116). Counsel in support of the complaint also refers to the testimony of Lowell Tesch, a Hilex assistant sales manager, who complained about a loss of sales during 1949 in the Omaha area, in the Denver territory, and in the vicinity of Ottumwa, Iowa, all allegedly due to Purex deals which were reported to him by customers. Despite these troubles, Tesch conceded that there had been an over-all increase in Hilex's business, that Purex's deals had had no effect in the Minneapolis area where Hilex is "kingpin", and that sales from the Denver plant had increased substantially (R. 1820–1822).

The president of the Hilex Company, A. A. Eldredge, while testifying that competition had been keen in the Minneapolis area, resulting in more sales work, advertising, and some deals on the part of his own company, was unwilling to attribute this to any one competitor and testified that Purex was no more of a competitor than any other company in the area (R. 1583–1586). He agreed that Hilex was predominant in the Twin Cities territory; in fact, that it was "sitting on top of the world" in that market (R. 1604) and, further, that sales from both the Twin Cities and Denver plants had increased substantially since 1946 (R. 1615).

The evidence offered with respect to the Hilex Company is such that it affords no substantial or reliable basis for any finding or inference that Purex competition had any material adverse effect on the fortunes of the Hilex Company in any of the above midwest areas.

4. Linco bleach

This bleach is manufactured by Linco Products Corporation and is distributed by Linco Products Company, a partnership, both companies being located in Chicago, Illinois. Salvatore Giachetti, president of the manufacturing company and a partner in the distributing company, testified at the hearing with respect to alleged injury to

competition caused by Purex bleach in two of his company's territories, the Twin Cities market (consisting of Minneapolis, St. Paul and the surrounding areas) and the so-called Tri-Cities territory (consisting of Davenport, Iowa, and Moline and Rock Island, Illinois). The testimony and evidence with respect to injury to competition in each of these areas are discussed separately below.

a. *The Twin Cities area*

According to Giachetti's testimony, Linco entered the Twin Cities market in 1946 and remained there until about October 1949, when it withdrew, allegedly because of Purex competition. Giachetti testified that his main competition in the Twin Cities market came from Hilex and Clorox until Purex inaugurated its deal of one free case with two in July 1948 (R. 2185), which resulted in a decline in Linco sales and the eventual decision to withdraw from the Twin Cities market in October 1949, after the loss of Linco's main customer, National Tea Company (R. 2283).

Counsel supporting the complaint endeavored to show, through summaries prepared from Linco's books and records, that its annual sales during the period of its operation in the Twin Cities market were as follows:

1946---------- 11,900 cases;
1947---------- 11,200 cases;
1948---------- 24,200 cases;
1949---------- 11,000 cases (up to October).

The exhibit containing the figures for the years 1948 and 1949 (CX 113–C) was stricken from the record when it became apparent that the invoices and other basic data upon which the specially-prepared summaries were based were not in the hearing room, available for inspection by counsel for respondent, and when an examination of the summaries for preceding years for which data were available disclosed a number of inaccuracies (R. 2255, 2257, 2268–2270). Although the attorney in support of the complaint stated that he would seek to have the basic records available at a subsequent hearing and reoffer these exhibits, he failed to do so. He has, nevertheless, relied on these figures, which were referred to in the testimony of Giachetti, despite the fact that it was clear from the latter's testimony that his statements regarding the totals for 1948 and 1949 were based upon the stricken exhibit, and that he had no independent knowledge of these figures (R. 2279, 2187). In the absence of reliable evidence with respect to the sales of Linco in the 1948–1949 period, when it was claimed that Purex competition affected Linco and finally drove it out of the

market, the record affords no adequate basis for arriving at any definite conclusions with respect to this situation.

However, even assuming that the information contained in the stricken exhibit is properly before the examiner, the record fails to sustain Giachetti's claim of injury due to Purex. Although Giachetti testified that he began to feel the effect of Purex competition after the latter instituted its 1–2 deal in July 1948, his company's figures for the year 1948 do not bear him out since the total sales of 24,700 cases in that year are more than double that of the previous year, when, according to Giachetti, Purex was not giving him any trouble (R. 2185). Giachetti sought to explain this substantial increase in sales during 1948 on the ground that his own company had instituted a coupon deal in the Spring of 1948, which resulted in a retail price reduction of 20 cents per gallon (R. 2201, 2184). However, if, as Giachetti claimed, this coupon deal was responsible for the marked increase in sales of Linco during 1948, it is equally reasonable to assume that the discontinuance of this deal in 1949 was responsible for the decline in Linco's sales to 11,000 cases, rather than to attribute this decline to Purex's competition. It is significant that his sales for the ten-month period during which he operated in 1949 are substantially the same as his sales for each of the full years 1946 and 1947 when, according to Giachetti, he was having no difficulty with Purex.

Giachetti gave as his main reason for leaving the Twin Cities market, the loss of his largest account, National Tea Company, which loss he "assumed" was due to Purex (R. 2189, 2283). This assumption was based mainly on hearsay information received from his sales manager, who had allegedly contacted the National Tea buyer (R. 2190). He also claimed that he himself had talked to several retail store managers, who purchased from National Tea, and that they had told him that they were adding a new bleach to their shelves, called Purex. Since the exhibit covering Linco's sales during 1948 and 1949 was stricken from the record, it is not possible to determine therefrom what the trend of Linco sales to National Tea Company was during this period. However, reference to National Tea Company's own figures raises considerable doubt as to the accuracy of Giachetti's claims. In the first place, although Giachetti testified that he began to feel the effect of Purex competition with the institution of its 1–2 deal in July 1948, the figures of National Tea Company disclose that they did not make their first purchase from Purex until December 21, 1948 (CX 109–C). In the second place, National Tea records covering bleach purchases from 1947 to date, and containing figures for Hylo, Hilex, Purex and Linco bleaches disclose purchases

of Linco only in 1947. In the absence of an explanation to the contrary, it must be assumed that these figures are complete. It would thus appear that the National Tea account was lost prior to the time when that company started its purchases of Purex bleach.

In considering the reasons for Linco's departure from the Twin Cities' market, it may be noted that one of its competitors attributed it to the fact that Linco's freight costs from Chicago were too high to enable it to compete (R. 1320). Others complained about their own difficulties in meeting Linco's competition at various times (R. 1200, 1408). The record also indicates that Linco had its own deals in the Twin Cities market.[22]

b. *The Tri-Cities area*

Unlike the Minneapolis territory, from which Linco withdrew in 1949, it is still operating in the Tri-Cities area. However, Giachetti claimed that there was a decline in the volume of his sales in the Tri-Cities market beginning in 1948, which continued until 1952, resulting in a loss of approximately $8,000 during this five-year period.

Like the Twin Cities area, counsel in support of the complaint offered figures purporting to show Linco's sales for each year from 1946 to 1951. However, the figures after 1949 were not supported by invoices or other basic data available in the hearing room for inspection by counsel for respondent, and these exhibits were stricken (R. 2273). The figures of case sales of Linco from 1946 to 1949 are as follows:

1946	7,164	1948	7,611
1947	7,424	1949	6,124

It may be noted that while the figures for 1949 show a decline of approximately 1,500 cases from the preceding year, the most drastic deal that Purex had in the Tri-Cities market was a 1–2 deal, which went into effect in April 1948. Yet this deal apparently had no effect on Linco's sales during the year 1948, the figures disclosing that its sales during that year exceeded those of the preceding two years.

Giachetti sought to attribute the decline in his company's sales to Purex competition. His testimony as to how he knew Purex was the culprit is a masterpiece of evasion, comparable to the testimony of Norton, referred to above, with Giachetti indicating variously, (1) that he got his information from his salesmen or office records, (2) that he may have gotten it from the jobbers and the retail stores himself,

[22] Giachetti admitted having a 1–10 deal in addition to the 20-cent coupon deal (R. 2186), and was extremely evasive as to whether his company also had other deals (R. 2308).

(3) that he couldn't specify the date when he was informed by customers regarding the reason for their decrease in purchases, (4) that it might have occurred in 1952 or in 1948, (5) that the customers "probably" did advise him that Purex was responsible for the decline in orders from his company, although "1948, that is a long time ago", and (6) that they definitely did so advise him (R. 2301–2304).

Despite the alleged decline in Tri-Cities sales beginning in 1949 and his withdrawal from the Twin Cities market in that year, the figures of Linco's over-all operations reveal that the year 1949 was one of the company's most profitable years, its net profits amounting to approximately $161,000. While profits in the years 1950 and 1951 declined to approximately $40,000 and $86,000, respectively, they rose again in 1952 to $115,000.

In view of the confusion and contradiction in Giachetti's testimony and the failure to supply information contained in the stricken exhibits, the state of the record is such that there is no substantial or reliable basis for finding that deals instituted by Purex in the Twin Cities or Tri-Cities areas were the factor, or a major factor, responsible for any alleged competitive difficulties which Linco may have experienced in these areas.

5. Hercules bleach

This bleach is manufactured by Hercules Laboratories of Minneapolis, which is operated by Lincoln Hamilton as a sole proprietorship. This company has been in business since October 1947, when it bought out another manufacturer, and is a relatively small operation, employing only two part-time employees in the manufacture of bleach. The proprietor, Hamilton, does his own selling.

Although Purex's best deal in the area, one free case with two, had been in effect since July 1948, Hamilton testified that Purex did not come to his attention until 1949 (R. 1172), and that by 1950 he began losing a number of his retail accounts due to Purex competition (R. 1177). Among the accounts which Hamilton claimed he lost due to Purex competition in 1950 was the Fairway Stores, where, according to Hamilton, he was advised that he couldn't compete with Purex prices (R. 1185). However, the buyer for Fairway Stores, Guy H. Klapper, who was also called as a witness in support of the complaint, testified that his firm had given up handling Purex bleach back in 1945 (R. 1862).

Despite the difficulties which he allegedly experienced because of Purex, Hamilton testified that since entering the business, he had moved from the space in the basement of a garage in which he had

originally started in business and built his own manufacturing plant, had installed an automatic bottle filler, and had gained in the number of customers (R. 1208). The testimony of this witness hardly furnishes a substantial basis for a finding that Purex's competition had any material adverse effect upon his business.

6. Clorox bleach

This bleach is manufactured by the Clorox Chemical Company of Oakland, California, the largest company in the business, and the only one having a national distribution. The attorney in support of the complaint offered the following figures of case sales by Holbert Company, Clorox's broker in the Minneapolis territory, during the period 1945 to 1952 (CX 96):

1945	11,731	1949	8,786
1946	11,988	1950	12,873
1947	10,959	1951	6,899
1948	8,537	1952	6,168

Counsel in support of the complaint argues that because there was a decline in Clorox sales during this period and an over-all increase in Purex sales, it must be concluded that Purex's deals were responsible for this condition.

This argument is not supported by the record. In the first place, representatives of Clorox's broker, who were called as witnesses by counsel in support of the complaint and whose testimony counsel now characterizes as "indifferent", could not attribute any decline in Clorox's sales to competition from Purex (R. 1704, 1889). Secondly, the figures which counsel in support of the complaint cites in his brief do not support his argument. In comparing the figures of the two companies, he has used figures of Purex sales through its Minneapolis territory, which includes all of Minnesota, South and North Dakota and part of Wisconsin (CX 74), while the Clorox figures which he cites only cover the territory handled by its broker, the Holbert Company, which is the southern half of Minnesota (CX 98, R. 1689). Moreover, the Clorox figures themselves do not justify the inference which counsel seeks to draw. Thus, while there is a decline of 2,000 to 3,000 cases in 1948 and 1949 over the previous years, the year 1950, when Purex's 1–2 deal was still in effect, shows the greatest volume of case sales during the period in question. On the other hand, in the years 1951 and 1952, after the termination of Purex's 1–2 deal, Clorox's sales decreased by about 50%. It is thus not possible, merely from

these figures, to infer that Purex's low prices resulting from its deals were responsible for any downward trend in Clorox's sales.

7. Hylo bleach

The record does not disclose the name of the manufacturer of this bleach or the details of its operations. No evidence of injury by Purex was offered with respect to this bleach. However, a number of witnesses referred to it as one of the leading competitive bleaches in the low-price field. The figures of the National Tea Company disclose that National Tea made substantial purchases of Hylo throughout the period in question, and that this volume continued, without substantial variation, despite Purex's competition (CX 109–A, –E).

Conclusions as to Twin Cities and Dakota markets

The record discloses that during the period 1947–1952 Purex was in competition with at least the following bleaches in the Twin Cities market and surrounding areas: Hilex, Clorox, Hylo, Kleen-ez, Sav-a-day, Linco and Hercules. Hilex is the biggest-selling bleach in the area, its sales exceeding those of all other companies combined. Despite competitive conditions, sales from both its Twin Cities and Denver plants have increased substantially during this period and it has continued to maintain its dominant position. The main complaint voiced with respect to it appears to be that it was not permitted to expand at a rate which would have established it as a virtual monopoly in this area. This is hardly a basis upon which to base a finding of injury to competition. The evidence with respect to the Clorox Company likewise does not support a finding of injury to competition resulting from Purex's deals. While its sales have fluctuated during this period there is no correlation between such fluctuation and Purex's deals. There was no testimony that Purex was responsible for any decline or from which an inference to this effect may be drawn. In the case of the small competitor, Hercules, the testimony regarding the alleged loss of several accounts by it was directly contradicted by at least one of the customers and was unsubstantiated by any records of the company. Despite the claims of injury due to Purex competition, Hercules' condition has actually improved since it entered the market. This hardly furnishes a reliable basis for a finding of injury. No evidence was offered concerning the manufacture of Hylo bleach and the record fails to show that Purex competition had any adverse effect on it.

In the case of Kleen-ez, Linco and Sav-a-day, the fact that they were forced to quit the market or changed ownership is indicative of the fact that they had experienced difficulties of some kind. However, the

record does not support a finding that Purex's deals were a substantial factor in their troubles. In the case of Kleen-ez most of the evidence of injury pertains to areas where there was no reliable evidence to show what deals, if any, Purex had. Although the record does contain reliable evidence of Purex deals in the Twin Cities area after 1947, the testimony of the witness Shapiro with respect to injury by Purex was a mass of contradiction and confusion, was unsupported by any documentary evidence, and was contradicted in many respects by other witnesses or evidence offered in support of the complaint. Shapiro's testimony affords no reliable or substantial basis for a finding of injury. The testimony and evidence with respect to Sav-a-day bleach are likewise characterized by confusion and contradiction of such magnitude as not to afford a reliable or substantial basis for a finding that Purex's deals were responsible for Sav-a-day's financial troubles. Significantly, the company which succeeded the original manufacturer of Sav-a-day has improved its competitive position despite the competition of Purex. In the case of Linco, the unreliability of the witness Giachetti and the incomplete state of the record insofar as the evidence of his company's sales is concerned are such that there is no reliable or substantial basis for attributing to Purex's deals the responsibility for that company's difficulties.

Counsel in support of the complaint places considerable emphasis on the large increase in Purex sales during this period as tending to establish injury to its competitors. While the rate of increase in Purex sales between 1945 and 1952 was substantial, as compared to that of some of its competitors, it should be noted that Purex had been more or less quiescent in this market during the War and, in effect, reentered the market around 1947.[23] It put on a strenuous advertising campaign and brought a number of its retail specialty salesmen into the market. It is therefore natural to expect a greater rate of increase from one starting more or less at the bottom of the market than from competitors who had already reached a certain peak in the market. It should also be noted that there is no necessary correlation between the rate of growth of its sales and its various deals, as contended by counsel supporting the complaint. Thus its sales during 1948, during which the 1–2 deal was in effect for about six months, were about 5,000 cases less than its sales in 1947. While there was

[23] Purex's annual case sales in the Minneapolis territory between 1945 and 1952 were as follows:

1945	17,986	1949	68,201
1946	9,790	1950	153,195
1947	32,387	1951	88,946
1948	27,138	1952	109,456

a substantial decline in 1951 after the termination of the 1–2 deal, there was a substantial increase again in 1952 despite the fact that there was no change in prices. The figures alone are too inconclusive to justify the drawing of any inference, such as that suggested by counsel supporting the complaint.

The 1–2 deal which Purex had in the Minneaplois territory from July 1948 to December 1950, unquestionably represented a substantial price reduction. Although respondent has not yet offered its defense, some of the evidence introduced by counsel supporting the complaint sheds some light on the reasons for the institution and continuation of respondent's deals in this area. Thus letters from Purex's broker to the respondent during 1947 and 1948 reflect the difficulties which respondent experienced in getting established in this market, referring to such matters as lack of consumer acceptance in the area, the keen competition of other bleach companies, the fact that certain customers were threatening to drop Purex, and the fact that competitors were offering various deals and price concessions (CX 36–G, –H, –K, –L, –N, –O, –Q). In any event, irrespective of why the deals were instituted, the fact that Purex was able to increase its sales during this period does not establish that any injury to competition resulted therefrom. While some of its competitors may have sustained a loss of sales, it does not follow that such losses can be attributed to Purex's deals. As stated by counsel supporting the complaint in his brief (p. 38):

> The naked and single fact that respondent's competitors lost customers or that their sales volume was reduced or that they operated on a reduced profit or that they reduced their prices to remain competitive is material, *but not legally significant in and of itself to the ultimate issues in this case without a further showing that the real reason lay in the respondent's discriminatory pricing policies* (except that an inference may be drawn from this and other facts). [Italics supplied.]

The evidence offered to show that Purex was responsible for these losses is too inconclusive to justify any such finding.

It is accordingly found that the record is lacking in substantial, reliable and probative evidence of any injury to competition with respondent in the Twin Cities area, Tri-Cities market or any of the other adjacent areas discussed above.

B. *The Des Moines territory*

The only evidence of alleged injury to competition in this area relates to S & S Cleanser Company of Des Moines, Iowa, manufacturer of a bleach called "Des Moines Cleanser". Counsel in support of the complaint endeavored to show through the testimony of Gino Sassatelli, a partner in this firm, that it had sustained a loss of approxi-

mately $40,000 because of Purex competition, and had lost a number of accounts and suffered a loss of volume because of Purex's deals. The examiner found Sassatelli a wholly unconvincing witness whose testimony was replete with confusion and contradiction and whose claims were based in large measure on hearsay and surmise.

With respect to the so-called loss of approximately $40,000, this was based on the fact that Purex, according to Sassatelli, had put on "some kind of a deal * * * way back in '42 and '43" (R. 2244–5), which allegedly forced Sassatelli's firm to put into effect a deal of one free with 12 in order to meet competition. The figure of $40,924 "lost" was based on an estimate of the number of free cases given each year beginning in 1945. The claims regarding this so-called $40,000 "loss" are based on sheer speculation and are unsupported by any reliable or substantial evidence.

In the first place it should be noted that the alleged $40,000 "loss" does not represent an actual loss or deficit in the company's operations, as the term is commonly understood, but is merely an estimate of the cost of free goods. Secondly, it should be noted that the estimate was not based on any books and records of the company but on some computations made by Sassatelli after he had come to the hearing (R. 2536). In the third place there is no reliable evidence in the record of the "some kind of deal" which Sassatelli claimed Purex had inaugurated "way back in '42 and '43," and there is therefore no way of determining whether Purex was responsible for Sassatelli's institution of a 1–12 deal and the ensuing "loss".[24] Finally, there is grave reason to doubt the veracity of Sassatelli's story regarding the so-called $40,000 loss. At first he testified that his company had had a steady growth from 1936 until about 1947 or 1948, when Purex "start[ed] to come in with some kind of deals" (R. 2230). He further testified that prior to 1947, the ranking of the various firms in the Des Moines area, in terms of bleach sold, was: his own company first, Clorox second, Hilex third, and Purex fourth (R. 2238). On the basis of this testimony Purex was the least potent of his competitors and gave him no trouble until 1947–1948. However, he subsequently reversed himself and claimed that Purex began to bother him "way back in '42 and '43" and that this was responsible for the 1–12 deal which he put into effect and maintained for about ten years. Adding further confusion to Sassatelli's story about being forced to institute and maintain a 1–12 deal beginning about 1942 or 1943 is his own testimony that during

[24] While the record does show that Purex had a 1–2 deal in 1948, the burden of Sassatelli's testimony was that it was "before '48" that his own deal was put into effect to meet Purex competition (R. 2244).

the war years he was able to sell all the bleach he "could get [his] hands on" (R. 2535).

Aside from the so-called $40,000 loss, counsel supporting the complaint relies on Sassatelli's testimony regarding the loss of a number of customers completely and a decline in sales to other customers, as a result of a 1–3 and a 1–2 deal instituted by Purex during 1947 and 1948. Sassatelli named a number of accounts which his company lost in its territory outside the City of Des Moines in 1948 (R. 2236), and stated that while it didn't actually lose any accounts within the City of Des Moines, there was a loss in sales volume there in 1948 and 1949 (R. 2241). Sassatelli also claimed that whereas he had formerly sold 75% of all the bleach sold in the Des Moines area, Purex competition had reduced his volume to about 50% of the market (R. 2488).

Aside from the fact that a decline from near monopoly proportions to approximately half of the market is hardly indicative of injury to competition, an analysis of Sassatelli's testimony regarding these losses reveals that it is cut from the same cloth as that relating to the so-called $40,000 loss. In the first place his testimony was based purely on his memory and was unsupported by any records showing what accounts he sold to, how much he sold to these accounts, and when they ceased buying or cut their orders (R. 2508). In the second place his testimony attributing the loss of a number of stores outside of Des Moines to Purex was based on hearsay information received from his driver-salesman since he did not himself call on any accounts outside of Des Moines (R. 2236). Thirdly, there is reason to doubt that he sustained any substantial losses in business as a result of Purex deals. For example, after testifying that he had lost business in the Super Value Store (R. 2517), he conceded on cross-examination that his sales to this account had actually increased (R. 2520). Further, while claiming that the worst effects of Purex competition occurred during 1948 and 1949 (R. 2236, 2241), the figures of gross sales submitted by Sassatelli reveal that there were actually increases in sales in each of these years of $6,000 and $13,000, respectively, over the preceding year (R. 2225). While the year 1950 shows a decline of $8,000 from the 1949 volume, the year 1951 showed an increase of $10,000, the same volume continuing in 1952, thus resulting in the largest volume of sales since 1946.[25]

[25] The figures of gross sales submitted by Sassatelli are as follows:

1946	$70,000	1950	$80,000
1947	66,000	1951	90,000
1948	75,000	1952	90,000
1949	88,000		

Despite Sassatelli's claim of injury by Purex, the record shows, according to his own admission: (1) that the number of his customers has increased substantially since 1946 (R. 2529), (2) that he has expanded his territory since 1946 (R. 2534), (3) that he has expanded his plant at a new location from a capacity of 1,500 gallons per day in 1945 to 4,000 gallons per day at the present time (R. 2498), (4) that he has increased the number of his employees since 1945 (R. 2497), and (5) that he is able to get his bleach into every new store opening in Des Moines (R. 2531). While not disputing the facts as to Des Moines Cleanser's over-all growth, counsel supporting the complaint argues that due to Purex the rate of growth has not been as great in recent years as it formerly was. The answer to this is, it is not unusual for the rate of increase in the post-war period not to keep pace with that in the war period when Sassatelli was able to sell all the bleach he "could get [his] hands on." Moreover, had his company continued to advance at the same rate, its 75% estimated share of the market might have reached complete monopoly proportions. The failure of this to occur can hardly be called injury to competition. It is accordingly concluded and found that the record is lacking in reliable, probative and substantial evidence of any injury to competition with Purex in the Des Moines market.

C. *Memphis territory and other southern states*

Counsel in support of the complaint offered evidence purporting to show injury to competition to three competing bleach manufacturers in the Memphis territory. The evidence with respect to each of these companies is discussed separately below. Before discussing the evidence of injury, it should be noted that the evidence of the deals which Purex offered in the Memphis territory shows that the deals in effect in that territory were of much shorter duration and involved less drastic price cuts than those in the Minneapolis territory. Most of the deals were in effect for only a month or two and involved one free case with nine, or a reduction of approximately 10% (CX 7, p. 5).

1. Bleach Kleen bleach

This bleach was manufactured by Southern Specialty Company of Memphis, which is engaged in the manufacture or sale of a wide variety of other products, including glass containers, spices, insecticides and furniture polish. It manufactures both household bleach and laundry bleach, the two bleach products accounting for about 12% of its total business and the household bleach alone amounting to only about 4% of its total business (R. 2082). The household bleach is

a 5¼% sodium hypochlorite solution, while the laundry bleach is a 10% concentrate, and the two are not competitive.

In support of his claims of injury by Purex, counsel offered the testimony of two salesmen and that of the owner of the company. The two salesmen only worked for Southern Specialty Company on a part-time basis, and handled a number of other items in addition to bleach, the latter being only a sideline which they evidently did not push too hard (R. 2069, 2122). Their testimony of injury to competition was of a rather desultory nature. One of the salesmen, Henry Hartwick, testified in general terms about being unable to meet the prices "of the different companies", referring, apparently, to Clorox as well as Purex (R. 2047). He testified that when he came into one of the stores, they figured out the prices and showed him that the price of Purex was cheaper. Asked when this all occured, Hartwick testified, "Maybe last year, years ago. I'm 70 years old. I can't remember all those things and I am using this as a sideline * * *" (R. 2049). The other salesman, Julius Lyon, told of having heard in the stores about a Purex deal of one with nine, and that he was unable to sell his bleach. Lyon couldn't name any accounts lost by him, was unable to state when he had experienced this difficulty in selling, and admitted that he didn't pay too much attention to the matter (R. 2117).

While the owner of the business, Sol Jaffee, appeared to be more familiar with the competitive situation than his two salesmen, his testimony likewise falls far short of establishing any substantial injury to competition resulting from Purex's deals. Jaffee claimed that there was a 50% drop in his household bleach business beginning in 1946, which he claimed was due to Purex deals (R. 2090). This testimony has no probative value for two reasons. In the first place there is no reliable evidence in the record of any Purex deals in Memphis during 1946. It is not possible therefore to attribute this alleged loss of business to unknown deals. Assuming, however, that part of this loss occurred during 1947, when there is evidence of Purex deals, Jaffe's own testimony establishes that a considerable part of his loss of business was due to reasons other than any alleged price advantage accruing from Purex deals. Thus Jaffee's testimony indicates that during 1947 a large wholesaler, Malone & Hyde, instituted a cooperative plan under which its affiliated stores were able to buy merchandise at cost plus a 3% commission. As a result of this, many of the better retail stores became affiliated with the Malone & Hyde co-op, causing Jaffee to be "shut out of the better stores and the only thing left to us was dirty front stores that were not affiliated with the

co-op" (R. 2105). It is thus apparent that the major cause of any decline in 1947 was the affiliation of the better stores with the co-op. That this had no connection with any price advantage arising from Purex deals seems apparent from Jaffe's own testimony that the customers trading in these stores were "more interested in the brand than they were in the price" (R. 2105).

The Purex's deals in Memphis during 1947 were of such a limited nature that they could hardly have produced any such drastic effect in the market as that claimed by Jaffee. The first deal, which went into effect April 7, 1947 and lasted for two months, was a deal of 1 free with 10. The second deal did not go into effect until August 13, 1947, lasted only a month and called for 1 free case with 9. It should be noted that the so-called 50% drop in Jaffee's business actually involved a drop in household bleach from about 8% of Jaffee's over-all business to about 4%. Since the record furnishes no clue as to the extent of Jaffee's business, no determination can be made as to the actual amount of the alleged decline, either on a dollar volume or case volume basis. In any event, the undersigned is satisfied and finds from the record as a whole that there has been no showing of substantial injury to Southern Specialty Company as a result of any Purex deals.

2. Sav-a-day bleach

This bleach was manufactured by the Barton Company, the same company as that referred to above in connection with the Minneapolis territory. The evidence offered with respect to injury to this company in the Memphis territory was, if anything, weaker than that pertaining to the Minneapolis territory. No official of the company having any direct knowledge of its over-all operations in the area was called to testify and none of its books and records were produced. The case of counsel supporting the complaint with respect to this company rests on the testimony of a former Barton salesman and broker, and on evidence supplied by several wholesaler witnesses.

The broker-salesman, Perry Lewis, was employed by Barton as a salesman in its Southern Territory (including Memphis) from December 15, 1945 to June 30, 1946, and then represented Barton as a broker in the Memphis area from the latter date until July 1950. Lewis' testimony with respect to the Memphis territory was to the effect that Purex had a deal of 1 free with 9, the date of which he could not fix since he was testifying "strictly from memory" (R. 2870), which deal he opined resulted in Purex selling more bleach and "I would say we sold less bleach" (R. 2872.) Lewis had no figures show-

ing the extent of this alleged decline and was unable to say how much the decline amounted to. Although Lewis testified that the plant eventually closed (apparently after July 1950), he had no personal knowledge as to the reason for its closing, the only enlightenment which he could supply being the hearsay information that Mr. Barton had told him his volume had dropped and that he had been losing money (R. 2872–2873).

Lewis' testimony furnishes no reliable basis for any finding that there was a decline in Barton's sales, or as to the extent of such decline or the reasons therefor. In any event, there is no reliable basis for attributing any alleged decline to Purex's deals. In fact Lewis' own testimony suggests that Sav-a-day's prime difficulty was that it was not as well-known and well-advertised a bleach as its competitors and was unable to obtain widespread public acceptance (R. 2896).[26] These competitors it should be noted, included Clorox as well as Purex (R. 2895, 2896). It should also be noted that even with Purex's occasional and relatively mild deal of 1 free with 9, Sav-a-day's prices were always substantially lower than Purex's.[27]

In addition to Lewis' testimony, counsel supporting the complaint relies on the testimony of representatives of several wholesalers in Memphis. One of these is C. B. Cook, who was employed as a buyer of bleach at various times prior to 1947 by Malone & Hyde, the largest wholesaler in Memphis, and after June 1948 was employed as a bleach buyer by Earle Wholesale Grocery. Counsel supporting the complaint places considerable emphasis on Cook's testimony that Malone & Hyde stopped buying Sav-a-day bleach and Del Haven bleach (the latter being a private-label bleach manufactured by Barton) because of "lack of movement out of the warehouse and out of the retail markets" (R. 2004), which lack of movement counsel seeks to attribute to Purex.

Counsel's position is untenable for several reasons. First, there is no reliable evidence as to what, if any, deals Purex had during 1946 when, according to Cook, Barton's bleaches were dropped. While Cook testified that Purex had a 1–9 deal at some time during the five- or six-year period of his employment up to 1946, he was unable to fix

[26] An index of the extent of Sav-a-day's popularity in the market is the testimony of the witness Hartwick, salesman of Bleach Kleen bleach, that he had never heard of Sav-a-day in this area (R. 2015).

[27] During 1947 when Purex's list price on quarts was $1.50 per case, its occasional 1–9 deal resulted in a net price of $1.35. Sav-a-day's price during the early part of 1947 was 95 cents, and from September to December 1947 it had, in addition, a deal of 1 free with 10, resulting in a net of 86 cents per case. During 1949 when Purex's list price was $1.70, its 1–9 deal resulted in a net price of $1.53. At the same time Sav-a-day was selling at a list of $1.40 with a 1–5 deal, resulting in a net of $1.16 for case (RX 6–30).

the time when this was in effect, pointing out that he did not handle bleach continuously during this period (R. 2007, 1994). The earliest reliable evidence of a 1–9 deal is that involving the period from August 13 to September 15, 1947 (CX 7, p. 5). Aside from this consideration, however, Cook's testimony on cross-examination reveals that another "leading factor" in the decline of his company's orders of Sav-a-day was the fact that it had had trouble with the caps of the bottles, many of them having blown up in the warehouse and in the stores (R. 2033).[28] Furthermore, there is no reliable evidence that Purex's deals were a factor in the so-called lack of movement of Sav-a-day. Cook specifically stated that he didn't know why Sav-a-day wasn't selling (R. 2005). While Cook testified that his company's purchases of Purex increased during the period of a deal, he also stated that this would not necessarily cause a decline in the over-all purchase of other bleaches, since the increased promotion and advertising accompanying the deals sometimes resulted in an increase in the purchases of other bleaches (R. 2014–2015. Cook's testimony in this respect was corroborated by one of the officials of Malone & Hyde, also called as a witness in support of the complaint, who testified that despite such deals, his company has continued to purchase greater quantities of Clorox than Purex (R. 2453).

Cook further testified that after he went with Earle Wholesale Grocery in June 1948 he took on Sav-a-day for a while to give it a try in Eastern Arkansas, because of his personal friendship with Mr. Barton (R. 2037), but that it was discontinued when he found he couldn't get a sufficient volume of sales. There is nothing in this testimony to warrant any inference that this discontinuance had any connection with Purex.

Counsel supporting the complaint places considerable reliance on the increase in Purex sales in Memphis between 1945 and 1952. However, no figures were offered to show a comparable decline in the bleach sales of other companies. The only reliable evidence of bleach sales of another company is that involving the Clorox Company, which shows that in the period from April 1950 to March 1953, its sales not only kept pace with, but exceeded that of Purex (CX 121–A, –B, –C). In any event, in the light of the other evidence in the record, as above discussed, no inference adverse to Purex can be drawn, merely because that company experienced a substantial increase in sales during the period in question. The record as a whole is lacking in reliable, pro-

[28] It may be noted that while Cook testified on direct examination that his company had dropped Sav-a-day prior to his leaving the company in 1946, he corrected this on cross-examination to state that they had not dropped it but were handling it on a limited basis (R. 2036).

bative and substantial evidence of any substantial injury to Sav-a-day resulting from Purex deals in this area.

3. Clorox bleach

Although evidence with respect to competition between Clorox and Purex in this area was offered at the hearing, counsel in support of the complaint does not devote any portion of his brief to any alleged adverse effect of Purex deals on Clorox, except incidental to a discussion of the testimony of several wholesaler witnesses. It is not clear whether he has abandoned any claim of injury to this competitor, or not.

Not only is there no showing of injury but the record affirmatively discloses that Clorox sustained no injury as a result of Purex competition. J. M. McKnight, Clorox's broker in the Memphis territory, who was called as a witness in support of the complaint, testified that Purex did not have any effect on his principal's sales and did not cause it any loss of business (R. 2824). According to McKnight there has been a substntial increase in Clorox's sales in this area each year since 1946, with the exception of the year 1952. That the reversal in trend in 1952 was not due to any Purex deal is evident from the fact that Purex has had no deals in the area since March 1952 (R. 2843, CX 158). McKnight further stated that if not for the competition of Purex, Clorox would have a monopoly in this area.

Counsel supporting the complaint refers in his brief to the testimony of the former Malone & Hyde buyer, Cook, that when he left that company in 1946, Purex was its leading bleach. However, both J. D. Bowen, Malone & Hyde buyer since 1950, and Joe Hyde, an official of that company testified that Clorox has always been their leading bleach (R. 2392, 2453). Their testimony is corroborated by the actual figures of Malone & Hyde purchases submitted by counsel supporting the complaint (CX 121–A, –B, –C). Further corroboration appears from the testimony of a representative of one of the retail stores affiliated with Malone & Hyde, who testified that he sold twice as much Clorox as Purex, despite the fact that Purex was 1 cent cheaper on quart sizes (R. 2134). It is interesting to note from the testimony of this witness, Gene Beretta, that although he increased his purchases of Purex during a 1–9 deal, he did not decrease the retail price of Purex to reflect the deal, but preferred to pocket the savings resulting from the deal (R. 2136). There has been no showing on the record as a whole that Purex deals have caused any substantial injury to its competitor, Clorox.

4. "Other Southern Territories"

In connection with his claim of alleged injury to competition in the Memphis area, counsel in support of the complaint also sought to show that Purex's deals caused injury in "other southern territories". Counsel relies, in this connection, on the testimony of Perry Lewis, the former Barton salesman and broker, and B. H. Blackard, a former Purex district manager, as showing that Purex deals caused injury to competition in the Florida, Alabama and Georgia areas. The testimony upon which counsel relies wholly fails to sustain his claims.

Lewis testified that while acting as a salesman for Barton during early 1946, he ran up against a Purex deal of 50 cents off per case in the Florida area, and a reduction of 25 cents per case in the Birmingham area. With respect to the Florida area, Lewis fixed the date of this deal as January 1946, and stated that he had "heard" from wholesalers that Purex was coming into Florida with that type of deal (R. 2865). While claiming that this affected his sales of Sav-a-day bleach, he conceded that the sales resistance which he met was also due to the fact that the manufacturer of a new bleach, "Thirty-Three", was putting up a plant in the Florida area (R. 2866). There is reliable evidence in the record, aside from Lewis' hearsay testimony, that Purex did sell some bleach in the Florida territory between November 1945 and April 1946, at discounts of 10 cents, 25 cents and 50 cents per case, as part of its effort to break into the Florida market (CX 19–B through –P; R. 318–319). However, this effort was unsuccessful, and Purex withdrew from the market in early 1947 when its sales dropped to negligible proportions (R. 320; CX 31–A and –B). No evidence was offered as to the extent of Barton's operations in the Florida territory, nor is there any reliable basis in the record for inferring that Purex's short-lived deals had any substantial effect on Sav-a-day sales in this market.

With respect to the Birmingham, Alabama, situation, there is no evidence, aside from Lewis' hearsay testimony, of any Purex deals in that market during March or April 1946, the period about which he testified.[29] Likewise, there is no evidence of the extent of Barton's operations in this area nor any evidence from which any inference can be drawn as to whether Barton sustained any substantial injury in this market.

Counsel supporting the complaint also refers in his brief to the testimony of a former Purex district manager in Memphis, B. H. Blackard, regarding a "one free with one" deal in part of his terri-

[29] The earliest reliable evidence of any deal in the Birmingham area is a deal of 1 free with 10 in April 1947 (CX 7, p. 1).

tory. Counsel apparently suggests that this deal was in effect throughout the territory in which Blackard operated, including Tennessee, Arkansas, Alabama and Georgia. However, it seems apparent, from Blackard's testimony, that he was referring to a deal which was in effect only in Georgia (R. 2853). Blackard's testimony regarding this alleged deal was extremely vague. He was unable to fix the date or duration of this deal and could not recall whether it was a jobber deal or involved a coupon arrangement on the consumer level. He conceded that there was never any such deal in the Memphis territory. In the absence of more definite evidence as to the nature of the so-called 1–1 deal in Georgia, and lacking any evidence of the competitive situation in that market, there is no basis for any inference adverse to Purex to be drawn from Blackard's testimony.

The examiner concludes and finds that there is no substantial, reliable or probative evidence of any substantial injury to any of Purex's competitors in the areas discussed above or of injury to competition with Purex in any of these areas.

D. *Dallas Division*

The evidence offered with respect to injury to competition in this area involved three companies: Hilex Company (to which reference has already been made in the Minneapolis territory); Airox bleach, manufactured by Joseph Goldman (to whom reference has also been made in connection with the discussion of Continental Laboratories in the Minneapolis territory); and the Charles H. Netherson Company. Before discussing the evidence with respect to alleged injury to the above companies, reference should be made to the evidence concerning the deals which were in effect in this area.

The Southern Division, also known as the Dallas Division, is one of the divisional offices of the respondent, and includes within it the following brokerage territories in Texas: Abilene, Dallas, Tyler, Houston and San Antonio. In addition, this division includes Albuquerque, New Mexico, and the states of Colorado and Oklahoma. Unlike the Minneapolis, Des Moines and Memphis territories, in which the attorney supporting the complaint offered a single exhibit setting forth all of the deals in these territories from April 1947 to December 1950, no over-all exhibit was offered with respect to the deals in the Southern Division. In his brief counsel supporting the complaint refers to a list of deals which were applicable in the Abilene territory from 1942 to 1950, and states that these are typical of the deals in effect in other territories comprising the Dallas Division. However, aside from a similar list for the Tyler territory, the record fails

to establish what deals were in effect in the other territories comprising the Southern Division, except for limited periods of time and in certain of the territories within the Division.

Counsel supporting the complaint offered several exhibits showing the deals in effect in the Dallas territory between April and October, 1949 (CX 27–E, –H, –J, –L, –N, –P and –R), and in the Dallas and Houston territories between July 1950 and September 1951 (CX 29–A). In addition to these, counsel relies on a series of bulletins issued by the respondent to its brokers and jobbers in the Southern Division during 1948 and 1949, which announce the inauguration or withdrawal of certain deals on designated dates (CX 15 series). However, it is impossible to determine from these bulletins just how long a particular deal which was being announced remained in effect, and just when a particular deal which was being revoked had been instituted.[30] Counsel also relies on certain invoices and ledger sheets as establishing the deals in this area. While a few of the invoices show a deal of 10 cents off list price per case during November and December 1946, in the Dallas territory (CX 21–H through –Q), it is impossible to determine from the remaining invoices and ledger sheets what the deals involved actually were (CX 22 series). It is thus difficult to determine, on an over-all basis, what deals were in effect in the various territories comprising the Southern or Dallas Division, except for limited periods and in limited areas. This lack of clarity in the record makes difficult an evaluation of the claims of the various competitors that they were injured by Purex deals in this area, since a large part of the evidence relates to periods when, and areas where, it is not clear what deals, if any, were in effect. With this preliminary discussion, the examiner turns to an analysis of the proof of injury to competition offered by counsel in support of the complaint with respect to the three companies mentioned above.

1. Hilex

The Hilex Company began selling in the Texas area in the latter part of the 1930's, and opened a plant in Dallas in the early 1940's. It remained in this area until 1952, when it closed down its plant and ceased operating in this market, except for parts of West Texas which it has continued to service from its Denver plant. The figures of Hilex's operations from 1943 to 1950 show that the company lost

[30] Although it was apparent that these exhibits were not arranged in any orderly fashion to reflect, chronologically, the commencement and termination of each deal in this area, and counsel for respondent offered to cooperate in an effort to achieve some orderly arrangement, counsel supporting the complaint appears not to have availed himself of this offer (R. 382, 364).

approximately $433,000 during this eight-year period (CX 88–95). Counsel supporting the complaint seeks to attribute these losses to Purex competition, and, in particular, to the Purex deals in the Texas territory. In the opinion of the examiner, this conclusion is not justified by the record.

Although A. A. Eldredge, president of Hilex, claimed that his company had been "going along pretty good" until Purex came into the market early in 1946 with a deal of one case of quarts free with each case of gallons (R. 1559), Hilex's figures show that, except for the year 1945 when it made a profit of $10,000, it lost money each year it was in the market beginning with 1943. The testimony of Purex officials discloses that Purex did have an introductory deal of one free case of quarts with each two cases of half-gallons, which was in effect in most of Texas, except for Abilene, for about seven weeks early in 1946 (R. 267). The record of deals in Texas thereafter is somewhat spotty. However, the most drastic deal appears to have been one free with nine, which was in effect periodically between 1947 and 1950. Contrary to Eldredge's testimony, Hilex's own records disclose that except for the period of the seven-week introductory deal in 1946, Hilex's net prices were substantially lower than Purex's. This was true not only of the regular Hilex bleach, but even more so in the case of a private-label bleach which Hilex began to manufacture and sell in 1947.[31] In view of the fact that Hilex's losses began even before the time when there was any claim of difficulty with Purex, and that its bleach was generally lower in price than Purex, it does not seem reasonable to assume that Purex's deals were the cause, or even a major factor in Hilex's financial difficulties.

The Hilex witness, A. A. Eldredge, had little personal familiarity with the Texas situation (R. 1623). His brother, Fields, was in charge of the Dallas plant (R. 1552), and A. A. Eldredge's only personal contact with the Texas situation appears to have been in 1946, when he went down there and allegedly was informed about the alleged Purex 1–1 deal (R. 1561). Even Eldredge was hesitant about attributing any part of his company's losses to Purex's competition (R. 1621). While the deal of one free case of quarts with the purchase

[31] Purex's average list price during this period was $1.65 per case, which resulted in a net price of about $1.45 during the period of a 1–9 deal. Hilex's own figures show the following net prices during the period 1946–1950:

	Hilex bleach	*Private-label*
1946	1.214	
1947	1.27	.746
1948	1.34	.816
1949	1.334	.911
1950	1.328	1.253

of each two cases of half-gallons did represent a substantial cut in the price of Purex, the record does not support any inference that this seven-week deal was a major cause of Hilex's financial difficulties. In fact, contrary to Eldredge's testimony that the deal caused his company's sales to drop about 100,000 cases (R. 1559), there was only a difference of approximately 4,000 cases between Hilex's sales in 1945 and those in 1946.[32] While the year 1946 showed a loss of $60,000, as against a profit of $10,000 in 1945, this change was due to a number of factors, including not only increased advertising expenses, but a substantial increase in the salaries paid to officers. Outside of the limited 1–2 introductory deal referred to above, Purex's other deals, consisting mainly of one free case with nine, were hardly such as to affect Hilex's ability to compete. While it seems likely that Purex's coming into this market after the war and competing for business was a factor to be reckoned with by Hilex, the record is lacking in substantial evidence that Purex's deals, as such, played a significant part in Hilex's financial difficulties, which, as already mentioned, preceded Purex's entry into the market in 1946.

2. The Charles H. Netherson Company

This company is an individual proprietorship owned by the individual whose name it bears. Netherson began the manufacture of bleach in January 1949, when he purchased the plant of Hood Chemical Company at Dallas, Texas. His business has been divided equally between laundry supplies, laundry bleach, and household bleach. During 1949 most of the household bleach manufactured by him consisted of private-label bleach made for particular customers. However, in November 1949 Netherson bought out the bleach plant of John Maher in Houston, Texas, and acquired the latter's brand label, "So-Wite". During the year 1949, Netherson's operations showed a net profit of $33,157, on gross sales amounting to $232,815. In the year 1950, although Netherson's gross sales increased to approximately $289,000, his net profits declined to approximately $14,000. In November of that year he closed his Houston plant, and since then has confined his operations to the Dallas area. In 1951 and 1952 his gross sales declined to approximately $185,000 and $150,000, respectively, and his net profits to $6,000 and $4,000, respectively. Netherson sought to attribute the closing of the Houston plant, and his company's failure to expand in the Dallas area, to the unfair competition

[32] The figures for these two years were as follows:

1945	292,466 cases
1946	288,426 cases

of Purex's deals. Discussed below are some of the more salient features of Netherson's testimony with respect to the various areas where he claimed he met Purex competition:

a. *Oklahoma*

Netherson testified that he withdrew from the Oklahoma market, where he had one account, because he was unable to meet an alleged Purex deal of one free with one which he claimed was prevalent in that market around July 1950 (R. 2547, 2771). However, there is no evidence in the record to show that Purex was selling in the Oklahoma market on a one free with one basis, other than Netherson's hearsay testimony that there were newspaper advertisements (which he evidently saw) offering Purex for sale in the retail stores on the basis of one quart for 13 or 14 cents and one quart free (R. 2547), and that his broker in Oklahoma City had informed him that a one free with one deal was "prevalent" (R. 2771). The only reliable evidence in the record relating to Purex deals during 1950 in any of the territories in the Dallas Division relates to the Dallas and Houston territories and shows that from July 1, 1950, to April 19, 1951, there were *no deals* in effect in those territories (CX 29–A). The only reliable evidence as to deals in the Oklahoma territory covers the period from April 1949 to October 1949 and discloses that during this period Purex either had a deal of one free with nine (CX 55–E and –H), or no deal (CX 55–K), or a deal of 18–24 cents off list (CX 55–O, –S, –Y, –Z–3). Lacking reliable evidence of Purex deals in the Oklahoma territory at or about the time when Netherson claimed he withdrew, there is no basis for determining whether Purex's deals were the cause of Netherson's alleged withdrawal from this market.

b. *Tyler, Texas*

Netherson testified that when he tried to expand into the East Texas (Tyler) market in the summer of 1950 he was told by the buyer for one of the wholesalers, The Mayfield Company, that Purex was offering a deal of one free with one which he would have to meet (R. 2565, 2657). According to Netherson, he sold this customer six truckloads of So-Wite bleach and gave him six free but never got any further orders.

Aside from the fact that Netherson's testimony does not demonstrate any inability to compete with Purex, but simply that the customer did not see fit to purchase any further merchandise from Netherson, his testimony regarding this incident is so thoroughly confused, evasive and contradictory as to reflect unfavorably on his reliability as a witness. After testifying with considerable certainty that the Mayfield buyer told him about a Purex one free with one deal, which

he would have to meet, and reiterating this testimony on cross-examination with the amplification that the buyer told him "Purex had one deal after another" (R. 2659), Netherson was asked by respondent's counsel whether he would regard as false a statement made by the Mayfield Company that: "Purex Company has not offered us a free deal of one case free with one case in the years 1949, 1950, 1951, 1952, 1953, to date * * *". After a series of evasive and contradictory answers in which he stated that "I could be mistaken" regarding the one free with one deal at Mayfield (R. 2662), that "I don't know" whether the deal was being offered, that "to the best of my knowledge" the buyer told him about it (R. 2663), that "I may not have been meeting one free with one as far as the Mayfield Company * * * but it was a general condition all over the State of Texas" (R. 2666), that the Mayfield buyer "might" have mentioned it, that the buyer "probably" mentioned it but that he (Netherson) wouldn't say the Mayfield statement read by counsel was false (R. 2667), Netherson finally conceded that probably the buyer didn't mention any Purex deal at all but that he (Netherson) having heard about the deal elsewhere, offered Mayfield a one free with one deal himself without anything being said about Purex (R. 2669). However, on redirect examination, after considerable prodding and leading by counsel supporting the complaint Netherson once again asserted that Mayfield told him about the Purex deal (R. 2816–2818).

Aside from the fact that the above testimony demonstrates Netherson's complete lack of candor, if not his total lack of reliability as a witness, no finding of injury to competition in the East Texas area can be made because there is no evidence of any Purex one free with one deal in this area, other than Netherson's hearsay testimony as to what a Mayfield buyer might have told him. The only reliable evidence of Purex deals in the Tyler territory is the exhibit previously referred to, which purports to cover all deals in this area from 1940 to 1950 (CX 57). This not only shows that there was no one free with one deal in 1950, but that there was no deal of any kind during July of 1950 when, according to Netherson (R. 2657), this incident occurred.[33]

c. *Fort Worth, Texas*

Netherson testified that around the end of March 1950 C. C. Braggans, buyer for Waples-Platter Company, one of his customers in Fort Worth, advised him that Purex was offering a deal of one free case

[33] The only deals listed in 1950 are:

Jan. 12–March 18	1 free with 9
May 1–June 17	15¢ per case off face value of invoice

with nine in that market, and requested Netherson to meet it with a deal of one free case with ten on the private-label bleach which Netherson was then selling to Waples-Platter under the latter's label. According to Netherson, he acceded to this request and Waples-Platter bought so much bleach that he was unable to make any further sales for about six months. Netherson also testified regarding another incident in July 1952, in which Braggans allegedly requested him to lower his price for private-label bleach because Purex had made an offer to sell them private-label bleach at a lower price (R. 2598–2601).

With respect to the first incident testified to by Netherson, the record is lacking in reliable evidence that Purex had any 1–9 deal in this area in March or April 1950. Netherson's hearsay testimony as to what Braggans told him is of no value in this regard. The only reliable evidence in the record of any Purex deals during 1950 in the Dallas territory (of which Fort Worth is part) covers the period from July 1, 1950, to April 19, 1951, and shows that Purex had *no deals* in this territory during that period (CX 29–A). Although there was a 1–9 deal in all the territories of the Dallas Division during April and May 1949 (CX 27–E and 27–H), this deal was discontinued in the Dallas territory itself in June 1949 (CX 27–J), and there is no evidence of it being continued in the other territories of the Division after June 1949. Moreover, Netherson's testimony regarding this incident is lacking in inherent probability. At the time in question Purex bleach was selling at $1.70 per case for the quart size (CX 4) and, with the alleged 1–9 deal, its net price would be $1.53 per case. Yet Netherson's private-label bleach was then selling for $1.05 per case (R. 2594), or almost 50 cents per case less than Purex. It is therefore difficult to understand how the alleged Purex deal could cause Netherson to reduce his price below $1.05. In the light of this witness' other testimony, some of which has already been referred to, the examiner cannot accept his uncorroborated hearsay testimony regarding this incident.

Netherson's testimony with respect to the alleged incident of July 1952 is equally unconvincing and, moreover, is irrelevant to this proceeding. Netherson's testimony involves an alleged offer by Purex to sell private-label bleach to Waples-Platter at a lower price. Even accepting Netherson's hearsay testimony as to what the Purex quotation to Waples-Platter was ($1.08 on quarts, $1.05 on half-gallons, and $1.07 on gallons (R. 2600)), these figures were not lower than Netherson's price of $1.05 per case. More important, however, the gravamen of the discrimination alleged in the complaint is the offering of lower

prices, mostly by way of deals, on regular Purex bleach,[34] whereas the incident in question does not involve any deal on Purex bleach, but the alleged offering of a price on private-label bleach to be manufactured by respondent for a particular wholesaler. The record in this case demonstrates that, almost without exception, Purex's competitors sell their private-label bleach at a substantially lower price than their regular brand-label bleach.

d. *Houston-South Texas area*

Netherson sought to attribute to Purex competition the closing of his Houston plant in November 1950, within a year after he had acquired it. Netherson testified that as a result of a Purex 1–1 deal during the late Spring or Summer of 1950, his volume of sales in the South Texas-Rio Grande Valley area served by the Houston plant dwindled until he finally had to close the plant and withdraw from that market. Insofar as Netherson's testimony purports to establish the Purex deal which he was allegedly meeting it is purely hearsay and no reliance can be placed thereon. Insofar as his testimony relates to alleged injury by Purex it is thoroughly confused, contradictory and unconvincing.

The basis of Netherson's testimony that there was a Purex 1–1 deal in the Houston-South Texas area during the Spring or Summer of 1950 is hearsay information he allegedly received from customers and prospective customers, and from newspaper advertisements. Insofar as customers are concerned, Netherson was unable or unwilling to name a single one who allegedly told him about the Purex 1–1 deal, with the possible exception of one customer in Laredo, and on cross-examination he finally conceded that he didn't even recall whether this customer had told him about the Purex deal (R. 2554, 2644, 2646, 2647, 2651, 2774–2776). It may also be noted that after considerable testimony about a 1–1 deal, Netherson suddenly began talking about a 1–9 deal about which customers allegedly told him (R. 2640). With respect to newspaper advertisements, the record does contain advertisements from Houston and San Antonio papers advertising Purex for sale at the retail level on the basis of one quart free with the purchase of a quart, upon presentation of a coupon (CX 13–A, –C, –D). However, all but one of these are advertisements of retail stores and not of the Purex Company. With respect to the one advertisement purporting to be a Purex advertisement, the record fails to show just how the terms of this offer applied to the jobber and retail customer. More important, however, there is no evidence of any actual sales to

[34] See Paragraph Two of the Complaint which states that: "Unless otherwise specified subsequent references refer to respondent's distribution and sale of Purex bleach."

customers by Purex pursuant to this offer. A mere offer to sell at different prices does not constitute discrimination. There must be evidence of actual sales at such prices.[35] Finally, it should be noted that, contrary to Netherson's hearsay testimony and the advertisements upon which counsel supporting the complaint relies, one of counsel's own exhibits discloses that from July 1, 1950 to April 19, 1951 there were *no deals* by Purex in the Houston territory (CX 29–A).

Aside from this weakness in the evidence concerning the existence of a Purex 1–1 deal, Netherson's testimony as to how the alleged deal affected him was thoroughly confused and unconvincing. At first he testified that his volume of sales during January and February was "pretty good", but that it began to slow up in March (R. 2556). He then testified that the Purex deal did not start until May or June 1950, which would thus seem to have no connection with the decline in March. When asked what effect the deal which allegedly began in May or June had on his sales volume, Netherson testified that it had a "very depressing effect". But when he was asked "how depressing" the effect was, Netherson replied: "My sales in July of 1950 were very much better than any previous month of that year" (R. 2557). This, however, was followed by further testimony that his volume of sales dropped from about 5,000 or 6,000 cases in June to about 2,000 cases in July. According to Netherson, his sales out of Houston continued to decline for the balance of the year until he closed the plant in November of 1950. He produced no sales records, however, to bolster his unconvincing testimony.

Counsel supporting the complaint places considerable reliance on a profit-and-loss statement produced by Netherson, as establishing his claims of losses in the Houston area. This statement shows a decline in net profits from approximately $35,000 in 1949 to approximately $14,000 in 1950. However, these figures have very limited probative value, since they cover all of Netherson's operations in both the Dallas and Houston plants, and include sales of laundry supplies, laundry bleach, private-label bleach and So-Wite brand bleach (R. 2587, 2809). Based on Netherson's estimate that his business was about equally divided among laundry supplies, laundry bleach, and household bleach, the latter would account for about one-third of his business. Since he further estimated that 90% of the household bleach was private-label and only 10% was So-Wite (R. 2509), this would mean that the latter only represented about 3 percent of his entire business.

[35] See Austin, *Price Discrimination Under Robinson-Patman Act*, p. 38, and cases cited therein.

In view of the fact that Netherson's alleged competitive difficulty with Purex in the South Texas area involved only So-Wite bleach, it seems apparent that a profit and loss statement covering all of his operations is hardly a reliable index of the trend of his sales of the product, which was a very minor factor in his business. Even assuming that So-Wite was a significant factor in Netherson's business, his gross sales for 1950 actually increased by $50,000 over 1949. While it is true that the net profit was smaller, the increase in gross sales would seem to contradict Netherson's testimony that there was any marked decline in sales of So-Wite after March 1950. Assuming, however, that there was a decline in the sales of So-Wite, the record affords no substantial basis for attributing this to Purex alone, or even in major measure. Netherson conceded that Clorox was the biggest seller in the Houston area. While he sought to minimize Hilex's part as a competitor, the record shows an advertisement for Hilex in the Houston market similar to the type of Purex ad which Netherson claimed had injured him (CX 13–B).

If the examiner were required to speculate as to the reasons for any alleged decline in So-Wite sales, the record contains evidence suggesting that Netherson himself may have been responsible for this condition. Thus, according to his own testimony, he became ill in July 1950 and ceased to engage in selling until December of that year (R. 2770–2771). Since he was the one primarily handling sales for his company (R. 2541), this might have been a factor in his company's alleged decline. Secondly, the record shows that whereas the price of So-Wite bleach in the early part of 1950 was $1.10 per case, with a deal of 1 free with 10 (R. 2623),[36] resulting in a net price of $1.00 per case, he raised his price in the Summer of 1950 to $1.35 a case (R. 2640). It is thus possible that this price rise was a factor in the sales resistance which allegedly occurred in July 1950.

In view of the absence of reliable evidence of any Purex 1–1 deal in the Houston-Southern Texas area during 1950, the confused state of the evidence concerning alleged injury, the lack of reliable evidence as to Netherson's operations in this territory, and the presence of evidence suggesting that other possible factors were responsible for his troubles, there is no substantial basis for concluding that Purex deals were a significant factor in the alleged decline of Netherson's business in the Houston area.

e. *Dallas territory*

As previously stated, Netherson bought the Dallas plant in Jan-

[36] The 1–10 deal was put into effect in February 1950, prior to the time of any claim of difficulty with Purex.

uary 1949 from the Hood Chemical Company. The latter had purduced a brand-label bleach called "Thirty-Three". However, Netherson did not use this label, his household bleach operations prior to November 1949 being confined to private-label bleach. In the Spring of 1950, after he had acquired the So-Wite label in the purchase of the Houston plant, Netherson endeavored to sell So-Wite in the Dallas area (R. 2796), but, according to his testimony, he was unsuccessful except for one customer (R. 2562). However, his sales of private-label bleach have continued on at least the same level as when he acquired the Dallas plant (R. 2795). His main complaint appears to be that he has been unable to make more headway in the sale of the So-Wite bleach in the Dallas market.

Counsel supporting the complaint refers in his brief (p. 77) to five advertisements appearing in Dallas newspapers during 1951 and 1952 as apparently being, in some way, responsible for Netherson's difficulties in Dallas. With one exception, all of these are ordinary advertisements of Purex bleach, having no connection with any deals. The one exception is an advertisement which offers the housewife a "Carry-All Apron" if she will send in 29 cents and a label from a bottle of Purex. If these advertisements prove anything, they prove that one of the factors for Purex's success is an aggressive advertising policy, keeping its bleach in the public eye. Even Netherson did not seek to attribute to Purex all of the sins of his inability to make more progress in the Dallas market. After conceding that he hadn't lost any customers in Dallas, Netherson testified that the reason he wasn't "able to get on the shelves in Dallas" was because they were "crowded with other bleaches", referring to "Hilex, Purex and Clorox" (R. 2821). All three bleaches are well-advertised products, and there is no reason to attribute to Purex or to Purex deals the responsibility for the sales resistance to So-Wite bleach in the Dallas market. The reliable evidence in the record shows that Purex deals in Dallas between 1949 and 1951 were of a limited nature, both as to time and amount (CX 27–E to –R, and 29–A), and that So-Wite's prices were substantially lower.

It is concluded and found that the record is lacking in substantial, reliable and probative evidence of any substantial injury to the Charles H. Netherson Company from any Purex deals.

3. Air-ox bleach

This bleach was manufactured in Houston for a period of less than a year beginning July 1948, by Air-ox Chemical Company, a partnership, of which one of the partners was Joseph Goldman. Goldman

testified that he was unable to compete with Purex, which he claimed was selling its bleach for $1.05 a case, net, whereas his own price was $1.35 a case for quarts and $1.20 for half-gallons (R. 1438). The record does not disclose the basis for Goldman's testimony regarding the price of Purex. There is no reliable evidence that Purex was being sold at that price between July 1948 and July 1949, the approximate period of Goldman's business operations in Houston. There was at various intervals in 1948 and 1949 a Purex deal of one free with nine in the Houston territory, but the dates of the inception and termination of the deal cannot be determined with any degree of accuracy (CXs 34–A, 15–Al, –Fl, –Gl, –Lla, –Nl, –Sla, 27–E, –H, –J, 55–E, –H, –K). However, this deal did not result in a net price of $1.05, but in a higher net price than that of Air-ox bleach. The available evidence for the Houston territory shows, for example, that the list price of Purex in April 1949 was $1.65 per case, and the net price, after deducting for a 1–9 deal, was $1.48 (CX 27–E). The same prices were in effect in May 1949 (CX 27–H). In June 1949, there was no deal in the Houston territory (CX 27–J).

Outside of his claim that he was being undersold by Purex, Goldman offered no other reason for his inability to sell in the Houston market. He conceded, however, on cross-examination, that it takes a year or more to develop public acceptance of a new bleach (R. 1501) and that he was unable to develop any real volume. Actually he was in the market only eight or nine months. There is no basis in the record for inferring that Goldman's inability to remain in the Houston market was due to anything other than the normal competitive factors with which he was confronted by his predecessors in the market, including Clorox and Hilex as well as Purex.

The record as a whole is lacking in reliable, probative and substantial evidence of substantial injury to any competitor of Purex in the Texas market and surrounding areas or of any substantial injury to competition with Purex in this area.

Conclusions as to primary line injury

Counsel supporting the complaint has produced an imposing mass of testimonial and documentary evidence in support of his claim of primary line injury. Measured in terms of sheer bulk, such evidence gives an impressive surface appearance. However, as is apparent from the foregoing discussion, the evidence, upon careful analysis, is revealed to be in large part superficial, unreliable, unsubstantial and lacking in essential probative qualities. The testimony of many of the key witnesses is based largely on unsupported hearsay, gossip and

surmise. Some of the witnesses demonstrated a complete lack of reliability in their testimony. In certain vital respects there is a complete lack of essential evidence, such as that pertaining to the nature of Purex deals in certain areas and at certain times when witnesses testified they were allegedly injured by Purex. A large part of the documentary evidence (most of which was admitted by consent) serves no useful purpose in this proceeding, since it consists of evidence of deals in areas where there was no showing of the competitive situation or of possible injury to competition. The same is true of all documentary evidence pertaining to the product Trend. This overabundance of unnecessary documentary evidence is in contrast with the absence in many instances of records or other reliable documentary evidence to show the competitive position of allegedly injured competitors, other than by their guesswork testimony as to how much they sold, to whom they sold and to what extent their sales declined.

On the present state of the record the examiner cannot conscientiously find that counsel supporting the complaint has established by reliable, probative and substantial evidence that respondent's deals or alleged discriminatory prices have caused substantial injury to competition with respondent in any of the markets where counsel sought to show such injury or, indeed, that there has even been a showing of substantial injury to any of respondent's competitors as a result of any discrimination in price by respondent. To hold that counsel supporting the complaint has established a prima facie case of primary-line injury based on this record would impose upon respondent the burden of chasing a veritable will-o'-the-wisp in order to offer a defense to the nebulous evidence offered against it.

In the brief filed by him, counsel supporting the complaint contends that a prima facie case of primary line injury has been established even without a showing of injury to any of respondent's competitors. Counsel argues that since it is conceded that respondent has charged different prices to different customers (thereby establishing the discrimination in price) and since it is conceded that the bleach industry is highly competitive, this establishes a prima facie case of injury, under the authority of *FTC* v. *Morton Salt Company*, 334 U. S. 37; *Moss* v. *FTC*, 148 F. 2d 378; and *FTC* v. *Standard Brands, Inc.*, 189 F. 2d 510.

It is true that the Act does not require a showing of actual injury to competition since, under the language of the Act referring to discriminations the effect of which "may be" or "tend to" cause injury to competition, it is sufficient to show that there is a reasonable probability

that there will be substantial injury to competition.[37] However, the examiner does not interpret the cases cited by counsel supporting the complaint as holding that proof of a discrimination in price, plus the existence of competition, is sufficient to establish a prima facie case in a primary-line injury case.

Both the *Morton Salt* and *Standard Brands* cases involved discriminations in price between competing purchasers. Under such circumstances, where there is a substantial difference in the prices charged to competing purchasers, it may be said that there is a reasonable probability of the nonfavored customers being injured. However, this result does not necessarily follow where the differences in price involve noncompeting customers. In such a case it is a complete *non sequitur* to say that because a manufacturer charges one price in Minneapolis and a higher price in California, his competitors in Minneapolis may be injured. This would depend on the existence of a number of other factors, in addition to the differences in price and the existence of competition. Before a presumption of injury can arise there must be some "rational connection between the fact proved [i. e., differences in prices charged to noncompeting customers plus the existence of competition with respondent] and the ultimate fact presumed [i. e., a reasonable probability of injury to the competitors of respondent] * * *."[38] While the *Moss* case, also cited by counsel, does involve primary-line injury, its holding that a presumption of injury arises merely upon a showing of discrimination in price extends beyond even the position here urged by counsel, and as previously mentioned, is based on an erroneous construction of the Commission's position as applied to the facts in that case.

In any event, whatever may have been the application of the *Morton Salt* doctrine to this case had no effort been made by counsel to show actual injury to competition, the showing made by counsel is such that it is no longer possible to conclude that there is a reasonable probability of injury to competition as a result of respondent's differences in price in different geographic areas. The proof of injury to competition which counsel supporting the complaint has offered not only fails to establish such injury, but creates such uncertainty as to the competitive situation in the various areas as to render it impossible to

[37] *Corn Products Ref. Co.* v. *F. T. C.*, 324 U. S. 726, 738. Counsel supporting the complaint refers to certain language in the *Morton Salt* case as establishing the test of injury as one of "reasonable possibility" rather than of "reasonable probability." However, the former has not been accepted by the Commission as the controlling test. See Memorandum of Commission by General Counsel, dated September 26, 1952, p. 7; Letter of August 4, 1950, from Chairman of Commission to Chairman of Senate Committee on Interstate & Foreign Commerce, answer to question 9.

[38] *Tot* v. *U. S.*, 319 U. S. 463, 467.

now conclude that there is any reasonable probability of injury resulting from respondent's alleged discriminatory prices.

It is accordingly concluded and found that there has not only been no showing of actual injury to competition with respondent, but that there is no reliable, probative and substantial evidence that there is a reasonable probability of such injury resulting from respondent's pricing practices.

V. Secondary line injury

Although the efforts of counsel supporting the complaint were directed mainly at showing injury in the seller's, or primary, line of commerce, he also introduced some evidence (mostly in the form of correspondence) purporting to show injury in the customer's, or secondary, line. This evidence involves, for the most part, wholesale customers of respondent located along the fringes of respondent's territorial divisions, who received the benefit of one of respondent's deals in their territory, and allegedly sold in the adjacent territory in competition with wholesalers located in such adjacent territory where such deal was not in effect. The evidence upon which counsel relies is discussed below, in connection with each of the territorial divisions where counsel claims there was injury to competition in the secondary line of commerce.

A. *The North Dakota-Montana conflict*

Prior to about 1949, the State of North Dakota was part of respondent's Minneapolis territory, and had the same deals and net prices as the latter territory. The State of Montana was not part of this territory, and its net prices were higher than those which prevailed in North Dakota from the end of 1948 through most of 1949, when the Minneapolis 1–2 deal was in effect. Counsel in support of the complaint sought to show that wholesalers in Montana were placed at a competitive disadvantage because of the fact that wholesalers in the western part of North Dakota, who had purchased Purex at the Minneapolis-deal price, were selling it in eastern Montana in competition with Montana wholesalers, who had purchased their bleach at non-deal prices.

In support of this contention, counsel cites a letter dated December 6, 1948, written by a Montana wholesaler, Ryan-Havre Company, to respondent's broker in Montana, complaining about the "cut-throat competition" resulting from the fact that the Gamble-Robinson Company (hereinafter referred to as Gamble) of Williston, North Dakota, was selling bleach in Montana at the lower North Dakota prices (CX

36–W). This complaint was apparently forwarded to respondent's sales manager in the Pacific Northwest Division, who not only assured the Ryan-Havre Company that this situation would be "cleaned up in a hurry" (CX 36–X), but, by letter dated December 28, 1948, requested its broker in the Minneapolis territory not to "accept any more deal orders from Gamble at Williston",[39] in view of the fact that the latter had failed to keep its promise (apparently made on prior occasions when there had been complaints) to refrain from selling in Montana at North Dakota deal prices (CX 36–Y).

It does not appear whether respondent's broker immediately complied with the request that Gamble not receive the benefit of North Dakota deal prices in its purchases at Williston. Further correspondence suggests that respondent continued to sell to Gamble at the North Dakota price after receiving a further promise that it would not sell in competition with Montana wholesalers at that price, but that this promise was broken. Thus a letter dated May 27, 1949 written by respondent's sales manager to its St. Louis divisional office, refers to the fact that, during a trip to Minneapolis, the sales manager had received Gamble's "positive assurance the practice [of selling Purex in Montana at deal prices] would be discontinued promptly and permanently", but that early that month the trouble had broken out again, and that the Ryan-Havre Company had expressed the intention of discontinuing Purex. The letter concludes with the statement that since Gamble "has gone back on their word the only thing we can do is to discontinue selling them * * * ", and requests the St. Louis divisional office to instruct respondent's Minneapolis broker "to accept no additional business for shipment to Gamble at Williston" (CX 37–Z3). Pursuant to this request, respondent's St. Louis office, on June 1, 1949, wrote to its broker in Minneapolis, in apparent confirmation of a telephone conversation had that day, instructing him not to sell to Gamble at Williston "as we will not ship any Purex from our St. Louis plant to these people" (CX 36–Z4). So far as appears from the record no further sales were made to Gamble at Williston on the basis of Minneapolis deal prices.

In his brief, counsel supporting the complaint suggests that even as late as August 30, 1949, the North Dakota-Montana conflict had not yet been resolved. He relies in this connection on a letter of that date, written to respondent by its Minneapolis broker, in which, after referring to the problem that had been created "by certain North Dakota

[39] The Gamble-Robinson Company had branches in other parts of the State of North Dakota. The problem which had arisen involved only its branch at Williston, North Dakota.

distributors shipping Purex into Montana," the broker suggested that the respondent give "reconsideration [to] extending the territory into which we can offer and ship the prevailing deal on Purex to include Bismarck, Dickinson and Minot [North Dakota]" (CX 36–Z5). Counsel supporting the complaint interprets this correspondence as indicating that respondent had not yet solved the conflict which had existed because of certain wholesalers in the western part of North Dakota selling in Montana. The examiner does not so interpret this correspondence. Apparently, as a result of the situation created by Gamble at Williston, respondent not only withdrew its Minneapolis deal from this wholesaler, but also detached the entire western half of North Dakota from the Minneapolis territory, and included it in the Montana territory (R. 1756–1760, 1766–1770; CXs 35–K, 101). This apparently gave rise to objections from several North Dakota jobbers located in Bismarck, Dickinson and Minot (which are not as far west as Williston) who, so far as appears from the record, had not been involved in any competitive problems with Montana firms. Respondent's broker had apparently suggested on a previous occasion that the newly-drawn North Dakota line be modified, so as to include the above three towns within the Minneapolis territory, but respondent had evidently refused to comply with this suggestion. This request was renewed in the letter of August 30, 1949 and again turned down by respondent. However, in October 1949, it apparently reconsidered its previous decision, and made the Minneapolis deals available in the above three communities, after receiving signed letters from each of the four wholesalers located in these communities that they would confine the then current Minneapolis deal to the State of North Dakota (CX 36–Z7 to –Z12). So far as appears from the record, this modification was not extended to Gamble at Williston, which had broken its previous commitments to confine the deal to the State of North Dakota (R. 1772).

In his brief, counsel supporting the complaint also suggests that the detaching of western North Dakota from the Minneapolis territory created new competitive problems between wholesalers in western and eastern North Dakota. However, the testimony of respondent's Minneapolis broker, upon which counsel relies in making this contention, does not support any such conclusion. While the broker testified that it "could have been possible" that there was some competition between wholesalers in the two parts of North Dakota, he was unable to recall any such instances (R. 1762, 1775). Moreover, his testimony suggests that because of the sparsity of the population

and the vastness of the area, any competition between the two areas would be on a minimal basis (R. 1776).

Counsel supporting the complaint also refers, in his brief, to the testimony of a representative of respondent's wholesale customer, Nash-Finch Company, as establishing that the new territorial line dividing North Dakota caused some injury to competition. The examiner does not so interpret the testimony of the Nash-Finch witness. The witness merely testified that there might have been some overlap between the branches of its own firm located in eastern and western North Dakota, and that, in a town or two, the company may have given the retailer the benefit of the lower eastern North Dakota prices, although the merchandise had been purchased at the higher western North Dakota price (R. 1537). However, this does not establish any injury to competition between different customers of respondent as a result of one getting the deal and the other not getting it, but merely demonstrates some internal maneuvering of the Nash-Finch Company.

The evidence with respect to this area demonstrates that respondent made every effort to prevent any injury to competition between its North Dakota and Montana territories. When one of its customers failed to honor his promise to confine the North Dakota deal to that state, respondent took the drastic action of refusing to sell to that customer at the North Dakota deal prices. In order to insure that there would be no recurrence of the situation, respondent detached the western part of North Dakota from the Minneapolis territory. Although it subsequently modified this territorial change to meet the objections of several customers, it did so only after it had received written assurance from these customers that they would not sell merchandise beyond the limits of the State of North Dakota at the deal prices. There is no evidence in the record that these written assurances were ever violated. The problem created in the North Dakota-Montana area appears to have been a limited one, and was handled by respondent in an expeditious and, on the whole, reasonable and effective fashion.

B. *The Iowa-Missouri conflict*

Somewhat similar to the North Dakota-Montana situation is that involving several firms located along the Iowa-Missouri State lines. During 1949, respondent had a deal of one free case with two in its Des Moines, Iowa, territory, and a less advantageous deal of approximately 24 cents off per case in the Kansas City territory. Three wholesalers located in the Des Moines territory were apparently selling over in Missouri in competition with two wholesalers located in St Joseph, Missouri, and the latter complained to respondent. On July 26, 1949,

respondent's St. Louis divisional office wrote to its broker in Des Moines, advising him that it had received a complaint from the two wholesalers in St. Joseph to the effect that the three Iowa firms were "allowing the one-free-with-two Purex deal to be sold outside the boundaries designated by us". The letter requests the broker to take steps "to control the deal, otherwise it will be necessary for us to take the same action in your territory as we did in North Dakota", viz., "to withdraw the one-free-with-two deal" (CX 35–K). This letter brought a prompt response from respondent's broker in Des Moines, who advised respondent by letter dated July 28, 1949, that these accounts had already been contacted two or three weeks previously by a representative in the broker's Kansas City office, who had advised them of recent complaints, and that they had assured the broker they would only sell Purex in Missouri on the basis of the cost in the State of Missouri (CX 35–M). This letter was followed on August 1, 1949, by another letter from an official of respondent's broker in Des Moines, advising respondent that he had talked to the salesmen who covered the three jobbers in question, and that "they [the salesmen] had already gone to each of them and laid down the law about selling in Missouri". The letter closed with the assurance that the broker had been "definitely promised complete cooperation by the parties concerned and we do not expect additional difficulty" (CX 35–N). So far as appears from the record, there were no further complaints about Iowa wholesalers selling in Missouri at the Iowa deal price.

In his brief, counsel supporting the complaint refers to another letter from respondent, which counsel contends constitutes an admission that respondent still continued to experience difficulty in controlling this situation. This letter, which counsel refers to as "the letter of August 31st" (Answering Brief, p. 103) and apparently regards as succeeding the letter of August 1, 1949, referred to above (CX 35–N), is actually dated August 31, *1948*, a year *preceding* the above correspondence. The August 31st letter has nothing to do with the Iowa-Missouri situation, but involves a purported conflict between the Des Moines, Iowa, and Omaha, Nebraska, territories (discussed next), which counsel evidently regards as having some connection with the Iowa-Missouri situation.

C. *The Omaha-Des Moines conflict*

A number of counties in the southwestern part of the State of Iowa, adjacent to Omaha, were part of respondent's Omaha territory and, as such, received the same deals as those in effect in Omaha. During 1949, when respondent's Des Moines territory had a more advantageous deal

of one free with two, a wholesaler in southwestern Iowa apparently complained to respondent's St. Louis office about two wholesalers in the adjacent Des Moines territory coming into his territory with the 1–2 deal, and he requested that he too be given that deal. A letter from respondent's St. Louis divisional office to its broker in Des Moines, dated August 9, 1949, refers to the fact that the writer had talked to the wholesaler on the telephone that day and had informed him it would be impossible to give him the deal. The letter closes with the suggestion that:

* * * whoever calls on the Townsend Wholesale Grocery Company [located in Shenandoah, Iowa] give these people assurance that we will do all in our power to keep the one-free-with-two deal out of their territory (CX 35–O).

The record does not disclose any further repercussions from this incident.

In his brief, counsel supporting the complaint refers to the "August 31st" letter (CX 35–G), previously mentioned, as apparently being related to this situation also, and as indicating continued difficulty in the handling of the problem. As previously mentioned, the August 31st letter was written in 1948, and preceded the above correspondence by a year. The August 31st letter (written by respondent to its broker in Des Moines) indicates that because wholesalers in several towns in southwestern Iowa had been selling the current Des Moines territory deal in Omaha territory, the deal would be withdrawn from them, and they would, in the future, be considered as part of the Omaha territory. This apparently resulted in southwestern Iowa being detached from the Des Moines territory and made part of the Omaha territory. The 1949 correspondence (CX 35–O) apparently represents an effort by one of the jobbers in this territory to get respondent once again to place this part of Iowa in the Des Moines territory, but respondent declined to comply, presumably because it did not wish to get into the conflict which had previously existed with Omaha. As previously mentioned, the record does not reflect any further conflict, after the letter of August 9, 1949, between southwestern Iowa (which had become part of the Omaha territory in 1948) and the Des Moines, Iowa, territory.

D. *The Nebraska-Colorado conflict*

During 1949, while there was a deal in respondent's Omaha, Nebraska, territory, one of respondent's so-called specialty salesmen took an order from a retailer located in western Nebraska at a price reflecting the current Omaha deal. The retailer apparently designated a wholesaler in eastern Colorado (Denver territory) as the firm through

whom the sale would be billed, and who would receive credit for the sale. The wholesaler advised respondent's broker in Denver that he could not fill the order because the price which respondent's salesman had quoted to the retailer was lower than the price at which he had purchased the bleach in the Denver (non-deal) territory (CX 37–Z–16), and the broker, in turn, called the matter to respondent's attention (CX 37–Z–14). Respondent, by letter dated September 9, 1949, advised the wholesaler that the deal which had been offered to the retailer was only being offered in the Nebraska territory, and was not available through Colorado jobbers (CX 37–Z–17). A similar letter was sent to the retailer (CX 37–Z–18). In his brief, counsel supporting the complaint interprets respondent's letter to the jobber as being an admission that the situation was typical of a number of others which had occurred in the past. Counsel quotes respondent as having stated, in the letter, that this situation was "one of the very *same* cases where the Nebraska territory conflicted with the Colorado territory." However, an examination of the letter discloses that respondent did not refer to this as being "one of the very *same* cases," but as "one of the very *rare* cases" where Nebraska and Colorado territories conflicted, and the letter further states that respondent "will take every step to see that this does not happen in the future".

The incident related above, involving the Colorado wholesaler who was unable to fill the order sold to the Nebraska retailer at the Nebraska deal price, is the only instance cited by counsel which in any way suggests a conflict between the Nebraska and Colorado territories. In his brief, counsel refers to another letter, alleged to have been written a "few days later," as apparently indicating some further difficulty between these two areas. The letter, which is dated April 13, 1950, seven months subsequent to the letter of September 9, 1949, referred to above, has nothing to do with the above situation, but involves the payment of a bonus to jobbers' salesmen in Denver. Repondent, at various times, paid salesmen employed by its wholesale customers a bonus of 10 cents per case in return for their efforts in pushing the sales of Purex bleach. So far as appears from the record, this money was paid to the salesman, and did not inure to the benefit of his employer. The letter of April 13, 1950, from respondent's broker in Denver to respondent's home office, refers to the fact that certain firms in Denver had not received the benefit of the salesmen's bonus, to wit, "Miller's, Safeway, [and] Colorado Wholesale" (CX 37–Z–35). In response, respondent advised the broker that the bonus was for "jobber salesmen only," that the three firms in question were not entitled to it since they did not employ salesmen, that it would be

a violation of law for them to accept it (they evidently being chain retailers), and that Safeway had even indicated that it would not accept the salesmen's allowance (CX 37–Z–36). Since this proceeding does not involve any charge of violation of Section 2 (c) or (d) of the Act, or any charge that the salesmen's bonus was a hidden price cut in violation of Section 2 (a), the hearing examiner does not understand what possible relevancy this incident has in this proceeding.

E. *The Colorado-New Mexico conflict*

Counsel supporting the complaint relies on a lettter written by respondent's divisional manager in Dallas to its broker in Albuquerque, New Mexico, as indicating a conflict between wholesalers on both sides of the Colorado-New Mexico line (CX 34–B3). This letter, which is dated April 28, 1949, advises the broker in New Mexico that as part of its opening of the Colorado market the respondent was "putting on a hot deal in Colorado," and continues as follows:

> We realize this puts you on the spot with your northern [New Mexico] jobbers. We are sending Mr. Sharp [respondent's sales manager] a copy of this letter and if anything can be done about the Colorado jobbers bringing the deal into your territory, it will be done. However, it is doubtful whether this can be controlled very well.

The letter contains a postscript from the divisional manager, addressed to respondent's sales manager, advising him that the New Mexico broker had told him that, "quite a few of the jobbers in Albuquerque territory were going to discontinue Purex. If there is anything you can do on this, we would appreciate it." The record does not disclose what the so-called "hot deal" in Colorado was, although it does appear that the Albuquerque territory then had its own deal of one free with nine. There is no other correspondence in the record relating to this situation, and no testimony by any New Mexico wholesalers as to the extent of the injury to competition, if any, resulting from the activity of Colorado jobbers. So far as appears from the record this was a temporary situation resulting from the opening of the Colorado territory.

F. *Peoria-Davenport conflict*

Counsel supporting the complaint refers in his brief to a conflict which allegedly arose in the Peoria-Davenport territories with respect to the sale of respondent's detergent product, Trend. The correspondence on which counsel relies consists of a letter dated March 23, 1948, written by respondent to its broker in Davenport, Iowa, in which

reference is made to an introductory offer of one free case with one which was being offered to retailers in Peoria, some of the orders for which were written through Davenport jobbers (CX 35–B). It is difficult to follow counsel's argument as to how this resulted in any price discrimination as between Peoria and Davenport jobbers. Counsel apparently contends that there is some inconsistency between the action taken in this situation and that discussed above, where a Nebraska wholesaler had originally been designated to receive credit for the order placed with one of respondent's salesmen by a Colorado retailer. However, the examiner fails to see any connection between the two situations, or how there was any price discrimination involved in the Peoria-Davenport correspondence. The record discloses that at the time the letter of March 23, 1948, was written, the net price of Trend, including deals, was identical in both the Peoria and Davenport territories, to wit, $3.50 per case (CX 3, West Central Division). Since the price in both territories was identical, the only problem involved appears to have been one of which jobbers would receive credit for the sales made by respondent's specialty salesmen. This has nothing to do with possible injury to competition resulting from price differences.

Conclusion as to Secondary Line Injury

Considering the many territories in which repondent operated and the vast number of transactions involved, the instances cited by counsel in which there was any conflict between wholesalers in adjacent territories as a result of one getting a deal and another not receiving it were amazingly few. In almost each instance respondent acted with reasonable dispatch in seeking to insure that the wholesalers in one territory would not have a competitive advantage over those in an adjacent territory. Where its efforts to secure voluntary compliance failed, it took such drastic action as declining to sell to certain wholesalers who failed to keep the deals within prescribed territorial limits, and also redrew some of its territorial lines to prevent a recurrence of the conflict. The instances cited where respondent was unable fully to resolve these conflicts are so few and so minor that it cannot be said that they resulted in any substantial injury to competition, or that there exists a reasonable probability that injury to competition in the secondary line will occur.

While the circumstances involved are not identical, the rationale expressed in the Commission's memorandum of October 12, 1948, stating its policy toward geographic pricing practices, appears to be particularly appropriate here. Thus, the Commission states:

However, there are strong reasons why the concept of injury adopted by the court in the Morton Salt case should not be applied automatically to discriminations arising under georgraphic pricing systems in which purchasers paying different prices are differently located and the price differences generally diminish as the distances diminish between purchasers' locations. In these circumstances *competition between purchasers paying significantly different prices may occur in quite limited areas or only along the fringes of trade territories.* Seeming advantages in price may be materially affected by disadvantages of location. These and other considerations make it clear that *in geographical price discriminations inferences of injury to competition drawn purely from the existence of price differences between purchasers who compete in some degree would have no sound basis.* The minimum determination of injury should be based upon ascertained facts that afford *substantial probability that the discriminations, if continued, will result in injury to competition* [Italics supplied]. (Statement of Commission's Policy Toward Geographic Pricing Practices, October 12, 1948, p. 8).

Although, as previously mentioned in connection with the discussion of primary-line injury, the circumstances giving rise to the Commission's statement of policy are not entirely analogous with those involved in respondent's territorial pricing system, the logic of that statement of policy has application to the factual situation here, insofar as there is involved limited competition along the fringes of trade territories and an absence of substantial evidence of injury to competition or the substantial probability that respondent's practices will result in injury to competition in the secondary line.

CONCLUSION OF LAW

It is concluded that counsel in support of the complaint has failed to establish by reliable, probative and substantial evidence that respondent has engaged in unlawful discriminations in price in violation of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C. Title 15, Section 13). The motion of respondent to dismiss the complaint herein, on the ground that no violation of said Act has been established and that no basis has been shown upon which to issue a cease and desist order, should, accordingly, be granted.

ORDER

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

IN THE MATTER OF

CENTRAL TRAINING INSTITUTE, INC., ET AL.

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

Docket 6167. Complaint, Feb. 5, 1954—Decision, Aug. 24, 1954

Order requiring a corporation and its president in Oklahoma City, selling a correspondence course intended to prepare students for examinations for U. S. Civil Service positions, to cease making a variety of misrepresentations by means of circulars and postal cards and through direct statements of sales agents, including such claims as that their business was connected with the U. S. Government or Civil Service Commission and their sales agents Government representatives; that completion of the course assured and guaranteed enrollees U. S. Civil Service employment in locations selected by them; that hundreds of such Civil Service Jobs were available and their course necessary to persons desiring to obtain them; etc.

Before *Mr. William L. Pack*, hearing examiner.
Mr. William L. Pencke for the Commission.
Dudley, Duvall & Dudley, of Oklahoma City, Okla., for respondents.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance" dated August 24, 1954, the initial decision in the instant matter of hearing examiner William L. Pack, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges respondents with the use of certain unfair and deceptive acts and practices in violation of the Federal Trade Commission Act. After the filing of respondents' answer to the complaint, a stipulation of facts was entered into by counsel supporting the complaint and counsel for respondents, which rendered unnecessary the holding of any hearings for the reception of evidence. The filing of proposed findings and conclusions and oral argument before the hearing examiner having been waived, the matter now comes on for final consideration on the merits.

Respondent Central Training Institute, Inc., is a corporation organized and existing under the laws of the State of Oklahoma, with its principal office and place of business at 216 North Broadway, Okla-

homa City, Oklahoma. Respondent S. R. Holton is President of the corporation and formulates its policies and controls and manages all of its affairs.

Respondents are engaged in the sale of a course of study and instruction intended for preparing students for examination for certain positions in the United States Civil Service, the course of study being pursued by correspondence through the United States mails. The business is interstate in character, the course being sold by respondents to numerous persons residing in various States of the United States other than Oklahoma. Respondents are thus engaged in commerce as that term is defined in the Federal Trade Commission Act.

In soliciting sales for their course of study respondents use postal cards, circular letters and other advertising material, all of which is distributed among prospective students either through the mails or through sales agents who call on such prospects. One of the pieces of material used, a postal card, reads as follows:

WANTED
MEN
and
WOMEN

Ages 18 to 50

To Prepare for
CIVIL SERVICE EXAMS
"Salaries to $5,400.00 yearly to start
General Preparation for
CIVIL SERVICE EXAMS.
Thousands of Men and Women Needed

Permanent Civil Service Jobs offer you security, opportunity for advancement, vacations, sick leave, and pensions are worth your effort to obtain.

Men and Women—ages 18 to 50—can prepare NOW FOR Civil Service jobs. A high school education is not always necessary. Listed below are a few of the hundreds of different jobs that are under Civil Service.

Mail Carriers	Stenographers
Postal Clerks	Typists
Custom Service	Storekeepers
Ass't. Meat Inspectors	Forest Service
Guards	Watchman
Agriculture	Immigration Service
Public Health Service	Border Patrol
Accounts and Auditors	Timekeepers
Cashiers	Warehousemen
Clerks	Railway Mail Clerks

Internal Revenue Service	Deputy Officers
Animal Industry	Deputy Zone Collectors
Messenger	and many others
Storekeeper—Gauger	

In circular letters addressed to prospects, representations are made to the effect that the addressee is "asking for information concerning the possibilities for you to prepare for some phase of activity under Civil Service"; that a representative, thoroughly trained in his duties, will make a personal call concerning the addressee's qualifications for Civil Service training, and that such representative is prepared to accept "your enrollment provided your qualifications are satisfactory"; and that the representative's credentials bear the official gold seal of the Central Training Institute. These circular letters are signed by respondent S. R. Holton as "Director of Public Relations." Respondents also request prospective purchasers to execute an analysis chart entitled

> Personal Information—Form 7—The information furnished will help in determining, in our opinion, your eligibility for Civil Service preparation and may direct you to the position where you are best fitted.

This chart contains, among other inquiries, questions pertaining to physical defects, financial circumstances, citizenship, government service, and personal habits.

The enrollment contract executed by purchasers of the course of study has contained, among other provisions, the following:

> The Central Training Institute, Inc., agrees that in the event you take an examination and are one of the fifteen (15) making the highest grade or rating during the year, you take a government examination, THAT THE ENTIRE AMOUNT OF TUITION PAID BY YOU WILL BE REFUNDED.

The use of this provision, however, was discontinued by respondents prior to the issuance of the Commission's complaint.

Through the use of this advertising material respondents have represented, directly or by implication:

1. That their business is a branch of or connected with the United States Government or the United States Civil Service Commission.
2. That all Civil Service positions are permanent.
3. That hundreds of different jobs, including those specifically listed on such postal card, are available and that starting salaries are as high as $5,400 a year.
4. That respondent Central Training Institute and its sales agents are qualified to determine the qualifications of applicants for Civil Service positions.

5. That such analysis chart will enable respondents to determine the applicant's eligibility for Civil Service preparation and the position for which he is best fitted.

6. That the corporate respondent maintains a Department of Public Relations, headed by a director.

7. That any student who is one of fifteen persons making the highest rating in Civil Service examinations held in one year will have refunded to him the entire amount of tuition paid to respondents.

Respondents' sales agents have in a substantial number of instances made to prospective purchasers the following oral representations:

1. That the Central Training Institute, Inc., is connected with or is a branch of the United States Civil Service or some other agency of the United States Government.

2. That respondents' sales agents are representatives or employees of the United States Civil Service or have some connection therewith.

3. That the completion of the course of study makes enrollees eligible for appointment to, or assures them of, or guarantees, U. S. Civil Service positions.

4. That after completion of the course of study, enrollees are assured of immediate employment in the U. S. Civil Service in locations selected by them.

5. That persons must take respondents' course of study in order to obtain Civil Service positions, or that such positions are difficult to obtain without the taking of such course.

6. That prospective purchasers of the course are especially selected, or that the prospect is the only person from a large number of applicants.

7. That respondents' sales agents are vocational advisers.

8. That the sales agent's time is limited and that unless a prospect enrolls immediately he will lose his opportunity to do so.

In some instances sales agents have rushed prospective customers into signing the enrollment contract without affording them sufficient opportunity to read and understand the terms of the contract and to consider the advisability of executing it.

These representations made by respondents through their advertising material or through their sales agents were false and misleading. Actually, neither respondents nor any of their agents are connected in any manner whatever with the United States Civil Service or any other agency of the United States Government. Although appointments to government positions are generally permanent, many current appointments are on a temporary basis and there are many circumstances under which employees may be sep-

arated from the service. Most of the positions specifically listed on respondents' postal card as being available, are not open to applicants generally but are either restricted to persons of veteran status or require special physical and educational qualifications and practical experience.

Positions in the Postal Service are restricted to persons living within the area of a given post office. No examinations have been announced for the position of storekeeper and gauger for years and none is contemplated. Positions in the Customs Service are restricted to men only, and most of the positions in that service are open only to veterans. Positions in the Immigration, and Border Patrol Services are restricted to veterans and require special training. Examinations for the positions in Forest Service have not been announced for a number of years, and moreover such positions require special qualifications and training. Other positions listed on the postal card require experience as one of the qualifications for employment. Generally speaking, the starting salaries for the positions listed are substantially less than $5,400.00 per year.

Applicants for Civil Service examinations are not required to take respondents' course of study in order to qualify for such examinations. Respondents' sales agents are not vocational advisers and are not qualified to determine the aptitude or qualifications (as distinguished from eligibility) for employment in the United States Civil Service. The use by respondent Holton of the term "Director of Public Relations" serves further to create the impression on the part of prospective students that there is some connection between respondents and the United States Government.

The filling out of the analysis chart referred to above will not enable respondents or their sales agents to determine the eligibility of applicants for Civil Service examinations. Many of the questions propounded in the chart are in no way related to the study of the basic course of instruction sold by respondents, and certain of the questions in the chart, particularly those with respect to personal habits and government service, simulate questions asked by the United States Civil Service Commission and tend to further the impression that respondents have some connection with the Civil Service. The provision formerly appearing in respondents' enrollment contract to the effect that fifteen students making the highest grade or rating during the year in which they took their Civil Service examinations would have their entire tuition refunded by respondents, implied that respondents were advised of the ratings or grades received by applicants taking Civil Service examinations. Actually, the United States

Civil Service Commission does not publish grades made by applicants and respondents had no knowledge of such grades.

The completion of respondents' course of study does not per se make enrollees eligible for appointment, nor assure them of appointment, to United States Civil Service positions immediately after completing respondents' course of study or at any time, or in a location selected by such enrollees. There is no requirement by the United States Civil Service Commission that applicants for positions take respondents' course of instruction in order to qualify them for Civil Service examinations or positions, nor is it difficult for persons having taken and passed Civil Service examinations to obtain a position without having taken respondents' course. Prospective purchasers of the course are not especially selected but respondents, generally speaking, sell the course to any person solicited who is willing and able to pay for it. Nor do prospects lose the opportunity to enroll because respondents' sales agents may be pressed for time and may not return for further solicitation. A large number of prospects solicited by such salesmen live in rural or farming areas where information regarding Civil Service and the methods of obtaining employment therein is not readily available.

It further appears that the misrepresentations of respondents' salesmen were made without the knowledge, consent or authority of respondent Holton; that in engaging salesmen respondent Holton endeavors to inquire into their record and past performance, and after employing them gives them specific instructions regarding representations to be made to prospects, which instructions include specific warnings not to represent, directly or by implication, that respondents' school is in any manner connected with the United States Government or that the sales agent is so connected. The salesmen are further instructed not to promise positions in the Civil Service, or to state to prospects that they will be employed by the Government immediately after taking and passing an examination. Respondent Holton has also followed up these instructions by requiring a signed statement from prospective purchasers to the effect that they understand fully that the salesman is not connected with the Government, that the school has no connection therewith, and that they have not been promised positions. The salesmen have also been instructed to give each prospect full opportunity to read the enrollment contract and the statement referred to above. Further, all prospects are given a copy of the enrollment agreement at the time it is executed.

The complaint also raises the issue of the use of the word "Institute" in the name of the corporate respondent. On this issue, the

facts are that respondent Holton operates a resident business school in Oklahoma City under the name Central Business College, which school includes a faculty qualified to teach commercial subjects, including fundamental principles of accounting and business law. It is the intention of respondent Holton to operate both the resident school and the Civil Service extension training under one corporate name, to wit, Central Training Institute, Inc., and the faculty now employed in the resident school will also participate in the operation of the extension training. If the name Central Business College is continued, such use will be only for the purpose of preserving the good will of resident students. The resident school will not constitute a separate entity but will, as stated above, be merged with the Civil Service extension training. In the circumstances, it is concluded that no adequate basis exists for requiring deletion of the word "Institute" from the corporate name.

CONCLUSIONS

The use by respondents of the misrepresentations set forth above has the tendency and capacity to mislead and deceive a substantial portion of the public with respect to respondents and their school and course of instruction, and the tendency and capacity to cause such members of the public to purchase such course of instruction as a result of the erroneous and mistaken belief so engendered. Respondents' acts and practices are therefore to the prejudice of the public, and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered that respondent Central Training Institute, Inc., a corporation, and its officers, and respondent S. R. Holton, individually, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of a course of study and instruction intended for preparing students thereof for examination for civil service positions under the United States Government, or any similar course of study, do forthwith cease and desist from representing, directly or by implication:

1. That respondents or their school have any connection with the United States Civil Service Commission or any other agency of the United States Government.

2. That respondents' sales agents are representatives or employees

of the United States Civil Service Commission or any other government agency or have any connection therewith.

3. That the completion of respondents' course of study assures students of positions in the United States Civil Service or makes them eligible for appointment to such positions.

4. That respondents can assure or guarantee positions in the United States Civil Service; or that students may obtain positions immediately after completing said course.

5. That it is necessary for persons seeking civil service positions to take respondents' course of study in order to qualify for or obtain such positions; or that it is difficult to obtain such positions without taking said course.

6. That any Civil Service position which requires appointees to have veterans status or special physical, mental, educational or experiential qualifications, is generally available.

7. That respondents have information regarding the grades awarded to applicants who have passed Civil Service examinations.

8. That vacancies exist in any United States Civil Service position contrary to the fact; or that the number of positions available or vacant in said service or any branch thereof is greater than is actually the fact.

9. That the starting salary for any United States Civil Service position is greater than it is in fact.

10. That respondents' sales agents are vocational advisers or qualified to determine the aptitude or qualification of any person for any Civil Service position.

11. That respondents maintain a Department of Public Relations or any other organizational division unless such is the fact.

12. That all appointments to United States Civil Service positions are permanent; or otherwise misrepresenting in any manner the conditions and limitations of employment in said Civil Service.

13. That the time for enrollment as a student for said course of study is limited.

14. That prospective purchasers of respondents' course of instruction are especially selected.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered that the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist [as required by said declaratory decision and order of August 24, 1954].

IN THE MATTER OF

ED HAMILTON FURS, INC., OF OREGON, ET AL.

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

Docket 6159. Complaint, Feb. 2, 1954—Decision, Aug. 26, 1954

Consent settlement order requiring furriers in Portland, Oreg., and Seattle, Wash., to cease violating the Fur Products Labeling Act and the Federal Trade Commission Act through failing to label fur products as required and through advertising falsely as to prices, quality, value of their products, etc.

Before *Mr. Abner E. Lipscomb*, hearing examiner.
Mr. Charles S. Cox for the Commission.
Mr. George W. Mead, of Portland, Oreg., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Ed Hamilton Furs, Inc., of Oregon, a corporation, Ed Hamilton Furs, Inc., of Washington, a corporation, and Ed Hamilton and Elizabeth Hamilton, individually and as officers of said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Ed Hamilton Furs, Inc., of Oregon is a corporation organized, existing and doing business by virtue of the laws of the State of Oregon with its office and principal place of business located at 910 S. W. Morrison Street, City of Portland, State of Oregon; respondent Ed Hamilton Furs, Inc., of Washington, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington with an office and principal place of business located at 1522 Fifth Avenue, City of Seattle, State of Washington. Individual respondent Ed Hamilton is president of respondent Ed Hamilton Furs, Inc., of Oregon, a corporation, and respondent Ed Hamilton Furs, Inc., of Washington, a cor-

poration. Individual respondent Elizabeth Hamilton is secretary-treasurer of respondent Ed Hamilton Furs, Inc., of Oregon, a corporation, and was vice-president of Ed Hamilton Furs, Inc., of Washington, a corporation, until approximately May 15, 1953, since which time she has been secretary-treasurer of same. The post office address of this individual respondent and of respondent Ed Hamilton is 910 S. W. Morrison Street, Portland, Oregon.

The individual respondents, Ed Hamilton and Elizabeth Hamilton, have acted and now act in conjunction and cooperation with each other in formulating, directing and controlling the business, acts, practices and policies of said respective corporate respondents, including the labeling and invoicing of merchandise and the advertising claims made directly and indirectly by said respondents Ed Hamilton Furs, Inc., of Oregon, a corporation, and Ed Hamilton Furs, Inc., of Washington, a corporation.

PAR. 2. Individual respondents Ed Hamilton and Elizabeth Hamilton and respondent Ed Hamilton Furs, Inc., of Oregon, a corporation, since 1947, and respondent Ed Hamilton Furs, Inc., of Washington, a corporation, since April 1952, have been engaged in the purchase, sale and distribution of fur products, including fur coats, fur jackets, fur stoles, fur scarfs and related fur garments. Respondents cause and have caused the aforesaid fur products, when sold, to be transported from their respective places of business in the State of Oregon and in the State of Washington to purchasers thereof at their respective points of location in various States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said products in commerce among and between various States of the United States.

PAR. 3. Respondents are engaged in the receipt in commerce, the introduction into commerce, and in the sale, advertising, and offering for sale, transportation, and distribution of fur products in commerce, as such products are defined in the Fur Products Labeling Act, and as "commerce" is defined in said Act. Respondents' fur products are composed of "fur" as that term is defined in the Fur Products Labeling Act, and which products are subject to the provisions of said Act and the Rules and Regulations promulgated thereunder. Since August 8, 1952, respondents have violated the provisions of said Fur Products Labeling Act and said Rules and Regulations promulgated thereunder in the introduction into commerce, and in the sale, advertising and offering for sale, transportation and distribution of said fur products in said commerce, and in the sale, advertising, offering for sale, transportation and distribution of fur products composed in

whole or in part of furs which had been shipped and received in commerce, by causing them to be misbranded and falsely and deceptively advertised and invoiced within the intent and meaning of the Fur Products Labeling Act and said Rules and Regulations promulgated thereunder.

PAR. 4. Among the products referred to in Paragraph Three hereof were scarfs, coats, capes, stoles and other articles of ladies wearing apparel composed in whole or in part of fur. Exemplifying respondents' practice of violating said Fur Products Labeling Act and the Rules and Regulations promulgated thereunder is their

(A) Misbranding, false advertising and false invoicing of such fur products by:

(1) Failing to affix labels to fur products, failing to show in advertisements of fur products, and failing to furnish invoices to purchasers of fur products showing:

(a) the name or names of the animal or animals producing the fur contained in the fur products as set forth in the Fur Products Name Guide and as permitted under the Rules and Regulations;

(b) that the fur product contains or is composed of used fur;

(c) that the fur product is secondhand;

(d) that the fur product contains or is composed of bleached, dyed or otherwise artificially colored fur;

(e) that the fur product is composed in whole or in substantial part of paws, tails, bellies or waste fur;

(f) the name of the country of origin of any imported furs used in a fur product;

(2) Abbreviating parts of the required information in violation of the Fur Products Labeling Act and Rule 4 of the Regulations thereunder;

(3) Using certain terms descriptive of the breed, species, strain or coloring of an animal which connote a false geographical origin of the animal. Exemplifying this practice, but not limited thereto, is the practice of describing an animal as "Aleutian Mink" in violation of the Fur Products Labeling Act and Rule 7 of the Regulations thereunder;

(4) Using a coined name as being descriptive of the fur of an animal which is in fact fictitious or non-existent, in violation of the Fur Products Labeling Act and Rule 11 of the Regulations thereunder. Exemplifying this practice, but not limited thereto, is the practice of describing the fur as "Hudson Seal," when there is in fact no such animal;

(5) Using the term "assembled" to describe fur products or fur mats or plates made of the pieces set out in Rule 20 (a) of the Regulations under the Fur Products Labeling Act without disclosing the named pieces, in violation of the Fur Products Labeling Act and such rule;

(6) Using the name of another animal in addition to the name of the animal actually producing the fur contained in the fur product.

(B) Further misbranding their fur products by:

(1) Falsely and deceptively labeling and otherwise identifying said fur products, and in the use of labels affixed to such products containing various forms of misrepresentation and deception with respect to such fur products. Exemplifying this practice, but not limited thereto, is the use of non-required labels containing statements conflicting with the required information appearing on the required labels;

(2) Setting out on labels required information in type smaller than pica or 12 point; mingling non-required information with required information; using handwriting in describing parts of the required information in violation of the Fur Products Labeling Act and Rule 29 of the Regulations thereunder:

(3) Failing to set out the applicable parts of the required information in the sequence provided in Rule 30 of the Regulations under the Fur Products Labeling Act;

(4) Failing to set forth on labels the name or other identification issued and recorded by the Commission of one or more persons who manufactured such fur products for introduction into commerce, introduced it in commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce.

(C) Further falsely advertising fur products by:

(1) Misrepresenting the prices of their fur products as being wholesale prices and as being so low as to attract other retailers as customers;

(2) Misrepresenting prices of fur products as being reduced from the regular or usual prices where the so-called regular or usual prices are in fact fictitious in that they are not the prices at which such merchandise is usually or regularly sold;

(3) Misrepresenting prices as being reduced where no reduction has been made;

(4) Misrepresenting the savings afforded by reduced prices on said products in that the represented savings are in excess of the savings actually afforded from any recent or current market values of said products;

(5) Misrepresenting the grade, quality and value of said products;

(6) Misrepresenting fur products as having been acquired at "close-

out sales," "distress sales" and under other circumstances, indicating that they were purchased at bargain prices contrary to fact;

(7) Misrepresenting fur products as "furs of the Hollywood stars," "Hollywood Fashion Furs," "Fabulous designer Furs," "purchases from the leading Mink designers," "Each intended originally for a Hollywood star" and by other representations indicating that the designer of said products, the source from which they were obtained and the persons for whom they were originally intended is other than the fact;

(8) Misrepresenting that any fur product was originally intended to be priced higher than is the fact.

PAR. 5. The aforesaid acts, practices and methods of respondents, as herein alleged, were in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constituted unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

PAR. 6. Respondents, during the periods herein stated, in the course and conduct of said business in commerce, as "commerce" is defined in the Federal Trade Commission Act, have made many statements and representations, including those misrepresentations described in Paragraph 4 (C) of this complaint which are incorporated herein by reference, concerning their said business, methods of operation of same, the composition, quality, price and value of the fur products offered for sale by them by means of advertisements inserted in newspapers, in circulars and in other advertising media, all of which were circulated and distributed among the purchasing public.

Typical of the said statements and representations, made in addition to those set out or described in Paragraph 4 (C) of this complaint, but not all inclusive, are the following:

You see our designers took the soft, underfur of the Squirrel Flanks and created these glorious new fashions!

1000 furs * * * offered under one roof at a single price

1000 furs * * * coats * * * capes * * * jackets * * * scarfs * * * at one astonishing price $125

Marvelous Muskrat. In four luxurious shades * * * Dyed Deep Brown * * * chocolate * * * moonglow $235
* * * wheat shade plus tax

Only Ed Hamilton offers you such a marvelous selection in the newest smartest shades * * * and in the new sweeps for '53. These are the choice of the market * * * We suggest comparison with coats priced up to $375 elsewhere.

Ed Hamilton's Anniversary sale * * * a sale four months in the making * * * A feast of values as great as any in our 98 years! * * * It's a new year and Ed Hamilton furs is 98 years old * * *

PAR. 7. Respondents, through the use of the statements appearing in the aforesaid advertisements, represented that they employ their

own fur designers and manufacture their fur products; that they offered for sale 1,000 fur products at $125.00 each; that their muskrat coats offered for $235.00 were comparable in quality to muskrat coats sold for $375.00 by their competitors; and that respondents' fur business has been in existence for 98 years.

PAR. 8. In fact, respondents do not employ fur designers or manufacture their fur products; they did not have 1,000 fur products for sale at $125.00 each; their muskrat coats offered for $235.00 were not comparable to the quality of muskrat coats sold by their competitors for $375.00; and respondents' fur business has not been in existence for 98 years, Ed Hamilton having established said business in 1946.

PAR. 9. Respondents, in addition to the foregoing, also engaged in unfair and deceptive acts and practices as follows:

(1) placing tags on their fur products listing prices thereon which were far in excess of those at which respondents intended to sell said merchandise;

(2) changing price tag labels on fur products with increases in prices listed thereon in order to offset any credit given on any merchandise certificates or trade-in allowances toward the purchase of a fur or fur product from respondents.

PAR. 10. Respondents, in the conduct and operation of said business, have also engaged in promotional activities, typical of which is the "Free Squirrel Cape offer." In connection therewith, respondents represented that during their "JANUARY FUR CLEARANCE SALE twenty-five beautiful luxurious Russian Squirrel capes" would be awarded at no extra cost, and that said capes were of a $200.00 value.

Said representations were false, misleading and deceptive. In truth and in fact no such capes were awarded during said sale at the store in the City of Seattle, State of Washington, and only two were awarded during said sale at the store in the City of Portland, State of Oregon. Furthermore, the capes that were awarded were not of a $200.00 value, that is, were not sold by respondents for $200.00 in their regular course of business.

PAR. 11. Respondents, in connection with the conduct and operation of said business, also operated a "Lucky Number Contest" in which it was represented that $38,000 in prizes would be awarded; that the first fifteen prizes would consist of various fur capes and coats and that there would be at least 500 extra awards of $65 each in merchandise certificates good toward the purchase of any Ed Hamilton fur coat or jacket.

Said representations were false, misleading and deceptive. In truth and in fact, respondents did not award $38,000 in prizes either in dollars or in merchandise. The so-called merchandise certificates were worthless in that respondents marked up the prices of all coats and jackets so as to absorb the amount listed on the merchandise certificate.

PAR. 12. Respondents, in connection with said business, also operated a "$55,000 Fur Puzzle Contest" in which it was represented that the first ten prizes were a stole, a cape, coats and a scarf of values ranging from $200 to $1,500, and that the "tenth" through the "twentieth" prizes would each be a $100.00 Siberian Kolinsky scarf; that the total value of all the fur or fur products offered as prizes from one to twenty, inclusive, would be $5,500. In addition to the fur or fur products to be given as prizes, respondents represented that there was added "at least 1,000 $50 certificates * * * good on the purchase of any Ed Hamilton fur coat, cape, jacket, or scarf for a full 30 days."

Said representations were false, misleading and deceptive. The represented value of the prizes was greatly in excess of the usual and regular prices respondents charged for merchandise comparable to that given as prizes. Furthermore, practically every person entering the so-called contest was considered a winner and awarded a merchandise certificate. However, respondents marked up the price on the merchandise on which they would allow the merchandise certificate to be applied, so that any article sold would be at a price in excess of the usual or regular price so as to offset the amount of the credit given for the merchandise certificate. Furthermore, respondents have on occasions refused to honor the said merchandise certificates when the same were presented at respondents' said stores in accordance with the terms of the certificate and have stated that they were not acceptable toward the purchase of "sale" merchandise.

PAR. 13. The use by respondents of the statements, representations, and practices set out or referred to in Paragraphs 6 to 12, inclusive, has had and now has the tendency and capacity to confuse, mislead and deceive members of the public into the erroneous and mistaken belief that such statements and representations are true, and to induce them to purchase respondents' said fur products.

PAR. 14. The acts and practices of respondents, as herein alleged in Paragraphs 6 to 12, inclusive, were all to the prejudice of the public and constituted unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated August 26, 1954, the initial decision in the instant matter of hearing examiner Abner E. Lipscomb, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On February 2, 1954, the Federal Trade Commission issued its complaint against the above-named respondents, charging them with acts and practices in violation of the Federal Trade Commission Act, the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder. Subsequent to service of this complaint upon respondents, and the filing of respondents' answer thereto, a hearing was held at Portland, Oregon on June 1, 1954, at which respondents and their attorney entered into an agreement with counsel in support of the complaint, and, pursuant thereto, submitted to the hearing examiner a Stipulation For Consent Order.

In this stipulation respondent Ed Hamilton Furs, Inc., of Oregon is identified as a corporation organized under the laws of the State of Oregon, with its office and principal place of business located at 908 S. W. Morrison Street, Portland, Oregon; respondent Ed Hamilton Furs, Inc., of Washington is identified as a corporation organized under the laws of the State of Washington, with its offices and principal place of business, at the time of the issuance of the complaint herein, and prior thereto, located at 1522 Fifth Avenue, Seattle, Washington and at 908 S. W. Morrison Street, Portland, Oregon; and respondents Ed Hamilton and Elizabeth Hamilton are identified as individuals and officers of the corporate respondents, with their offices and principal place of business located at 908 S. W. Morrison Street, Portland, Oregon.

Respondents admit all the jurisdictional allegations set forth in the complaint and stipulate that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations. All respondents request that their answer filed herein on February 25, 1954, be withdrawn, and expressly waive the filing of an answer to the complaint and further procedure before the hearing examiner and the Commission. Respondents agree that the order contained in said stipulation shall have the same force and effect as if made after a full hearing, presentation of evidence, and

findings and conclusions thereon, and specifically waive all right, power or privilege to contest the validity of said order. Said stipulation recites that said complaint may be used in construing the terms of the aforesaid order, and that said order may be altered, modified, or set aside in the manner provided by statute for orders of the Commission.

It is further agreed therein that said Stipulation For Consent Order, together with the complaint, shall constitute the entire record of this proceeding, and that the order contained therein may be entered upon the record, in the disposition of this proceeding, without further notice.

In view of the provisions of the Stipulation For Consent Order as outlined above, it appears that respondents' request that their answer to the complaint herein be withdrawn should be granted, and that such action, together with the issuance of the order contained in the stipulation, will resolve all the issues arising by reason of the complaint in this proceeding and respondents' answer thereto, and will safeguard the public interest to the same extent as could be accomplished by full hearing, and all other adjudicative procedure, waived in said stipulation. Accordingly, the hearing examiner, in consonance with the terms of said agreement, accepts the Stipulation For Consent Order submitted herein; grants respondents' request that their answer to the complaint herein, filed on February 25, 1954, be withdrawn; and issues the following order:

It is ordered that respondent Ed Hamilton Furs, Inc., of Oregon, a corporation, and its officers, respondent Ed Hamilton Furs, Inc., of Washington, a corporation, and its officers, and respondents Ed Hamilton and Elizabeth Hamilton, individually and as officers of said corporations, and their respective representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce; as "commerce," "fur," and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

(A) Misbranding, false advertising, or false invoicing of fur products by:

(1) Failing to affix labels to fur products, failing to show in advertisements of fur products, or failing to furnish invoices to purchasers of fur products, showing:

(a) the name or names of the animal or animals producing the fur contained in the fur products as set forth in the Fur Products Name Guide and as permitted under the Rules and Regulations;

(b) that the fur product contains or is composed of used fur, when such is a fact;

(c) that the fur product is secondhand, when such is a fact;

(d) that the fur product contains or is composed of bleached, dyed or otherwise artificially colored fur, when such is a fact;

(e) that the fur product is composed in whole or in substantial part of paws, tails, bellies or waste fur, when such is a fact;

(f) the name of the country of origin of any imported furs used in a fur product;

(2) Abbreviating parts of the information required under the Fur Products Labeling Act and the Rules and Regulations thereunder;

(3) Using terms descriptive of the breed, species, strain, or coloring of an animal which connote a false geographical origin of the animal;

(4) Using the term "Hudson Seal," or any other coined name, as being descriptive of the fur of an animal which is in fact fictitious or non-existent;

(5) Using the term "assembled" to describe fur products or fur mats or plates made of the pieces set out in Rule 20 (a) of the Regulations under the Fur Products Labeling Act without disclosing the named pieces;

(6) Using on labels attached to fur products, in advertisements of fur products, and on invoices of fur products, the name of another animal in addition to the name of the animal actually producing the fur contained in the fur product.

(B) Misbranding their fur products by:

(1) Falsely or deceptively labeling or otherwise identifying said fur product, or using labels affixed to such products which contain any form of misrepresentation or deception with respect to such fur products;

(2) Setting out on labels attached to fur products the required information in type smaller than pica or 12 point; mingling non-required information with required information; or using handwriting in describing any of the required information;

(3) Failing to set out the applicable parts of the required information on labels in the sequence provided in Rule 30 of the Regulations under the Fur Products Labeling Act;

(4) Failing to set forth on required labels attached to fur products the name or other identification issued and registered by the Commission of one or more persons who manufactured such fur products for

introduction into commerce, introduced it in commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce.

(C) Falsely advertising fur products by representing, directly or by implication:

(1) That the price of any such product is a wholesale price or is so low as to attract other retailers as customers unless such is the fact;

(2) That the customary or regular price of any such product is any amount in excess of the price at which such product has been offered for sale in good faith or has been sold by respondents in the recent regular course of business;

(3) That the regular price of any such product is a reduced price;

(4) That a price enables purchasers to make any saving in excess of the difference between said price and the price at which comparable products sold at the time specified or, if no time is specified, in excess of the difference between said price and the current price at which comparable products are sold;

(5) That any such product is of a higher grade, quality or value than is the fact;

(6) That any said products were acquired at "close out sales" or other distress sales or were acquired under other special conditions conducive to low or bargain prices unless such is the fact;

(7) That the designer of any such product, the source from which it was obtained, or the person for whom it was originally intended is other than the fact;

(8) That any such product was originally intended to sell or be priced at a higher price unless products of like grade and quality were customarily so priced and sold.

It is further ordered that respondent Ed Hamilton Furs, Inc., of Oregon, a corporation, and its officers, respondent Ed Hamilton Furs, Inc., of Washington, a corporation, and its officers, respondents Ed Hamilton and Elizabeth Hamilton, individually and as officers of said corporations, and their respective representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of fur products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Making any of the representations listed in sub-paragraphs C (1) through (8) of this order;

(2) Representing, directly or by implication:

(a) That they manufacture or design any of said products, unless such is the fact;

(b) That the number of said products available for sale is other than the fact;

(c) That the price of any said product is lower than competitors' products of comparable quality, unless such is the fact;

(d) That they have engaged in the fur business for a longer period of time than is the fact;

(e) That merchandise certificates have any value in excess of the amount of reduction from the regular price of a fur product allowed a purchaser presenting said certificate for credit;

(f) That the total value, individual value, or number of the awards to be made by respondents in any manner is other than the fact;

(3) Increasing the price of any of said products for the purpose of nullifying any part of the value of their merchandise certificates presented for credit on the purchase of said product;

(4) Refusing to honor at face value or placing any limitation on the honoring of any merchandise certificate or other award issued by them unless the basis for refusal or limitation is clearly and conspicuously set forth in the certificate or award and in the advertising referring to said certificates or awards.

It is further ordered that the answer to the complaint herein filed by respondents on February 25, 1954, be, and the same hereby is, withdrawn from the record.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered that respondents Ed Hamilton Furs, Inc., of Oregon, a corporation; Ed Hamilton Furs, Inc., of Washington, a corporation; and Ed Hamilton and Elizabeth Hamilton, individually and as officers of said corporations, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist [as required by said declaratory decision and order of August 26, 1954].

IN THE MATTER OF

THE CAPITOL SERVICE, INC., ET AL.

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

Docket 6164. Complaint, Feb. 5, 1954—Decision, Aug. 31, 1954

Order requiring the corporate operator of a correspondence course of study for United States Civil Service examinations and its president-manager in Lansing, Mich., to cease representing falsely, through postal cards, circulars and other advertising matter, and statements of sales agents, that they were connected with the U. S. Civil Service Commission and their sales agents were employees thereof; that many thousands of civil service positions, near their homes and at high starting salaries, were available and guaranteed to students completing the course but that taking the course was the only way to obtain a Government job; that purchasers of the course would receive specialized training for specific positions and were specially selected, among other things.

Before *Mr. William L. Pack*, hearing examiner.
Mr. William L. Pencke for the Commission.
Robbins & Wechsler, of Detroit, Mich., for respondents.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated August 31, 1954, the initial decision in the instant matter of hearing examiner William L. Pack, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges respondents with the use of certain unfair and deceptive acts and practices in violation of the Federal Trade Commission Act. After hearings had been held at which certain evidence in support of and in opposition to the complaint was received, a stipulation of facts was entered into by counsel which provided, among other things, that the record might be closed insofar as the reception of evidence was concerned and the case submitted to the hearing examiner for final consideration upon the record as made up to that time including the stipulation, the filing of proposed findings and conclusions and oral argument being waived. The matter

is therefore now before the hearing examiner for final consideration on the merits.

Respondent The Capitol Service, Inc., is a corporation organized and existing under the laws of the State of Michigan, with its principal office and place of business at 2019 South Cedar Street, Lansing, Michigan. Respondent Robert K. Smith is President and a director of the corporation, and formulates all of its policies and controls and manages all of its affairs.

Respondents are engaged in the sale of a course of study or instruction intended for preparing students thereof for examination for certain Civil Service positions in the United States Government, the course being pursued by correspondence through the United States mails. The business is interstate in character, the course of study being sold by respondents to numerous persons located in various states of the United States other than Michigan. Respondents are thus engaged in commerce as that term is defined in the Federal Trade Commission Act. A mailing address in Washington, D. C. was formerly maintained by respondents and much of the advertising material which was distributed among prospective purchasers of the course of study was mailed from the Washington address. The use of this address, however, has been discontinued and now all of the business is transacted from Lansing, Michigan.

In soliciting sales of their course of study respondents use postal cards, circular letters and other advertising material, which is distributed among prospective purchasers through the mail. Typical of the statements appearing in such advertising material are the following:

WANTED!

(Picturization of Capitol Dome)

MEN—WOMEN (married or single)

Ages 18 to 50

Preparatory Training for

CIVIL SERVICE

NOW IS THE TIME

GET A U. S. GOVERNMENT JOB

Many Thousands of Opportunities

GOVERNMENT JOBS

MEN and WOMEN * AGES 18–50 * Good Steady Pay

(To $4479 yearly to start) (To $4479 yearly to start)

HERE IS YOUR OPPORTUNITY!

Civil Service positions offer chances for advancement and increased earnings in Grade Pay Raises, Liberal Pensions, Sick Leave with pay and Paid Vacations. Instructions now being given if you qualify.

Postmaster
2nd, 3rd or 4th Class
Rural Mail Carriers
Postal Clerks
Mail Clerks
Customs Service
Storekeepers

Mail attached Card Today!
FOR FULL INFORMATION
AND FREE LIST OF POSITIONS

Many Jobs High School Education not Required

Asst. Meat Inspector
Clerk-Typist
Railway Mail Clerk

Govt. Guards
U. S. Jobs in Foreign Countries

The Capitol Service, Inc.,

P. O. Box 1537

Washington 13, D. C.

There are now many more than a million persons employed in the Civil Service . . . To maintain this enormous staff of federal employees, the civil service placements have been estimated to total many thousands of persons annually . . . Each year thousands of men and women from every walk of life, wise enough to realize the wonderful opportunities awaiting them, step from insecure, poorly-paid jobs into well-paid, lifetime government positions . . .

A personal appointment is necessary in order to determine what field you may be best qualified in, before competing in your Civil Service Examination. A few days may lapse before a field man will call on you.

Check two positions on the reverse side you are interested in, keep this letter and give it to the field man so that he may return it to this office explaining why you were accepted or rejected.

Select 1 or 2 positions that interest you. Perhaps you may have the proper qualifications. Our field man will help you when he calls.

Positions for men! Positions for Women!

The respective lists of positions set forth under the foregoing headings include various positions in the postal service; positions for meat and live stock inspectors, customs, border and patrol inspectors; storekeeper-gauger; revenue agent; criminal investigator in the foreign service; accountant; social worker; bookkeeping machine operator and a number of service positions of lower grade.

A questionnaire distributed to prospective purchasers, entitled "Personal Information—7", is headed "The information here furnished will aid us in determining best your qualifications so we may help you in your Civil Service career."

On respondents' postal cards, circular letters and other printed material there is prominently displayed a picturization of the dome of the United States Capitol.

Through the use of this advertising material respondents have represented, directly or by implication:

1. That their business is a branch of or is connected with the United States Government or the United States Civil Service Commission.

2. That many thousands of positions are open in the United States Civil Service, including those specifically listed on such postal cards and circular letters.

3. That many thousands of persons are appointed annually, and that thousands of men and women change from poorly paid and insecure jobs to well-paid life-time appointments in the United States Civil Service.

4. That the information given on respondents' "Personal Information—7" blank enables them to qualify applicants for Civil Service positions.

5. That it is necessary that applicants be interviewed by respondents' field agents to determine their qualifications for civil service positions, that respondents and their agents are qualified to make such determinations, and that such positions may be obtained through respondents' school.

6. That the starting salaries for the positions listed by respondents are up to $4479 per year.

Accompanying respondents' postal card is a return card for use by prospective purchasers in indicating their interest in the course of study. Upon receiving this return postal card respondents have their sales agents call upon the prospect and endeavor to sell him the course. In a substantial number of instances the following oral representations have been made to prospects by the sales agents:

1. That The Capitol Service, Inc., is connected with or is a branch of the United States Civil Service or some other agency of the United States Government.

2. That respondents' sales agents are representatives or employees of the United States Civil Service or have some connection therewith.

3. That the taking of respondents' course of study is the only way to obtain a Government job.

4. That completion of respondents' course of study assures students of positions in the United States Civil Service or makes them eligible for appointment to such positions.

5. That purchasers of the course would receive specialized training for specific positions.

6. That prospective purchasers of respondents' course of study are especially selected.

7. That enrollees may obtain employment at or near their place of residence.

8. That enrollment contracts may be cancelled by enrollees at any time they desire to do so.

These representations made through respondents' printed advertising material or orally through their sales agents are false and misleading. Actually, neither respondents nor any of their agents are connected in any manner whatever with the United States Civil Service or any other agency of the United States Government. Most of the positions listed in respondents' advertising material as being available are not open to applicants generally, but are either restricted to persons of veteran status or require special physical and educational qualifications and practical experience. Positions in the postal service are restricted to persons living within the area of the particular post office. Positions in the Customs Service are restricted to men and most of the positions are open to veterans only. Positions in the Immigration, Border, Port and Patrol Services are restricted to veterans and require special training. No examination has been announced for the position of storekeeper-gauger for a number of years. Examinations for the position of Verifier, Opener and Packer and Forest and Field Clerk have not been announced for many years. The representation that many thousands are appointed to Civil Service positions every year is highly exaggerated.

It is unnecessary that persons desiring to prepare for Civil Service examinations be interviewed by respondents' sales agents in order to enable them to do so. Applicants for Civil Service examinations are not required to take respondents' course of study in order to qualify for such examinations, nor does completion of such course make applicants eligible for Civil Service examinations or assure them positions in Civil Service. Generally speaking, the starting salaries for the positions listed by respondents are not as high as those stated and implied. Respondents do not offer specialized training for specific positions but sell only one course of study, this course being intended only to prepare students for basic Civil Service examinations. Students or enrollees are not especially selected by respondents; on the contrary, it is respondents' practice to accept all persons willing and able to pay the purchase price of the course. Respondents are unable to obtain positions for their students in localities selected by the student. Enrollment contracts are not subject to cancellation, respondents usually demanding payment of the full purchase price of the course regardless of whether the course is completed by the student.

Respondents' former practice of mailing advertising material from an address in Washington, D. C., was also misleading in that it furthered the impression of prospective students that respondents were connected with the United States Civil Service Commission or some other agency of the United States Government.

It further appears that while the oral misrepresentations of respondents' sales agents referred to above were made during the regular course of their employment, such representations were made without the knowledge, consent or authority of respondents; that persons applying to respondents for employment as sales agents are investigated to determine their fitness for such employment; that all sales agents employed by respondents are required to enter into a written contract which includes, among other things, specific provisions with respect to misrepresentations; and that when it is found that sales agents have been guilty of misrepresentations in the sale or attempted sale of the course of study, such agents are discharged by repondents.

The complaint also raises the issue of the use by respondents on their advertising material of the picturization of the dome of the United States Capitol. It appears from the testimony that the use of the picture serves to further the impression of prospective purchasers of the course that there is some connection between respondents and the United States Government. It is therefore concluded that the picture as presently used is misleading. However, an absolute prohibition against the use of the picture does not appear to be warranted. All that would seem to be necessary to prevent such erroneous impression is that where the picture is used, it be accompanied by words clearly stating that respondents' business is a private correspondence school.

CONCLUSIONS

The proceeding is in the public interest. The acts and practices of respondents as set forth above have the tendency and capacity to mislead and deceive a substantial portion of the public with respect to respondents and their course of study, and the tendency and capacity to cause such members of the public to purchase respondents' course of study as a result of the erroneous and mistaken belief so engendered. Such acts and practices are to the prejudice of the public, and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered that respondent The Capitol Service, Inc., a corporation, and its officers, and respondent Robert K. Smith, individually,

and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of a course of study and instruction intended for preparing students thereof for examination for civil service positions under the United States Government, or any similar course of study, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) That respondents or their school have any connection with the United States Civil Service Commission or any other agency of the United States Government.

(b) That respondents' sales agents are representatives or employees of the United States Civil Service Commission or any other government agency or have any connection therewith.

(c) That the completion of respondents' course of study assures students of positions in the United States Civil Service or makes them eligible for appointment to such positions.

(d) That it is necessary for persons seeking Civil Service positions to take respondents' course of study in order to qualify for or obtain such positions.

(e) That any Civil Service position which requires appointees to have veteran's status or special physical, mental, educational or experiental qualifications is generally available.

(f) That it is necessary that persons desiring to prepare for civil service examinations be interviewed personally by respondents' salesmen.

(g) That vacancies exist in any Civil Service position contrary to the fact; or that the number of positions available or vacant in said service or any branch thereof is greater than is actually the fact.

(h) That the starting salary for any United States Civil Service position is greater than it is in fact.

(i) That respondents offer any specialized training or sell any course of instruction other than a basic course for lower grade positions.

(j) That positions obtained in the United States Civil Service will be at or near the place of residence of the employee.

(k) That prospective purchasers of respondents' course of instruction are especially selected.

(l) That enrollees may cancel their enrollment contract at any time without liability for the balance of the purchase price of said course.

2. Using any picturization resembling or simulating the dome of the United States Capitol unless in immediate conjunction therewith it is clearly set forth that respondents' business is a private correspondence school.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered that the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist [as required by said declaratory decision and order of August 31, 1954].