IN THE MATTER OF

C. E. NIEHOFF & CO.

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

Docket 5768. Complaint, May 1, 1950—Decision, May 17, 1955

Order requiring a manufacturer in Chicago, Ill., of automotive products and supplies, to cease selling its products of like grade and quality at higher and less favorable prices to numerous small businessmen purchasers than it sold them to various larger purchasers competing with those less favored, in violation of sec. 2 (a) of the Clayton Act as amended.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. Eldon P. Schrup, *Mr. James E. Corkey* and *Mr. Francis C. Mayer* for the Commission.

Taylor, Miller, Busch & Magner, of Chicago, Ill., for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

The complaint in this proceeding charges respondent with violation of Section 2 (a) of the Clayton Act (15 U. S. C. 13) by selling in commerce its automotive products at different prices to purchasers who compete with each other in the resale thereof, so that the effect may be to substantially lessen competition and tend to create a monopoly in both the seller's and buyer's lines of commerce, or to injure, destroy or prevent competition with the respondent, with those of its purchasers buying at respondent's lower prices or with the customers of either.

Respondent's amended answer admits its corporate status, that it is engaged in interstate commerce and in competition with others selling comparable automotive products, that it charges different customers different prices for the same products based on the quantity thereof purchased. It denies that many of its customers compete in the resale of products sold them by it; denies that it discriminates in the price between customers; alleges that most of its customers resell wholly in intrastate commerce; alleges that its price differentials make only due allowances for differences in the cost of sale or delivery resulting from the differing methods or quantities in which its products are sold or delivered; and finally alleges that any such price differentials were granted in good faith to meet an equally low price of a competitor, or the equally low prices of various of its competitors.

The pleadings therefore raise the following issues:

1. Do those who purchase from respondent at different prices compete with each other in the resale thereof?

2. If such competition is wholly or partially in intrastate commerce, is jurisdiction defeated?

3. Do the price differentials at which respondent's products are sold by it have any or all of the prescribed competitive effects on either line of commerce?

4. Are these price differentials made in good faith to meet the equally low prices of one or more of respondent's competitors within the meaning of Section 2 (b) of the Clayton Act?

5. Are these price differentials cost justified under the first proviso of Section 2 (a) of the Clayton Act?

The facts are found as follows:

1. Respondent C. E. Niehoff & Co. is, since 1923, an Illinois corporation with its principal office and place of business located at 4925 Lawrence Avenue, Chicago, Illinois, at which place it manufactures and from which place it sells, admittedly in interstate commerce, three general classes of automotive products—the hydraulic line, consisting of automobile wheel cylinders, Hydraulic brake fluid, bleeder tanks, master cylinders, brake hoses and their respective parts; the ignition line, consisting of distributor, generator, starter and switch parts, contact points, condensers, brushes, and coils; and the testing equipment line, such as voltmeters, current indicators, timers, and compression and vacuum gauges. These products, when sold, are shipped by respondent to purchasers located throughout the United States and a constant course of trade and commerce exists therein. Respondent manufactures about 65 percent of all the items which it sells.

2. In 1949, respondent's sales volume in all products amounted to $2,086,499—90 percent of which was in its ignition line; 2 percent, in its testing equipment; 3–6 percent, in its hydraulic line; and 2 percent, in rebuilt items. These products reach the user through the usual distributive hierarchy—respondent to jobber, jobber to dealer, dealer to consumer, except the testing equipment, which stops with the dealer, who is the user. Respondent suggests resale prices for each distributive level and the record shows these are generally maintained. These prices result from varying discounts of 33⅓–40 percent to dealer, and 50–60 percent off list to jobber from respondent's list prices and are illustrated as follows:

IGNITION LINE 1949

Part	*List*	*Dealer*	*Jobber*
AL83	$5.10	$3.06	$2.04
DR70	4.00	2.40	1.60
FF.142	3.20	2.13	1.52

HYDRAULIC BRAKE LINE 1948

Part	*List*	*Dealer*	*Jobber*
K3615	$2.20	$1.54	.88
3707	1.00	.70	.40

TESTING EQUIPMENT 1949

Part	*List and dealer*	*Jobber*
T–8	$12.00	$9.00
T–3	3.90	2.95

The above price differentials, representing functional discounts from list, are not challenged by the complaint in this proceeding and are noted merely by way of illustration. In addition, respondent sells special accounts at special prices in very small volume but these transactions are likewise not challenged here. Respondent has no house accounts or private brand accounts.

3. Respondent sells nationally [1] and only to jobbers (whether they be so called, or called wholesalers or distributors) and classifies all of them into four groups, for pricing purposes, largely according to annual cumulated purchase volume. To illustrate this with a view of preventing confusion by reason of the nomenclature and changes therein, the following table shows respondent's classification, former and present, its basis, prices paid by each class, number in each class, percentage of respondent's total sales volume bought by each class, and the average size order, dollarwise, of each class:

Respondent's customer classificaton

Classification [1]	Basis	Buying Price	Number	Annual volume percent of Resp.'s total sales	Average Annual Purchases
Jobber (J)	Annual purchases up to $1,200.	Jobber—no discount	299	7.5	$524
Jobber with Agreement (JA).	Annual purchases more than $1,200 up to $3,600.	Jobber plus volume rebate 5% on 1200–2400, 7% on 2400–3600, 10% on 3600-plus (not on brake parts).	228	18.79	1,719
Distributor (D)	Annual purchases over $3,600 plus buying entire line.	Jobber plus straignt 10% all products.	241	25.8	2,241
Distributor with agreement [2] (DA).	Annual purchases [3] over $6,000 plus buying entire line.	Distributor's plus volume rebate of 5% on 6000–8400, 6% on 8400–12,000, 7% on 12,000 plus all products.	98	47.8	10,128

[1] In 1950 designations were changed by respondent as follows: Jobber (J) became distributor (D); Jobber with agreement (JA) became distributor with agreement (DA); Distributor (D) became discount distributor (DD); and distributor with agreement (DA) became warehouse distributor (DW); basis and buying prices remained same for each class.
[2] Includes Cotton States, Inc., the only buying group to whom respondent sells.
[3] Discounts in this bracket do not apply on purchases of service stocks, equipment and brake fluid.

[1] Excluding the Pacific Coast, the New England States and Metropolitan area of New York City where respondent distributes through manufacturer's agents. This distribution is not involved in this proceeding.

5. Respondent's officials testified that these classifications are reviewed at the end of each calendar year to ascertain if the year's purchase volume justifies the classification and its concomitant discount and that charges upward and downward are accordingly made. However, examination of the 1949 purchase volumes and rebates of 153 of respondent's accounts (there are actually 200 such accounts in the record but 11 of these are members of Cotton States, Inc., of which more later, 15 do not have a full year's purchase, and 21 are or have branches whose purchase volumes may be aggregated) located in 144 cities in 12 southern states shows 39 instances of pricing at variance with respondent's stated basis, of which 28 received more rebate and 11 received less discount than they were entitled to on respondent's stated basis.[2]

6. Respondent sells to one buying group, Cotton States, Inc., composed in 1949 of 11 jobbers. Respondent treats this group as one purchaser and sells on its "distributor with agreement" basis, in other words, at 10 percent plus 7 percent, less than to its low volume jobbers. The aggregate purchases of the group members justify this under respondent's classification, but the classification is artificial and really a bookkeeping device, because each jobber sends his order direct to respondent and receives the merchandise, shipped back, direct from respondent. The jobber pays the invoice to the group headquarters, and it in turn remits monthly for all its members' purchases during that month. Except for one monthly billing, instead of twelve, the operation saves respondent nothing. In 1949, the annual purchases of only one member would have individually justified the discount given. The purchases of one other would have justified a discount of 10 percent plus 6 percent; 4 others, 10 percent and 5 percent; one other, 5 percent; three others, 5 percent; and the eleventh member, no discount at all.

7. It is the four price classifications set out in Paragraph 4 above which form the basis of the charges in the complaint. Thus, it is claimed that the effect of respondent's granting no discount to 299 jobbers was to lessen substantially their aggregate competition with the 567 other purchasers from respondent, or to tend to create a monopoly in the 567, or to injure, destroy or prevent competition by the 299 with the 567. Similar effects are claimed for the 527 buying at no discount or at the volume discounts for $3,600 annually or less, as against the 339 buying at higher discounts, i. e., the distributors and distributors with agreements. The same is claimed between the first

[2] Commission's Exhibit 47A–E. This exhibit was sealed by the Examiner to prevent the unnecessary revelation of sales volumes, etc., to the public, hence the names, addresses and other details of these instances are not identified herein.

three groups—jobbers, jobbers with agreements, and distributors—as against the 98 distributors with agreements. Finally, it is claimed that these differing sales prices of respondent have the effect of substantially lessening competition between respondent and its competitors in their attempts to sell to jobbers, tending to create a monopoly in respondent, and injuring, destroying or preventing competition with respondent.

8. Respondent's annual volume discount plan, as set forth in Paragraph 4, *supra*, is available to all its customers and respondent's salesmen are forbidden to deviate therefrom in quoting prices or making sales. All customers are treated equally in the granting of freight allowances and returned merchandise.

9. On the first issue of whether purchasers from respondent at whatever price are in competition in the resale with each other and with jobbers who buy from respondent's competitors, the record is clear that they are when located in the same trading area. Respondent's president unequivocally so testified,[3] and a chart[4] of 144 trading areas in 12 southern states shows, 200 of respondent's 866 accounts buying from respondent at respondent's four different prices. In addition, there is the testimony of 2 jobber customers in each of two of these trading areas that they compete in their selling area (which varies in extent with the size of the jobber's business, of course) with all other jobbers of automotive parts located in the area.

10. On the second issue, respondent admittedly sells its products in interstate commerce and charges different prices, here alleged to be discriminatory, in the course of such commerce. Jurisdictionally, this is sufficient. The purchasers thereof need not be engaged in interstate commerce, in the use, consumption or resale thereof. See *Cosmetic Shoppe* v. *Elizabeth Arden Sales Corporation*, 178 Fed. 150; *Meyers* v. *Shell Oil Co.*, 96 F. Supp. 670; *Danko* v. *Shell Oil Co.*, 115 F. Supp. 886.

11. The third issue is whether respondent's price differentials have had the statutorily prescribed effects as described in Paragraph 7, *supra*. On this issue, the record shows that some of respondent's jobber customers in particular, and automotive jobbers generally, operate on a very thin margin of profit—4 percent of sales or less; that all of them must take the 2 percent discount for cash payment within 10 days, usually extended by suppliers (this discount is not involved here because it is uniform to all); that failure to take it in many instances wipes out profit, in others, cuts profit in half or less; that automotive jobbers must stock many lines of products ranging from 15

[3] Tr. 518–9, 537–9, 542–3.

[4] Cx. 47A–E.

to 20 for the small operator to more than 100 for the large jobber, consisting of many thousands of individual items; that profit is made up of an aggregate of very small amounts on each, or as one large jobber put it, 3c on a $1.00 sale meant the difference between staying in business and failing. Although there is some testimony by respondent's president and sales manager that quality, missionary work, checking stock, advertising, etc., are all factors in the competition to sell to jobbers, the record is clear that price is the most important and frequently the only factor considered. This is made quite clear by the testimony of one of the two respondent's salesmen in his statement that when he lost an account he deemed it sufficient only to report the loss without giving any reason since the home office had the price sheets of its competitors.[5]

12. This picture is confirmed in more interesting detail by a jobber buying from respondent at its highest discount, or lowest price, i. e., 10 percent plus 7 percent below the regular jobber price. This jobber located, in Chicago, shipped into seven or eight states, employed 9 salesmen and 3 merchandise trucks in 1951. His records revealed the following volumes and margins:

Year	Volume	Gross margin	Net profit
		Percent	*Percent*
1938	$148, 000	14. 1	0. 75
1939	184, 000	15. 6	3. 5
1940	194, 000	17. 2	1. 5
1941	252, 000	18. 5	2. 25
1942	230, 000	24. 3	1. 25
1943	314, 000	25. 3	2. 00
1944	387, 000	25. 7	2. 6
1945	513, 000	21. 2	2. 2
1946 [1]	978, 000	25. 5	4. 8
1947	757, 000	24. 8	1. 7
1948	525, 000	29. 9	. 6
1949	477, 000	26. 3	3. 9 net loss
1950	636, 000	27. 5	1. 00

[1] This was an abnormal year, "Once in a lifetime you get a year like that," Tr. 791.

Gross and net margins in the above are figured on sales volume, and gross margin represents the difference between net prices paid for merchandise after discounts, rebates and receipts from sales thereof before expenses and taxes. These figures, of course, show that although the witness's sales volume has shown a steady growth, his net profit percentage thereon has not, in fact, it has decreased since 1946. From this respondent contends, of course, that its more favorable price has had the opposite effect to that contended for by counsel for the complaint. However, when these net profit percentages are converted into actual profit totals we find the following:

[5] Tr. 1352.

Year	*Actual net profit*
1938	$1,100
1939	6,440
1940	2,910
1941	5,670
1942	2,875
1943	6,280
1944	10,062
1945	11,286
1946	46,944
1947	12,869
1948	5,250
1949	18,603—loss
1950	6,360

Excluding the three years 1945, 1946 and 1947, which the witness testified were abnormally profitable years for every automotive jobber, these actual profit figures do not show the same pattern as his net profit percentages. The contrast between percentage and actual profit indicates what is generally known, that in a reselling operation, as volume increases, overhead does also and net profit percentage of sales necessarily decreases, although actual profit may or may not. The record also shows that in 1950 his discounts and rebates on all his purchases were $8,953.98, contrasted with a net profit of $6,360.00; and in 1949, $6,132.00 of discounts and rebates as against a loss of $18,603.00. To the above must be added, also, that in 1945 the witness had an inventory of $67,000, but this by 1950 had grown to $174,000 and that his net worth in 1933 was only $6,300.00, whereas in 1951 this amounted to $115,000.00. The significance of discounts and rebates in this witness's profit picture is too apparent to need elaboration. As for his purchases from respondent only, he started out in 1933 paying the full jobber's price, apparently, and purchased in succeeding years at progressively lower prices from respondent until in 1949 and subsequent years, he was buying at 10 percent plus 7 percent, lower than the jobber's price. In 1950, he bought $15,000.00 of respondent's products, which marked up for resale, amounted to $20,000.00 annual sales out of a total of $600,000.00 annual sales of all products handled.

13. Two other jobber-customers of respondent, competing with this large operator in the resale of respondent's products, testified that one entered business in 1946, and has for some years been buying from respondent on the basis of a jobber with agreement (see Par. 4, *supra*) and the other entered business in 1949, in which year he paid respondent full jobber's price, but in 1950, and since, has been buying on the basis of a jobber with agreement (see Par. 4, *supra*). Both testified

that they have progressively grown, have by reason of personal contacts and solicitation taken business away from the jobber whose testimony is summarized above in Paragraph 12; that his competition with them has not bothered them, because of their better service, more frequent calls, low overhead, and personal contacts. One thought the large-volume jobber referred to, was buying at the same price from respondent as he was, the other knew that the large-volume jobber was getting a better price. On cross-examination they both admitted the obvious—that they were interested in growing; that a greater discount or lower price would help them do this; and that they wanted such lower price and would put the increased margin into their businesses to expand it. Both had some doubts that a lower cost of product acquisition would pay for hiring extra salesmen, or otherwise expanding, but both gave the impression that they would like to try.

14. Respondent's sales manager also testified that in his eighteen years with respondent he had seen many small jobber accounts grow and prosper upward into the more favorable discount brackets, identifying three of them. One in 10 years had grown from less than $1,200 to $6,000 annually; another, from $1,800 to $2,400 in two years, the third from $1,128 to $2,076 in one year. He further said that there were 10 to 15 such instances in each of respondent's 15 sales districts, and that the number of potential jobber customers—respondent's potential market—was about 7,500 in 1949, 8,200 in 1950, and 8,676 in 1951, although no breakdown as to size is mentioned.

15. From the above, and from other evidence in the record, respondent contends that its varying discounts have no adverse effect on the jobbing line because the jobber buying from respondent at its lowest price, due to his size, has proportionately more overhead than his smaller, price-disfavored competitor; that the latter by very reason of his smallness can and does take business away from his favored large competitor through low overhead, personal contacts, time for personal solicitation, and quick service; that the small-sized jobber has grown in size in spite of paying the higher price; and that the large and price-favored jobber has declined profitwise.[6] It seems to this Hearing Examiner, however, that Section 2(a) of the Clayton Act is concerned primarily, if not exclusively, with commanding equality of price among competitors at the time of purchase, rather than with the myriad factors of a reselling operation which may destroy the effect of that equality, or if there be no price equality, may

[6] It is unfortunate that the record does not show the overall growth in the aggregate of automotive jobbing business in this particular area, nor sales volume figures for the two jobbers referred to in Par. 13 for comparison with comparable figures set out in Par. 12 above.

offset disadvantage on the one hand or advantage on the other.[7] Enforcement of the law would become well-nigh futile if the number of salesmen, their respective salaries, commissions, and efficiency, location of the bussiness, rents paid, truck maintenance and the wisdom of employing this or that resale aid or the efficiency of any of them have to be gone into. If a price preference can be justified to one customer because the recipient's location is poorer or his rent higher or his maintenance more expensive than those of a customer not receiving such price preference, it would inevitably lead to an evaluation of the efficiencies of hundreds of purchasers and to a probable subsidization by the seller of inefficiency itself. Pricing by resale efficiency must inevitably lead to pricing by customer—the very practice at which the law was aimed to prevent. The Hearing Examiner does not believe such was the Congressional intention. He is of the opinion that the mandate requires only equal price opportunity, that what the purchaser does thereafter in the resale of his own merchandise, if he then operates inefficiently or fritters away his equal price start, is, presently at least, no concern of the law.

16. From the facts found in Paragraphs 11 and 12, *supra*, it is obvious that a much smaller discount or price differential than respondent grants directly and markedly affects profit margin; that the price differentials which the jobber (whose sales volume and profit margins, covering a period of years, are set out above, Paragraph 12) enjoyed, accounted for all or most of his actual net profit, at least in two years [8] that although his two smalier competitors, buying from respondent at higher prices, testified that they could ascertain no injury to them from his competition, they both wanted a greater discount which they would use to enlarge their businesses and expand their operations; they both wanted the opportunity to grow afforded by such price treatment, one of them believing he was under no price disadvantage as compared with his large competitor. And, it is also evident from the record that this large, price-favored jobber did not maintain suggested resale prices, as did all the other jobbers who testified, but cut prices on respondent's products to "meet competition" as he put it. From his financial picture, it is doubtful if he could afford to do this, without the discounts and rebates he was receiving. The power to cut prices, thus vested, carries with it a direct poten-

[7] This idea of resale operational factors and efficiency, as affecting and justifying price discriminations, is pointedly illustrated by the cross-examination of respondent's president at Tr. 519–37; 570–3, 587–91.

[8] This is confirmed and highlighted by testimony of respondent's sales manager that when in 1949, because of insufficient volume he reclassified 92 "D" accounts to a "JA" basis (see Par. 4, *supra*) many of them strenuously objected to the lower discount or higher cost of product acquisition, Tr. 693–4.

tiality of substantially lessening competition and of injuring, destroying or preventing competition with him. The record does not clearly show that either of these effects have as yet occurred.

17. The "fait accompli" of actual injury, however, need not be shown for a violation of Section 2(a) to occur, if the Morton Salt doctrine [9] is to be followed. It is sufficient thereunder if there is a reasonable possibility (under the majority opinion) or a reasonable probability (under the minority opinion) that price differentials will result in these competitive effects.[10] It was there held "It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence." The discounts and rebates here are more substantial, comparatively, than those involved in that case. The Hearing Examiner is certainly bound by this latest decision on this point [11]—if there is to be a reinterpretation, it is for the reviewing authorities to make it. The finding, therefore, is that respondent's price differentials constitute discriminations in price, the effect whereof may be to substantially lessen competition in the resale line of commerce, and to injure, destroy or prevent competition with those who buy from respondent at its lower or discriminatory prices.

18. The Hearing Examiner, however, sees no potential or actual tendency toward monopoly in those buying from respondent at these lower and discriminatory prices. It is true that the financial history of the only witness in this category is one of growth, but it also shows that for several years that growth has been uncertain and vacillating, and profitwise has been arrested and even retarded to the extent that profit existence rests on the discriminations received. Unfortunately, the economic picture of at least one other favored discriminee for comparative purposes is not in the record. The record as a whole, though, shows no substantial concentration in the coffers of the few; it shows rather the power to lessen, injure or prevent competition with

[9] *F. T. C.* v. *Morton Salt Company,* 334 U. S. 37.

[10] See also *Corn Products Ref. Co.* v. *F. T. C.,* 324 U. S. 726, 738; *F. T. C.* v. *Staley Mfg. Co.,* 324 U. S. 746.

[11] The implications of the *Morton Salt* holding are made unmistakably clear by Justice Jackson's dissent "The Court uses overtones of hostility to all quantity discounts, which I do not find in the Act, but they are translated into a rule which is fatal to any discount the Commission sees fit to attack"

them, but as yet nothing to indicate that they may monopolize to the extent of substantially influencing or dictating the competition of the unfavored.

19. The record is barren of anything substantial indicating that competition in respondent's line of commerce has been affected in its favor. What little evidence there is, is to the contrary. Respondent has, and for many years has had, severe, even bitter, competition from other automotive parts manufacturers and suppliers, particularly the subsidiaries of automobile manufacturers who secure practically all of the replacement parts business done by automobile agency service garages through their corporate connections and the consumer advertising campaign to get "genuine" parts when having an automobile repaired. It is ridiculous to claim on this record that the competition of respondent's competitors has been substantially lessened by reason of respondent's price differentials, or that the latter are tending to vest in respondent any monopoly. The financial growth or condition of respondent over a period of years is not shown. There is evidence that respondent's gross volume was less in 1950 than in 1949, on the other hand respondent's sales manager said the gross volume increased in 1950 over 1949, and in 1951 over 1950. Although not truly indicative of a volume trend, the record does show that respondent's jobber customers declined in number from 866 in 1949 to 821 in 1950, and to 805 in 1951, while its market of potential jobber customers increased from 7,500 in 1949 to 8,200 in 1950, and 8,676 in 1951. There is nothing substantial in the record either to show that respondent's price discriminations have injured, destroyed or prevented competition with it. The finding is that there is no substantial evidence showing, or from which one can infer, an adverse competitive effect on the seller line of commerce.

20. The fourth issue is whether respondent's price discriminations were made by it in good faith to meet the equally low price or prices of a competitor or of competitors. In support of this, respondent's founder and president testified that he incorporated in 1923, had Model T Ford parts, principally vibrator parts, manufactured for him by others, assembled and packaged them under his own brand and sold them to jobbers. This activity continued until 1936 when he began his own manufacturing and expanded to making also General Motors and Chrysler parts, and since 1939 has done this in his own factory, built that year. Respondent has never sold automotive parts for original equipment.

21. He further testified that respondent's present volume discount plan goes back to the early 1930's. Before that in the 1920's it was an item quantity discount, but neither of these discount plans origi-

nated with the respondent, they were general in the industry. The present volume discount plan was adopted by respondent because it felt that it was more equitable to allow small customers to get the advantage thereof because the previous discount plan was an item quantity discount and only the larger buyers could obtain it. It was first adopted by respondent's competitors in the fields of ignition and automotive parts and this competition forced the issue on the respondent who went on a volume discount basis in 1934, 1935 or 1936. In that period, competition forced respondent to quote 10 percent to a majority of its accounts. The original parts manufacturers, such as General Motors, Chrysler and Ford set the pattern for the industry, but respondent must also contend with many replacement parts manufacturers, whose price schedules respondent must study to be competitive, along with the list prices of the original parts manufacturers. Respondent knows the prices of its competitors because they all issue price lists and furnish these to respondent's jobbers. In most cases, competitors' discounts are somewhat longer (their prices somewhat lower) than respondent's. Jobbers will not handle respondent's line, unless respondent gives a profit incentive in its lines over other lines. It has always been a strenuous battle for respondent to get a jobber to buy respondent's line, and merchandise and resell it in competition with the original parts manufacturers and their outlets. Respondent has not been able to achieve the lowest price offered by its competition—its prices on single items in some instances are lower than its competitors'—but in other instances its prices are the highest. The average of respondent's prices is higher than those of its rank and file competitors. To achieve a lower price than any other competitor, respondent would have to sell below cost. Respondent's prices are fixed somewhere between cost of production and the prices of original parts manufacturers. Respondent's president does not know how any concern can maintain itself in business if all volume discounts were eliminated and salesmen sold only at a jobber's price, reducing such price only at the actual point of sale when necessary to meet the equally low price of a competitor. In such case, respondent would have as many different prices as it has customers, and it would be disastrous to respondent to operate that way. If respondent dealt in only one or two items, and then only in large quantities, perhaps it could do so. Operating from a single price and granting a reduction therefrom to meet the particular price of an individual competitor would mean that respondent's salesmen, in the field, would have to be competent to determine the extent to which respondent could go to meet the price of a competitor, which respondent does not think they could. This would require more personnel; far greater expense; and would preclude respondent from maintaining the business it now has particularly the large volume customers who account for nearly one-half of respondent's volume. The result would be that respondent's cost would be higher due to lower volume. Selling on the basis of a single price from which deviations would be made only in particular instances would involve a great deal of extra detail and work. Salesmen would have to check with the customer and sales manager and determine the cost that would have to be met in the particular case. Two or three times the number of salesmen would be required to contact customers and to maintain close surveillance of prices offered by competitors. This would be impossible to follow through, and in view of the extent of respondent's line of products would be tremendously costly.[12] The delay ensuing from the time that salesmen discovered a competitor's low price until the home office approved (as not being below cost) an equally low price, and the customer could be informed thereof, would mean that the respondent would be too late to get the business. It would not be feasible to give salesmen sufficient authority to reduce a price to meet a competitor's lower price without consulting the home office, because the salesmen would have no means of determining the cost factors involved in the particular product.

22. He further testified that if respondent were ordered by the Federal Trade Commission to discontinue its volume rebate plan and adopt a uniform price regardless of volume, while respondent's competitors are not similarly enjoined, the effect would be disastrous. Respondent would have to give every purchaser its extreme discount 10 percent plus 7 percent to maintain its business, in which case, it would make no profit. If such price were set at any higher level, respondent would lose about 50 percent of its volume which in turn would skyrocket respondent's costs.[13]

23. Respondent's president further testified that jobbers' prices must be competitive with Auto-Lite and Delco Remy's prices. Delco Remy is considered a prestige line because it is on the car when it comes from the manufacturer, it has a larger sales force, probably many times greater than respondent's. Auto-Lite operates in a slightly different manner, but is definitely a prestige line. Respondent's net price must be under Auto-Lite's and Delco Remy's prices, otherwise respondent's jobbers will not handle its lines. These concerns have this advantage over respondent, inasmuch as they supply for replacement "original" parts, and there is a definite preference on the part of the car owners to replace a worn out part with the same part made by the car manu-

[12] 2,000 items on the ignition line ranging in price from $.02 to $2.25; 1,200 in the hydraulic brake line ranging in price from $.02 to $4.50, Tr. 668–9.

[13] The foregoing testimony of respondent's president is corroborated in all material aspects by that of respondent's sales manager, Tr. 665–71, et al.

facturer as that which is worn out. For this reason, respondent must sell more cheaply to many customers than either of these concerns, to overcome this disadvantage. Respondent's president has never known his ignition line to be handled by an authorized automobile dealer, except during the war when the dealer was unable to obtain parts from car manufacturers. Respondent's president stated that there are other ways (unspecified) than respondent's present pricing methods to meet competition, but thinks its present method is best because it gives the jobber the best opportunity of meeting the original parts competition.

24. Respondent has seven competitors on its hydraulic parts line and some thirty competitors on its other lines. It is obviously impossible for it to exactly meet the prices of all of these competitors. According to respondent's president, some of these competitors are lower on all lines than respondent; some of them are lower on some items and higher on others; some of them are higher than respondent; and others are approximately in line with respondent. Auto-Lite and Delco Remy set the price pattern for the entire industry with differential prices for different classes of their trade, and respondent tries to keep its prices slightly lower than both of them. The Ford Motor Company's distribution method is a little different and its price competition is sometimes lower than respondent's. Respondent cannot sell the Ford dealer and meet Ford's prices. Respondent maintains its pricing system as is, under the volume discounts established, and never departs therefrom regardless of specific price cutting.

25. Of fourteen replacement parts competitors (as distinguished from original parts manufacturers and sellers) on ignition parts, respondent's president testified that with 3, respondent had no competition; and of 2 others, he did not know whether their prices were lower or higher than those of respondent. Of the remaining nine, 5 were lower than respondent, none were higher, and 4 were about the same. Of his seven competitors on brake parts (not original parts manufacturers or sellers), he testified he had no appreciable competition with 3, 1 was higher in price than respondent, and 3 were lower.

26. Respondent's sales manager testified that of the sixteen identified competitors of respondent on ignition parts, none had a net price to a jobber that was higher than respondent's similar price, and that none of them had a jobber price classification such as respondent's (see Par. 4, *supra*). He further stated that the ignition parts line which respondent sells ranks seventh in sales volume among all automotive parts. Respondent never has and cannot afford to sell on a net price basis.

27. One of respondent's fifteen district salesmen (Arkansas, Mississippi, Alabama, and parts of Tennessee and Louisiana) testified that a number of his customers had been offered ignition parts at lower prices than respondent's prices; that he knew this from seeing proffered contracts, price sheets, and from what his customers told him; that these competitors were seven of the sixteen identified in the record; that he had lost customers to them (he identified 5 which he had lost and to which competitors he lost them, as well as one which he gained) because of a lower price; and that it is harder to regain a former customer taken away by a competitor, than to take away one not previously sold from a competitor.

28. A comparison chart of 1949 jobber (without any discount) prices of respondent, with the jobber (without any discount) prices of ten of its principal replacement parts competitors on 57 of its most popular parts (representing 80 percent of respondent's ignition line volume) with the same or comparable (interchangeable) parts of these ten competitors shows:

Parts	Respondent was—		
	Higher	Lower	Same
7 point sets	37	11	18
7 condenser	17	15	31
10 distributor cap	53	10	25
7 rotor	22	22	23
6 brush set	22	8	26
3 regulator	7	21	0
14 switch	57	54	16
3 relay	10	11	6

Any discrepancies between the lineal aggregates above and the total number of comparisons is due to one or more of the competitors not making one or more of the parts selected for comparison, hence price comparisons could not be made. The same comparison made by individual competitors on all 57 parts shows:

Competitor [1]	Respondent was—		
	Higher	Lower	Same
1	19	18	19
2	18	18	21
3	40	4	11
4	13	27	15
5	18	20	14
6	18	15	24
7	27	12	17
8	13	8	2
9	22	21	13
10	38	9	8

[1] The ten competitors are referred to in the transcript by numbers, which numbers are keyed to the names in an exhibit sealed by the Hearing Examiner at respondent's request to prevent unnecessary disclosure of identity.

On overall totals this shows respondent higher in net price on 226 comparisons, lower on 152, and the same on 144.

29. Respondent has also shown the annual volume rebates given by these same ten competitors. In some instances, printed contract forms setting these rebates out are in the record, in others, it comes from the sales manager of respondent and is based on what he has gleaned in the industry, from customers, from his salesmen, or from his competitors. Comparison of respondent's annual volume rebates with those of these ten competitors follows below:

	Percent
Respondent:	
Up to $1,200	0
$1,200–$2,400	5
$2,400–$3,600	7
$3,600–$6,000	10
$6,000–$8,400	10 plus 5
$8,400–$12,000	10 plus 6
$12,000 and over	10 plus 7
Competitor No. 1:	
$1,800–$2,400	3
$2,400–$3,600	5
$3,600–$5,000	7
$5,000–$6,500	9
$6,500–$8,000	11
$8,000–$10,000	13
$10,000–$100,000	15
Over $100,000	20
Competitor No. 2:	
$200–$299	10
$300–$399	13
$400–$20,000	15
$20,000 and over	20
Competitor No. 3:	
Up to $1,800	10
$1,800–$3,599	10 plus 5
$3,600–$6,399	10 plus 7
$6,400–$10,000	10 plus 10
$10,000 and over	20
Competitor No. 4:	
Up to $5,000	10
$5,000–$10,000	15
$10,000 and over	20
Competitor No. 5:	
Up to $1,800	5
$1,801–$3,600	10
$3,601–$5,000	15
Over $5,000	20
Competitor No. 6:	
Up to $1,000	10
$1,001–$2,000	15

	Percent
Competitor No. 6—Continued	
$2,001–$3,000	20
Over $3,000	25
Competitor No. 7:	
Up to $3,600	?
$3,600 and over	15
Competitor No. 8	23 to a central distributor reselling to jobbers at 10 percent off jobber's price. No volume discount.
Competitor No. 9:	
Up to $3,600	8
$3,600–$4,800	8 plus 3 on the full $1,200 in excess of first $2,400.
$4,800–$6,000	8 plus 6 on the full $1,200 in excess of first $3,600.
$6,000–$7,200	8 plus 12 on the full $1,200 in excess of first $4,800.
$7,200–$9,600	8 plus 15 on the full $1,200 in excess of first $6,000.
Over $9,600	8 plus 15 on the full $2,400 in excess of first $7,200.
Competitor No. 10	Straight 10 percent off invoice regardless of volume.

Some of the above discounts are advanced monthly; some rebated yearly; some are conditioned on carrying stock or carrying stock in certain amounts, others are not. Six other competitors of respondent on ignition parts do not have any volume discount allowance, but sell on net prices, fixed in accordance with volume—the net effect so far as respondent is concerned being the same.

30. It is obvious from the above comparisons, and from the other evidence in the record, including the testimony of respondent's president, that there has not been, in fact, there could not be, a meeting of the equally low prices of all these competitors on all the hundreds of parts involved. Section 2 (b) of the Act, under which this defense is offered, has been twice construed by the Supreme Court in the Staley [14] and Standard Oil [15] cases. The Hearing Examiner construes the first of these as holding that the statute is inapplicable, or the defense thereunder not made out, unless the seller's discrimination was:

1. Temporary;
2. Localized;
3. Individualized as to a particular competitor;
4. Not part of a pricing system;
5. Defensive rather than aggressive.

[14] *F. T. C.* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746.
[15] *Standard Oil Company* v. *F. T. C.*, 340 U. S. 231.

The facts set out in Paragraphs 20 to 29 above do not meet these requirements. Respondent's price differentials are part of a nationwide pricing system, which is permanent in essentials, with minor adjustments from time to time, is continuing in nature, prospective as well as for the present, constructed for all of its competition rather than any particular competitor, and not exactly meeting any one or all competitive prices in the great majority of instances, undercutting and overshooting out number matching. It is deliberately set to be lower than respondent's most powerful competition—the original parts manufacturers. In fact, respondent's officials impliedly admit they have never met these Staley requirements by offering cogent reasons why they cannot. They point out that they sell over 3,000 items instead of one homogeneous commodity; in comparatively minute quantities, rather than in carload or tank car lots; that they cannot meet the different prices of 30 or 40 competitors (in the Staley case, of course, all competition sold at a uniform price in every town and hamlet in the United States); and finally, based on more than 30 years experience in the industry, they say that to establish a uniform price to all and then deviate therefrom only in individual localized instances would make it impossible for them to remain in business. These are indeed persuasive facts and make out a hardship case.[16] But, unless the factual setting of the Staley case can be basically differentiated from that in this proceeding, the defense must fail. The Hearing Examiner is merely a judicial delegate of the Commission and as the low man on the judicial totem pole, is bound to follow the mandate of the highest body on that same pole. Any reassessment or exceptional reinterpretation of the statute must come from the courts or from that body of experts, the Commission.

31. The facts show distinctions, but without basic differences, between this proceeding and the Staley case. In the latter, there was but one homogeneous commodity involved, sold in tank car lots for the most part, and there was but one price to meet. Here there are myriad products, prices and competitors. But the fundamental condemnation there is present here—a nationwide pricing system which inevitably spawns systematic and continuing price discriminations. Any such system cannot be wholly defensive. There was in the Staley case at least an exact meeting, here, there is not. It is believed, accordingly, that no fundamental difference is shown and that the defense fails for that reason.

[16] "Hardship cases make bad law," Rolfe, M. R. in *Winterbottom* v. *Wright*, 10 M & W, 109, 116.

Regardless of approach or criteria, respondent's pricing system is one which favors, progressively upward, its financially powerful customers and as Justice Black said in the Morton Salt case, *supra*, "theoretically these discounts are available to all, functionally they are not."

32. The finding, therefore, is that respondent has not met the equally low price or prices of a competitor or competitors. There is, therefore, no necessity for any finding as to good faith or otherwise. The Hearing Examiner has no doubt on this record that what respondent has done, it has done in good faith, in an ordinary if not legal sense, but what it has done is not what the statute, as interpreted requires it to do.

33. Discussion of the Standard Oil case construction of the Act is therefore probably academic, but since the Commission may reach a different conclusion as to the applicability of the Staley holding, a finding on this point may be necessary. The Supreme Court in the Standard Oil Case [17] interpreted the Act's phrase "equally low lawful price of a competitor" and counsel for the complaint contends that there is no showing that the prices of respondent's competitors were or are lawful, i. e., non-discriminatory. This is true. There is nothing in the record to show that such prices are either lawful or unlawful as an absolute, unless one adopts the rigid contention that every quantity or volume discount is per se discriminatory and therefore illegal, which this Hearing Examiner does not. However, this legality test or requirement has in effect been replaced, amplified or supplemented by the Commission to be whether respondent's officials knew, or, as reasonably prudent businessmen, had reason to believe that the prices of their competitors were unlawful.[18]

34. As to this, the testimony of respondent's president and sales manager is that they had no knowledge of the lawfulness of competitor's prices one way or another; that they assumed them to be lawful; that although competitors had different prices to different purchasers, whether net or by reason of quantity or volume discounts, respondent's officials did not know whether such differentials were cost justified or not, and could not find out; that they knew of no court or Commission decisions holding that such prices were discriminatory, although they knew complaints had been filed against some of them charging price discrimination, but that charges were not proof. Cross-examination indulged in legalisms and technicalities which were obviously beyond the scope of the witnesses' knowledge. Without more detail, the Hearing Examiner is satisfied that respondent's officials did not

[17] 340 U. S. 231.

[18] Ruling on appeal May 21, 1953, Docket No. 5770, *E. Edelmann & Company*.

know of any illegality in their competitor's prices, and, without expert legal knowledge of the intricacies involved in the application of the Act, had no reason to believe so—a matter on which experts themselves disagree. Other holdings by the Commission condemning as illegal volume or quantity discounts must, of course, be assessed in the light of each individual record and these witnesses could hardly be expected to do that. The "reasonable prudence" required must be interpreted through commercial, not expert or legal, eyes.

35. Counsel in support of the complaint contend that since respondent's prices have not been shown to be cost justified (hereinafter discussed), it follows that respondent's officials knew or must have suspected that their competitor's prices likewise could not be so justified, assuming that respondent has not, or cannot, cost justify its discounts. It has since the inception of this proceeding claimed that it can and does so justify and there has as yet been no holding that such cost justification is invalid. Counsel therefore imputes to respondent a rejection not so far made, and then upon this, further imputes a similar rejection of any cost justification which may or may not exist of competitor's discounts. This is to pile inference upon imputation. It is further to impute to respondent that its competitors' discounts had the same prohibited competitive effects herein found to follow respondent's pricing. The knowledge of illegality contended for by counsel in support of the complaint to be imputed to respondent can only be done by holding that any cumulative annual volume discount is per se illegal. No case yet so holds.[19]

36. The finding on this point, therefore, is that respondent's officials are reasonably prudent businessmen of lifelong experience in the industry; that they had no knowledge of any price of their competitors being illegal, although they did know that different prices for the same merchandise were charged by such competitors; that they had no knowledge and could obtain none, as to whether such competitors' price difference could be wholly or partially cost justified, nor whether such competitors' differing prices had the statutorily proscribed competitive effects; and that, therefore, assuming as the Hearing Examiner must, that the standard recently set up by the Commission on this point is a defense, such defense has been made out, on this legality issue.[20]

[19] *Bruce's Juices Inc.,* v. *American Can Co.,* 87 F. Supp. 985; 187 Fed. 919 presents a far different factual picture in that, in that case, pooling of purchases from other plants was counted toward the qualifying volume, although, of necessity, costs thereat invoiced and the volume brackets were so wide in spread as to intentionally exclude 98 percent of purchasers.

[20] A number of comments, observations and reasons made by this Hearings Examiner in his initial decision in Docket No. 5770, E. Edelmann Company, are apposite to the third and fourth issues in this proceeding, but their repetition herein would unnecessarily extend this opinion.

37. The final issue is respondent's defensive contention that its price differentials resulting from its cumulative annual volume discounts "make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." Since respondent sells to all by the same method, this defense is necessarily grounded on whether the different quantities in which it sells, justify the differing prices. To establish this, respondent has shown advertising expense, direct sales expense on a per account basis, and time and cost studies on a per order basis showing the cost of processing orders of various dollar size through the 21 steps each order must traverse from receipt to shipment.

38. To ascertain the latter, respondent employed in 1951, a qualified industrial engineer, who requested from, and was furnished by, respondent's sales manager over a period of time 17 orders, selected to show a range of dollar amounts.

These orders were time studied through their filling process, and cost of each ascertained by multiplying the handler's wage rate by the time consumed in each processing step with the following results:

Sales order No.	Net billing	Number of packages	Number of items	Processing cost per dollar of net invoice
44524	$12.00	2	1	$0.0992
44525	37.66	23	6	.0349
44576	45.14	29	20	.0431
44575	56.51	49	8	.0366
45968	125.20	69	33	.0211
44572	134.47	116	25	.0233
46162	206.79	171	37	.0174
44577	208.64	86	36	.0159
44573	223.76	163	63	.0211
45969	259.80	110	49	.0147
45945	305.01	163	56	.0177
46161	341.79	236	49	.0130
44991	496.98	391	68	.0144
45078	523.22	334	81	.0166
45301	785.80	623	101	.0136
45079	811.57	598	94	.0141
44993	846.66	469	89	.0123

Graphs plotted from these figures, of course, show the obvious—the greater the net billing, the more packages per order, or the more items per order—the lower the total processing cost per dollar of net invoice. From this last graph it is then computed that, in even billing amounts, the processing cost per dollar and per order is as follows:

Net billing	Total processing cost per dollar of net billing	Total processing cost per order
$20	$0.0660	$1.32
40	.0500	2.00
60	.0420	2.52
80	.0380	3.04
100	.0340	3.40
150	.0270	4.05
200	.0225	4.50
250	.0190	4.75
300	.0170	5.10
350	.0150	5.25
400	.0145	5.80
500	.0125	6.25
600	.0115	6.90
700	.0105	7.35
800	.0100	8.00

39. Having thus arrived at the total processing cost per dollar of net billing, respondent then takes any customer in any discount bracket, totals his year's net billings and divides by the number of orders, to ascertain the average size order over the year, and multiplies this by the total processing cost per dollar of net billing applicable to that size order to obtain the actual processing cost of that customer's business. It is this latter computation which contains a basic fallacy. Respondent's discounts are not granted on a quantity per order basis but upon an annually cumulated volume basis. If each customer's order was in exactly the same amount each time, this method might be acceptable, but a customer buying $15,000 annually of respondent's products might well send in as a substantial part of that volume a number of small and high cost orders, whereas contrariwise $500 of annual purchases could well be in two orders of $250 each.

As was said in *H. C. Brill Co., Inc.*, 26 F. T. C. 678:

"Purchasers of large annual amounts sometimes buy in larger individual shipments than do buyers whose purchases do not amount to as large a sum. Large buyers, however, also place numerous small orders and the average size of such orders is frequently less than the average size of orders placed by buyers whose aggregate annual purchases are less in volume. Indeed under a discount plan based on aggregate volume purchases for a given period, * * *, it may cost the seller more per dollar of sales to serve a customer who places a large number of small orders which are sufficient in the aggregate to earn the discounts, than to serve a customer who places a few large orders whose total is not sufficient to obtain the discount."

Reference to Commission's Exhibit 94 shows that the customer who sent in Sales Order 44993 [21] in 1949 sent in 90 orders that year totaling $4,076.08 for an average of only $45.29 per order; whereas, the cus-

[21] Par. 38, *supra*.

tomer who sent in Sales Order 46162 [21] bought in 1949 $6,304.88 in only 30 orders for an average order of $210.16. There is no showing of the number of orders received over the year 1951 from each of the 17 customers whose single orders were cost analyzed, nor any showing of their individual amounts, and hence it is impossible to tell how many orders varied precipitately from the average and hence how much actual cost variance there may have been. Respondent's actual records could have shown the exact processing cost of each and all orders from the 17 selected customers for 1951, but this was not done.

40. The point is made clearer by the same exhibit which shows the total year's billings in 1949, 1950 and 8 months of 1951 of the 17 selected customers, together with dollar size range of all orders received during each period, the number of shipments, and the average dollar size of total year's shipments. From this it is seen, for example, that the customer who in 1951 sent in Sales Order No. 44577 [21] bought $378.63 worth of merchandise from respondent in 7 orders ranging in amount from $2.00 to $160.00 for an average of $54.09 per order; whereas in 1950, the same customer bought $844.68 worth of merchandise in only 3 orders ranging in amount from $189.00 to $445.00 for an average of $281.56 per order. This customer received no discount from jobber's list in either year, yet respondent's processing cost was obviously markedly different. The same is true of the customer who in 1951 sent in Sales Order 44525 [21] and received 10 percent off list as a discount. His total net billing for 1949 was $1,786.30 on 17 orders ranging in dollar size from $1.00 to $322.00 for an average of $105.08; whereas in 1950, $2,696.08 was bought in 11 orders ranging from $4.00 to $645.00 for an average of $245.10. This unreliability of averages as between customers in any one year and as between averages between the same customer in different years, where cumulation is practiced, is further illustrated by the fact that Sales Order 44577 [21] used as a sample or typical instance, was in the amount of $208.64, far in excess of the average of $54.09 in 1949, and that in 1951 Sales Order 44525 [21], likewise used as a typical sample, was for only $37.66; whereas this customer's average order in 1949 was $105.08 and in 1950, $245.10. The latter lends support also to the contention of counsel in support of the complaint that 17 orders out of thousands received and processed annually (10,008 during 1949) cannot be typical and are far too few to be relied upon either absolutely or as a basis for averaging.

41. The finding, accordingly, is that respondent has failed to show by reliable, probative, substantial, and the best available evidence any

[21] Par. 38, *supra*.

justification for its price differentials due to actual different processing costs applicable to the different quantities to which the different prices apply.

42. The next item of cost offered as justification is respondent's advertising expense incurred in preparing, editing, and printing catalogs, price sheets, tune-up charts, signs, displays, circulars and trade magazine insertions, samples and show expense. In 1949, this amounted to $100,437.11 and by dividing this total by its 866 accounts, respondent arrives at a per account cost of $115.97, and it argues therefrom that for advertising alone respondent spent $115.97 for $600.00 worth of business at its no discount level, but for the same expenditure realized $12,000.00 worth of business at its 10–7 percent level.

43. Analysis of respondent's advertising expense, however, shows that the great majority of it cannot be properly allocated on a customer basis because it is general advertising not geared to any particular customer, to any particular product or line of products or to any particular class, discount or otherwise, of customers. The breakdown is as follows:

Executive salaries	$6,200.00
Advertising office	9,249.61
Advertising trade papers	28,279.45
Advertising catalogs	32,389.07
Advertising printed matter	15,460.93
Advertising miscellaneous	650.76
Show expense	3,390.23
Display	3,531.88
Photo expense	1,169.29
Samples	115.87
Total	$100,437.11

It is obvious that the effectiveness of trade paper advertisements, broadcast generally throughout the trade, or show expense cannot be measured by any customer's volume—it can only be measured by respondent's over-all sales volume. The same is true of every other item except catalog expense. Respondent's president admitted that averaging this total expense on a per customer basis was arbitrary. It can only be allocated on a per dollar of sales basis which, of course, furnishes no cost justification for differing prices as between customers.

44. It is believed, however, that the catalog expense can properly be allocated on a customer basis because the record shows on the whole that these are distributed evenly, in fact, if there is any variance from this, it is in favor of the smaller-volume customer, inasmuch as respondent's salesman stated that the smaller the account volumewise,

the greater the number of catalogs. It is from these catalogs, price sheets, tune-up charts, etc., that each jobber directly makes his sales, and his purchase volume can be directly attributed to this material furnished by respondent. On this basis a total expense of $32,389.07 gives an expense of $37.40 per customer. Taking the median figure [22] of each volume discount bracket, the following results obtain.

Median purchase volume for each discount bracket	Catalog, etc., expense	Percent of sales	Cost difference	Price difference	Percent of price not justified
			Percent	*Percent*	
$600	$37.40	6.23	----------	----------	----------
$1,800	37.40	2.08	4.15	5	0.85
$3,000	37.40	1.25	.83	2	1.17
$4,800	37.40	.78	.47	3	2.53
$7,200	37.40	.52	.26	4.5	4.24
$10,200	37.40	.37	.15	.9	.75
	37.40	.31	.06	.9	.84

The above represent the amount of cost justification of the various discounts between each successive bracket, but therefrom can be ascertained also the amount of cost justification between non-successive brackets as, for instance, between the lowest and highest bracket,

$600	$37.40	6.23%			
12,000	37.40	0.31%	5.92%	16.3%	10.38%

The net result is that the price differences are partially, but not wholly, justified by cost savings.

45. The finding on advertising cost therefore is that $68,048.04 of respondent's advertising costs cannot be allocated on a per customer basis, but can only be allocated on a per dollar of sales basis, which furnishes no cost justification for the price differentials charged; that $32,389.07 representing cost of catalogs, price sheets, tune-up charts, etc., can be allocated as urged and when so allocated partially justify, but do not wholly justify, the price differentials charged.

46. The last record item of cost justification is that of direct selling expense totaling $159,433.59 in 1949 broken down as follows:

Salesmen's salaries	$67,662.00
Salesmen's commissions	11,217.20
Travel expense	70,433.12
Entertainment	4,652.73
Sales conferences	5,468.54

This expense covers 12 districts embracing all of the United States, except New York City, the New England States and Pacific Coast

[22] Respondent in its proposed findings uses a median figure for the lowest discount bracket and the bottom or minimum figure for each other bracket. It is believed a median figure for each bracket is more accurate.

States which are serviced by factory representatives who employ their own salesmen. There is one salesman to each of the 12 districts. Respondent's president and sales manager testified that each such salesman calls on each account in rotation 5 or 6 times a year and makes an equal number of calls on each jobber, irrespective of size, but spends more time per call with the smaller-volume jobber than with the larger-volume jobber because with the former it is necessary to physically check his inventory; whereas, the latter usually has a perpetual inventory system; and because it is often necessary for the salesman to wait around to see the smaller-sized jobber to get an order because the latter must make deliveries and calls himself and must himself wait on counter customers; whereas, the larger-sized jobber has a purchasing agent who is readily available.

47. On this basis of the same number of calls per salesman, per customer, respondent then divides total direct selling cost by number of accounts and arrives at an average cost per account of $204.00 and contends that since that expenditure with a small jobber brings in only $1,200.00 or less, that same cost with the largest jobber brings in $12,000.00 or more and therefore the price differential of 10–7 percent in favor of the latter is pro tanto cost justified.

48. This claimed result must stand or fall on the soundness of its basis—namely, that respondent's salesmen make the same number of calls per year on each customer regardless of size. This is supported by the generalizations of respondent's president and sales manager, but is not corroborated by any record of such calls. Salesmen must routinely report itinerary, expense and time to respondent, but such records were not produced, it being stated that they had been destroyed. The testimony of the one typical district salesman who testified refutes the generalizations of his superiors. His territory embraced Alabama, Arkansas and Mississippi and parts of Florida, Kentucky, Louisiana and Tennessee, and customers of respondent called on therein were located in 43 towns.[23] The salesman testified he not only called on respondent's jobber customers in these towns, but also contacted 18 prospective customers located in other towns one or more times during 1949, and called on prospective dealer customers with jobbers' salesmen on an average of 15 or 20 times a month.[24] Time spent on such missionary work can obviously not be allocated on a per customer basis. Furthermore, this salesman's headquarters were in Memphis, Tennessee; his trips therefrom ranged from one day to three weeks at a time. The number of his visits to towns where respondent's jobber customers were located ranged from 1 to 7 calls,

[24] Tr. 1354; 1418–34.
[23] RX 60A–L; RX 25; CX 47A–E.

except Memphis, during 1949, with the majority receiving only 2 or 3 visits. He called on the 4 jobber customers in Memphis between 3½ and 4 times during 1949. A comparison of the itinerary [25] of this salesman for 1949, taken from his weekly expense books with the location of his customers in his area,[26] shows the following:

Frequency of 1949 calls	Number of jobbers			
	J	JA	D	DA
No calls	2	1	1	0
1 call	1	5	3	1
2 calls	2	5	5	7
3 calls	5	1	1	6
4 calls	0	1	2	6
5 calls	0	0	1	1
6 calls	1	0	0	0
7 calls	0	0	0	1

The testimony of this salesman and the exhibit of his 1949 itinerary were apparently offered as typical of other salesmen of respondent and in corroboration of the general testimony of respondent's officials that salemen make the same number of visits to every account. Instead of corroboration, is the refutation, and since it is specific and in detail has greater weight than the aforementioned generalizations. It is concluded, therefore, that the asserted basis for allocation is not established by reliable and substantial proof and therefore that any computations or extensions or conclusions upon such basis are untenable and unacceptable.

49. The defense of cost justification to price discrimination is an affirmative one, and the burden is upon him who asserts it to establish it by detailed specific evidence rather than by conjecture, speculation, arbitrary allocation or broad averaging,[27] because such costs are peculiarly and solely in the possession of and under the control of respondent. Failure to keep detailed records cannot be accepted as an excuse for substituting generalizations for actual outlays. Respondent herein has largely failed to sustain this burden.

50. In summary, respondent has attempted to establish its defense of cost justification in much the same manner as its defense of meeting competition in good faith—generally, instead of specifically, with generalizations and opinion rather than with detailed records which are solely within its knowledge and ability to keep and maintain and under its control. Judicial interpretation of the statute involved is to the contrary.

[25] RX 60A–L.
[26] CX 47A–E.
[27] See *Russellville Canning Co. v. American Can Co.*, 191 F. 2d 38.

CONCLUSION

Respondent has violated the provisions of Section 2(a) of the Clayton Act (15 U.S.C. 13) by discriminating in price between its customers competitively engaged in the resale of products purchased by them from respondent at differing prices and has failed to establish either of the two asserted defenses which are provided in the statute, by substantial, reliable and probative evidence.

ORDER

It is ordered, That respondent C. E. Niehoff & Co., a corporation,[28] directly or through any corporate or other device, in, or in connection with, the sale for replacement purposes of automotive products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from discriminating, directly or indirectly, in the price of said automotive products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser, which purchasers compete, in fact, in the resale of said products; except insofar as such price differences do not exceed the amounts thereof, under respondent's current pricing practices, herein found to be cost justified.

OPINION OF THE COMMISSION

By SECREST, Commissioner:

Presented for our determination here are the cross appeals filed by the respondent and counsel supporting the complaint from the initial decision of the hearing examiner. The initial decision held that respondent had discriminated in price in violation of Section 2 (a) of the amended Clayton Act, and ordered respondent to cease and desist from:

"* * * discriminating, directly or indirectly, in the price of [its] automobile products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchasers, which purchasers compete, in fact, in the resale of said products; except insofar as such price differences do not exceed the amounts thereof, under respondent's current pricing practices, herein found to be cost justified."

In urging under its appeal that the complaint instead should be dismissed, the respondent contends, *inter alia*, that the hearing examiner erred in concluding that the effects of respondent's price differ-

[28] The phrase "officers, representatives, agents and employees" is omitted on the authority of *R. J. Reynolds Tobacco Co.* v. *F. T. C.* 192 F. 2d 535, 540–4 which case the Hearing Examiner regards as apposite and binding on himself and upon the Commission.

entials may be to injure, destroy and prevent competition among and between purchasers who pay respondent's higher prices and those accorded its lower prices, and also in concluding that a violation of Section 2 (a) of the Act has been established by the record. Additionally urged as error under the appeal was the hearing examiner's failure to find that the respondent's price differentials were established in good faith to meet the equally low prices of its competitors and his declining to rule that a complete defense had been established by respondent under Section 2 (b) of the Act. Also excepted to is the examiner's rejection of respondent's contention that the evidence submitted in the course of its defense showed its price differentials to be fully cost justified under the Act, rather than only partially so.

Respondent, an Illinois corporation, with its office and factory located in Chicago, is engaged in the manufacture, sale, and distribution of a complete line of automotive replacement ignition parts (excepting spark plugs and generators), a complete line of hydraulic brake parts for all makes of automobiles and trucks, as well as a line of testing equipment and a line of rebuilt items. Respondent manufactures about 65% of all the items it sells. Respondent's sales are limited to the replacement parts field commonly known as the "after market," making no sales to the original equipment market (automobile manufacturers); thus, except for certain areas in which it affects distribution through manufacturers' agents, respondent sells its products almost exclusively through independent automotive jobbers who in turn resell to garages, fleet owners, gasoline stations, and over-the-counter.

In 1949 respondent's wholesale customers, said to number 866, were divided into four classifications for pricing purposes, namely, Jobber, Jobber with Agreement, Distributor, and Distributor with Agreement. Classified as a "Jobber" were those purchasers with an anticipated annual volume in respondent's products of under $1200. Buyers in this classification purchased respondent's products at its base price and received no discount other than the 2% cash discount for prompt payment accorded all purchasers. Jobbers with annual purchases ranging from $1200 to $3600 were classified as "Jobbers with Agreement," and as such received discount allowances ranging from 5% to 10%, depending on their volume. Distributors purchasing $3600 to $6000 from respondent, received a 10% discount off of the jobber's base price on their purchases. Jobbers whose annual purchases exceeded $6000 were classified as "Distributors with Agreement" and in addition to respondent's 10% discount, these purchasers received certain additional discounts ranging from 5% to 7% depending on their annual volume; hence, it appears that respondent's prices differed between customers in its four classifications and as between individual members in these classifications. All of respondent's jobbers were classified for discount purposes at the beginning of each year using as a basis therefor their purchases for the preceding year.

In addition to these jobber classifications, respondent also sells to one buying group, Cotton States, Inc., of Greenwood, Mississippi, and respondent treats this group as one purchaser and sells it as a "Distributor with Agreement," using as its basis the aggregate purchases of the group. However, respondent admits, and the hearing examiner so found, that all individual members of this group could not qualify under respondent's stated basis for the individual discounts allowed.

In objecting to the initial decision's conclusion that the effects of respondent's price discriminations may be to injure, destroy and prevent competition between purchasers receiving the benefits of the discriminations and those paying respondent's higher prices, respondent states that the record does not show that purchasers of its goods which are located in the same trading area in fact compete with each other. In appraising this contention, we have considered the testimony received, which expressly relates to the Memphis and New Orleans trading areas, and to Chicago and other areas as well. The competitive situation prevailing among respondent's Chicago wholesalers would appear to be broadly representative of other metropolitan areas, and we are of the view that the record conclusively shows that competition, both actual and potential, exists among and between many of respondent's customers who are required to pay different prices for its merchandise. Respondent's contention that the competitive situation prevailing among its Chicago wholesalers cannot be considered because this area represents a purely intrastate phase of respondent's business, not subject to the Commission's jurisdiction, is without merit. The intra or inter state nature of respondent's business in the Chicago area is not controlling to our conclusion that this area is broadly representative of other areas and that competition does, in fact, exist between respondent's customers.

The initial decision correctly held that a much smaller discount or price differential than respondent herein grants directly and markedly affects profit margins; that the price differentials which a jobber enjoyed accounted for all or most all of his actual net profits, and that the failure of respondent's jobbers to take advantage of the 2% discount for cash, which respondent affords to all of its purchasers, would, in instances, wipe out or materialy reduce small jobbers' net profits. Rejected is respondent's contention under the appeal that its discounts are only important to its large jobbers. Consonant with the hearing examiner's findings, we believe the record clearly shows that respondent's discounts and rebates to its favored customers carried a direct potentiality of injuring, destroying and preventing competition among its purchasers.

Relevant to this conclusion is evidence in the Chicago area which indicates that one of the respondent's price-favored customers did not uniformly maintain respondent's suggested resale prices, but, in instances, cut prices in situations where it was believed others were offering reduced prices on respondent's merchandise. Objection is interposed under respondent's appeal to the initial decision's statement that it was doubtful that this particular purchaser could have made those price reductions in the absence of the additional discounts afforded him under respondent's pricing program. This particular purchaser sold over a large territory into several states and he stated that his net margin of profit incident to his extensive operations was very low. It would be unrealistic to conclude that his decision to reduce prices in the instances referred to was not materially influenced by the greater gross profit margin afforded under the respondent's pricing program. The initial decision's views on this score are nowise refuted by the circumstance that the lead in reducing prices may have been taken by small volume purchasers who elected to reduce their profit margins in the interests of increasing sales volume in their territories.

In further support of its contentions that no injurious competitive effects may result from its discriminations, the respondent states that its additional discounts and allowances do not entirely compensate wholesalers selling in larger volume for the additional sales efforts and expense incurred in obtaining sales, and that these extra expenses must be absorbed in part from regular margins afforded to all customers. This, however, does not signify, as also urged by respondent, that jobbers denied the additional discounts have a marked competitive advantage over their price-favored rivals. The jobber paying list prices likewise must canvass or otherwise maintain contact with the repair shops and other outlets for respondent's merchandise; he, too, must incur expense in selling those customers on the merits of the Niehoff products and promptness of his service in filling their requirements and his necessity in those respects scarcely lessens when other Niehoff dealers, whether local or distantly situated, are enabled by respondent's additional discounts to extend or intensify their efforts in those regards. We do not share respondent's view, therefore, that no adverse effects are probable from respondent's pricing practices which accords greater profits to purchasers who resell in higher volume brackets.

Respondent's additional discounts and volume allowances clearly are available for innumerable purposes which in this highly competitive resale field can be used to promote the commercial growth of jobbers granted them. It is not controlling, therefore, that certain of the witnesses who competed with recipients of respondent's larger discounts stated that they had observed no adverse effects from competitive selling activities. Some unfavored jobbers testified that they wanted respondent's lower prices for the purpose of expanding their businesses. It is true that no evidence was presented relating to any specific instances in which financial failure may have stemmed from respondent's pricing practices but this does not support the appeal's position that conclusions below respecting the illegality of respondent's pricing program are based on a doctrine that the differentials are illegal, per se. Contentions in this regard ignore other matters revealed in the record, including the fact that the differentials are substantial and materially influence the competitive positions of purchasers who resell respondent's merchandise in this highly competitive field.[29]

Only brief reference is warranted with respect to the matters additionally raised by the respondent in connection with this aspect of its appeal. The fact that a number of respondent's larger volume jobbers began handling its lines originally as small jobbers and were not then eligible for discounts under its pricing program does not mean that its discounts are attainable by all of its jobbers. For example, in 1949, more than one-third of respondent's jobbers were in a volume bracket which entitled them to no extra allowance and only slightly less than 50% of its domestic volume was purchased by fewer than 100 jobbers who were in the highest discount brackets. As pointed out by appellant, the initial decision held there was no showing in the record that respondent's pricing practices had injured manufacturers competing with it in the sale of similar merchandise or that respondent's pricewise favored purchasers were achieving a monopolistic position in the resale of its merchandise. However, in opposition to appellant's contention, these matters are nowise inconsistent with that decision's rulings that the effects of respondent's discrimination in

[29] Observations on factors other than financial failure which may contribute to or materially affect an unfavored purchaser's ability to compete are discussed in our opinions in Docket 5770, *E. Edelmann & Co.*, Docket 5723, *Moog Industries, Inc.*, and Docket 5722, *Whitaker Cable Corporation.* The testimony of the small jobbers in the present record would support many of our comments and observations made in these decisions in this regard.

price may be to injure, prevent and destroy competition among its purchasers competing in the resale of such merchandise.

We consider now the respondent's contention that the initial decision erred in failing to find that respondent's price differentials were made in good faith to meet the equally low price of a competitor or competitors within the meaning of Section 2 (b) of the Act.[30] The evidence received indicates that the prices of many of respondent's rival independent replacement parts manufacturers are somewhat lower than its prices. The average of respondent's prices is higher than those of its competitors in this category yet lower than the prices of original parts manufacturers such as Autolite and Delco-Remy, who likewise sell into the replacement field. Respondent's discount program is generally similar to some but is not identical with the schedules adopted by ten of its principal independent competitors. The respondent has one basic price schedule and it is from this that its various discounts and rebates are granted. Its accounts, as previously noted, are classified for discount purposes at the beginning of each year on the basis of their purchases for the preceding year. The initial decision correctly found that respondent's price differentials are a part of a nationwide pricing system formulated to meet competition generally and not designed to meet exactly any competitor's prices.

Respondent contends that the ruling rejecting its defense represents an erroneous application of the legal principles enunciated by the Supreme Court in the *Staley* and *Standard Oil* cases.[31] We do not agree. Controlling in our evaluation of the examiner's findings is the circumstance that it is individual competitive situations to which the exemptive provisions of the statute relate and not general systems of competition. This is not to say, however, as suggested in the initial decision, that evidence directed to showing that the sellers' discriminations were temporary and localized in area is an indispensable prerequisite to establishing a defense under the subsection. We do find, however, that a pricing program which provides for an inherent pattern of discrimination among competing customers and is geared generally to competing for business and not specifically for meeting competing prices is not within contemplation of this defense. Respondent has not shown by substantial, reliable and probative evidence on this

[30] Price discriminations prohibited by Section 2 (a) of the Clayton Act are nevertheless justifiable by virtue of Section 2 (b) which declares that nothing in the Act "shall prevent a seller rebutting the prima facie case thus made by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor * * *."

[31] *F. T. C.* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746. *Standard Oil Company* v. *F. T. C.*, 340 U. S. 231.

record that its lower price or prices were made to meet an equally low price or prices of a competitor or competitors.[32]

The respondent introduced evidence which was the basis for its contention below that the price differentials resulting from its volume discounts were justified by differences in costs incurred in selling and delivering merchandise to customers in the various discount classifications.[33] This evidence related to justification stemming from alleged differences between its four jobber classifications; (1) in the cost of processing and filling purchase orders, (2) in selling costs, and (3) in advertising expenditures. The initial decision rejected respondent's contentions of justification for its differentials resulting from matters in the first two categories and also rejected in part but adopted insofar as they related to partial justification of catalogue expense those included in the third category. Respondent's appeal challenges the initial decision's conclusions adverse to its position and the appeal of counsel supporting the complaint interposes objections to the holding relating to catalogue expense.

Among other evidence received bearing on the first issue, respondent offered data pertaining to the purchases of two customers in one city who were accorded different prices and to those of two others similarly buying at different prices in another city. This evidence was directed to showing that approximately one-fourth of the price differentials between the customers in each of these respective areas may have been justified in certain years by differences in cost of filling and processing orders. Respondent's price differentials are not scaled on a quantity per shipment or order basis but formulated instead on annual volume of purchases, and, as previously stated, contemplate that the progressively high discounts afforded for each corresponding volume bracket in respondent's schedule be applied retroactively or cumulatively. When weighed with the other evidence, the matters pointed to by respondent do not suffice for informed conclusions that particular average ranges of sizes of purchase orders are in fact representative or typical for customers in each of respondent's volume classifications. We concur in the initial decision's conclusion that the respondent has failed to show by reliable, probative and substantial evidence that its price differentials have been justified by actual differences in costs of filling and processing orders among purchasers in respondent's various annual volume brackets.

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[32] Cf. Opinion of the Commission in Docket No. 5770, *E. Edelmann & Company*. See p. 1000 of this volume.

[33] Section 2 (a) provides that nothing in the Act "shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

On the basis of evidence indicating that direct selling expense incurred in twelve sales districts totaled $159,433.59 in 1949, and other evidence relied upon in support of its contentions that each customer, large and small, was called on substantially the same number of times, respondent states that this expense represents $204.00 per account. Its method of apportionment relates to each $100.00 of sales; to illustrate, respondent's sales cost for a jobber on a basis of annual purchases of $600.00 would be deemed $34.00 per $100.00 of sales; for a purchaser in the $6,000 bracket $3.40 on $100.00 of sales. When so allocated, salesman's cost affords complete cost justification at the first two volume classifications and substantial justification at all other levels. The initial decision held that the evidence relied upon by respondent in support of its contention that the same number of visits are made on accounts large and small and was general and conjectural in nature and that it was refuted by specific testimony and evidence showing details of the sales activities engaged in a typical sales territory.

In contending that the initial decision erred in this respect, the respondent states that the testimony relating to that particular territory shown that in each trading area which he was able to visit, the salesman called on each jobber account an equal number of times. The contrary inferences drawn from the expense book exhibits referred to in Paragraph 48 of the initial decision are unwarranted, respondent also argues, for the reason that the exhibits merely designate the towns where the witness stayed over night or headquartered for the purpose of making calls in nearby towns rather than showing the towns in which the salesman actually made calls. Respondent also states that the exigencies of its business, including the constant efforts of its competitors to lure away respondent's accounts, require its salesmen to make a substantially equal number of calls on accounts under a rotation plan pursuant to predetermined travel schedules.

The desirability of frequent contacts with the jobber accounts by respondent's representatives is plainly apparent. This does not mean, however, that the evidence presented by the respondent fairly supports conclusions that accounts, large and small, are contacted a substantially equal number of times. Salesmen are not only expected to contact prospective jobber customers, but they also are required to make missionary calls on prospective customers of dealers with jobbers' salesmen. The salesman whose testimony was referred to in the initial decision likewise performed these duties. Respondent's contentions to the contrary, an appraisal of the testimony and exhibits permits reasonable inferences regarding sales contacts actually made.

Irrespective, however, of the accuracy of the tabulation of sales calls which appears in the initial decision, there can be no doubt but that this salesman's calls as between large and small customers were disproportionate. For example, an undisclosed number of his 59 jobber accounts, necessarily larger ones, maintained branches; but the witness, in addition to keeping regular contact with such accounts' main offices, followed an apparent policy of making calls on branch operations. The record, we believe, requires our denial of this aspect of the respondent's appeal from the initial decision.

The third item of cost pointed to by respondent as asserted justification for its price differentials relates to advertising expense. Its expenditures in this connection fall into ten categories, including those for salaries, advertising office, trade papers, catalogues, other advertising printed matter, miscellaneous advertising, show expense, display, photo expense and samples. In 1949 they aggregated $100,437.11, and by dividing this amount by its asserted total of 866 jobber accounts, respondent has arrived at a per account cost of $115.97 and the respondent would allocate this in the same manner as salesman's expense.

The initial decision, however, ruled that the effectiveness of trade paper advertisements, show expense and the other items, except for catalogue expense, cannot be measured by an individual customer's volume but must be allocated only on the basis of respondent's overall sales volume. With respect to catalogue expense, however, in which category the hearing examiner included expenses for price sheets and certain tune-up charts, the decision below expressed views that customers' purchases were directly attributable to this promotional material as furnished by respondent, and it ruled that advertising expense of $37.40 per customer properly could be prorated equally as against each $100.00 of purchases in the various volume brackets. Under that holding, respondent's price differentials were regarded as partially justified as outlined in the table set forth in Paragraph 44 of the initial decision.

In objecting in part, respondent states that the primary and over-all purpose of respondent's advertising in trade publications and through direct mail is to gain new jobber accounts and to retain old ones, and that equal apportionment of all forms of advertising expenses among current accounts accordingly is a practical and realistic business procedure. Detailed evidence relating to the form and make-up of the advertising engaged in under each of the foregoing categories was not submitted for the record. We think, however, that the hearing examiner correctly held, in effect, that the foregoing items do not furnish a proper basis or cost justification for respondent's price differentials.

Counsel supporting the complaint urge under their appeal that the initial decision erred in finding that the respondent had successfully carried its burden of showing the necessary proof relative to partial cost justification incident to catalogue expense; and in opposition thereto, respondent maintains that the hearing examiner limited the cost justification to the catalogue expense through inadvertence and really intended to include in that category additional expenses incurred for other printed matter and for photographic expense for a total additional outlay of $49,019.29.

In this connection, the initial decision stated that the record as a whole shows that the catalogues are evenly distributed and that, according to the testimony of one of respondent's salesmen, any variance therefrom favors the smaller volume customer. Although the record is lacking in clarity as to policies adopted and procedures followed in distributing catalogues and printed matter, we think that the initial decision's basic premise of substantially equal distribution to, and utilization by, the stated 866 jobber accounts is refuted by the record. Bearing on this is the testimony of respondent's sales manager who stated that, on original mailings, respondent submits catalogues to the jobbers for all of their binders used at counters and carried by salesmen plus catalogues for buyers and for sales managers. The witnesses pointed out that the small jobber might require two or three, others six or eight, and that some jobbers have 18 salesmen out and use six counter binders. When taking on a new account, respondent makes inquiry of the number of catalogues which it will require. Both small jobbers and large jobbers are encouraged to distribute any additional catalogues and other printed matter furnished down through the trade purchasing from them, but smaller jobbers, according to the testimony of respondent's representatives, are more active on this score. According to the testimony also, an undisclosed percentage of the catalogues and price lists are used by the respondent in soliciting prospective jobbers to handle the Niehoff lines.

Exact distribution figures were not made available for the record for 1949 or any other year. It appears, however, that in 1951, respondent printed approximately 50,000 catalogues for its ignition line, and the run for the hydraulic catalogues was believed by a company witness to be 10,000. In 1949 respondent compiled three types of catalogues, one for its ignition line and testing equipment, another for its hydraulic brake line, and a third, and much smaller catalogue, which related to parts and testing equipment for Ford, Mercury and Lincoln automobiles. Distribution of respondent's catalogues among purchasers had to vary greatly inasmuch as some jobbing accounts have handled only respondent's line of ignition parts, others only the hydraulic brake line, others limited their purchases to special items for the Ford lines and still others purchased all lines. The number of customers in each of these categories is not disclosed by the record, but the record suggests that the distributors with agreement customarily handled both the ignition and hydraulic lines and, accordingly, utilized those catalogues. Purchasers in this category received respondent's greatest discounts and rebates and it included customers who travel larger numbers of salesmen and maintain branches.

Other facts appear in the record showing that an allocation of catalogue costs equally among 866 direct jobbing accounts represents an inaccurate procedure. Data submitted by respondent is to the effect that, in 1949, it had 866 jobbing accounts, of which number 98 assertedly received the greatest discounts and purchased as distributors with agreement. Testimony was received, however, indicating that these figures did not include the individual members of Cotton States, Inc., a cooperative buyer group. All of its nine members and two of the branches of one of them submitted their purchase orders direct to respondent and were accorded its greatest discounts. Not all of respondent's merchandise, moreover, is sold through its domestic jobber accounts, among whom respondent would equally apportion its advertising expenses. In addition to approximately $2,000,000 per annum of net sales through those accounts, approximately $300,000 is distributed annually to export customers. The record, however, is silent as to whether these customers participate in respondent's advertising programs.

Furthermore, some of respondent's accounts receiving the larger discounts have done a subjobbing business, and they, except in instances where these accounts print house catalogues of their own, manifestly require larger supplies of printed matter to assist such jobbers in their resale of the Niehoff lines to garages and filling stations. Respondent's allocation takes no cognizance whatsoever of catalogues and advertising matter utilized in this manner. Noted in this connection is the fact that L. C. Bigelow, reported by respondent to be its only customer in the New York and New Jersey Metropolitan area, purchased a substantial quantity of respondent's products in 1949; and, according to the record, it sold only to other automotive parts jobbers, no sales being made by it direct to garages and filling stations.

We, accordingly, reject the initial decision's view that the record supports conclusions that respondent's catalogues are evenly distributed or utilized by its accounts. The appeal of counsel supporting the complaint from the initial decision's ruling in reference to advertising expense is, therefore being granted.

We have considered the respondent's exceptions challenging the hearing examiner's rulings excluding certain evidence offered by it. Under one of such rulings, the hearing examiner declined to receive data relating to certain surveys conducted by National Standard Parts Association. These assertedly were offered in corroboration of other evidence directed to showing that larger jobbers incurred higher expenses in conducting their business operations which was one of the matters urged in support of respondent's contention that its larger discounts and rebates could not be deemed to be injurious to smaller volume jobbers from whom they were withheld. The questionnaire forms which were the basis for these tabulations were disseminated among the Association's entire membership numbering between 1,100 and 1,200 and returns ordinarily are received from approximately 10% of the membership. Included among the members submitting the returns were some Niehoff customers but their exact number and identity were not disclosed.

The reports prepared from the questionnaires represent industry averages relating to the financial operation of jobbers in small, medium and large categories. The information furnished in the questionnaires include merchandise costs and receipts in the aggregate, gross profit, expenses and net profit. In rejecting the tabulations, the hearing examiner held that opportunity for full cross-examination respecting the accuracy of the surveys and supporting data was not afforded. The data furnished concern all forms of automotive products and are unsegregated as to any product category; hence, the lack of materiality of these industry studies as a basis for evaluating what may be the effects of the respondent's pricing practices between and among its competing customers is plainly apparent. In this situation, therefore, it does not appear that the challenged ruling of the hearing examiner was unduly restrictive or in any way prejudicial to the respondent's rights.

Somewhat similar considerations are applicable in appraising respondent's exceptions to the hearing examiner's exclusion of the Crowell-Collier Survey in reference to car owner repairs. This survey was offered to show that of the automotive repairing in this country, 54% was done in the shops of franchised automobile dealers. That proffered evidence manifestly was irrelevant and immaterial to the issues presented here and its conclusion by the examiner was proper. Considered also are the matters urged by respondent in support of its exceptions to certain of the hearing examiner's findings of facts and his rejection of various of its proposed findings. We think, however, that those challenged findings and rulings are free from substantial or prejudicial error and respondent's exceptions thereto are denied accordingly.

Stating that an order requiring the respondent to terminate its unlawful discriminations will destroy the Niehoff business when its competitors are not likewise enjoined, appellant requests that this proceeding be held in abeyance until the Commission can place all industry members under identical restrictions. The pricing practices used by the respondent, however, have been found to be in violation of law. Since their continuance by the respondent is likewise unlawful the Commission's duty, under the applicable statute, is to require their termination forthwith. That respondent's business may be adversely affected by the requirement to cease its unlawful conduct does not counter-balance the precedent which would be set by the requested action which, if followed, would mean that Commission orders would be forever pending and unlawful practices rarely, if ever, corrected.[34]

Also considered are respondent's objections to the substance and form of the order contained in the initial decision. The provisions of the order are reasonably related to the unlawful general course of conduct found to have been engaged in by the respondent, and the order, therefore, cannot be regarded as unduly lacking in specificity. The fact that the order forbids respondent from discriminating "directly or indirectly" in the respects there designated does not mean, moreover, that the proscriptions of the order exceed the authority of the Commission under the Act. Inclusion of the word "indirectly" is designed to prevent evasion of its orders and similar provisions have been included in other orders of the Commission, including the modified orders issued in the *Standard Oil*[35] and *Morton Salt*[36] cases. Nor is there any sound basis for respondent's contention that the record requires that a distinction be made in the order as between respondent's sales to its regular jobber accounts and sales made to or through its manufacturer's agents. We regard the various objections interposed by the respondent to the initial decision's order to be without merit.

In further reference to the order, we have, as previously noted, rejected the initial decision's holding that the respondent's price dif-

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[34] Relevant to our consideration here is the opinion of the Second Circuit Court in *Dictograph Products* v. *F. T. C.*, 217 F. 2d 821, 826. Judge Medina, for the Court, therein stated that: "Preliminarily, it should be noted that potential or even probable adverse effects upon petitioner's business alone is not a sufficient basis for withholding injunctive relief. Were we to hold otherwise, we would quite effectively draw the teeth of Section 3 and of the antitrust laws generally."

[35] *Standard Oil Company* v. *F. T. C., supra.*

[36] *F. T. C.* v. *Morton Salt Company,* 334 U. S. 37.

ferentials are partially justified by savings or considerations related to catalogue expense. Our order, therefore, makes appropriate provision for modifying the initial decision's order in this respect. For reasons explained in our decision in the *Edelmann* matter, Docket No. 5770, we likewise are modifying the order below in the instant proceeding (1) by striking the phrase "for replacement purposes" [37] and (2) by inserting words to the end that the proscriptions of the order be additionally directed to the respondent's officers, representatives, agents and employees.

We have granted that part of the appeal of counsel supporting the complaint objecting to certain of the initial decision's rulings with reference to catalogue expense, but an additional point is urged under the appeal. The initial decision in effect held that the status of the price of respondent's competitiors as lawful or unlawful was not controlling to decision here, but additionally ruled that knowledge could not be imputed to the respondent that its competitors' prices were in fact illegal. Counsel's appeal primarily interposes objection to the latter and related conclusions and states that implicit in them is the erroneous holding that the respondent has successfully carried the burden of showing necessary proof relative to the lawfulness of competitors' prices. As previously observed, however, the hearing examiner ruled that the lower prices afforded its purchasers under respondent's continuous nationwide pricing program did not represent prices made to meet an equally low price or prices of competitors as contemplated by the language of Section 2(b). The lawfulness or unlawfulness of its competitors' prices are therefore not in issue inasmuch as respondent's defense has been found legally insufficient on other grounds. We are therefore denying this phase of the appeal of counsel supporting the complaint and are denying the respondent's appeal, but are granting the appeal of counsel supporting the complaint to the extent previously described in this opinion. With the order to cease and desist modified in the manner previously discussed, the initial decision is affirmed.

FINAL ORDER

Counsel for respondent C. E. Niehoff & Co., and counsel supporting the complaint, having respectively filed on November 18, 1954, and November 19, 1954, their cross appeals from the initial decision of the hearing examiner in this proceeding; and the matter having been heard by the Commission on briefs and oral argument; and the

[37] The record reveals that respondent's discriminatory practices relate to its testing equipment and tools as well as its products designed for replacement purposes.

Commission having rendered its decision denying the respondent's appeal and granting in part the appeal of counsel supporting the complaint and affirming the initial decision as modified:

It is ordered, That the order contained in the initial decision be, and it hereby is, modified to read as follows:

It is ordered, That respondent C. E. Niehoff & Co., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with, the sale of automotive products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from discriminating, directly or indirectly, in the price of said automotive products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser, which purchasers compete, in fact, in the resale of said products.

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

IN THE MATTER OF

THE VIRGINIA-CAROLINA PEANUT ASSOCIATION ET AL.

Docket 6138. Complaint, Oct. 29, 1953—Order, May 17, 1955

Order dismissing, for failure of proof, complaint charging a trade association and its members, constituting substantially all the cleaners and shellers of peanuts in the Virginia-Carolina area, with entering into an agreement or understanding to fix the prices at which they would purchase farmer's stock peanuts during the 1952 crop season.

INITIAL DECISION OF HEARING EXAMINER

Before *John Lewis*, hearing examiner.

Mr. Paul R. Dixon, counsel supporting the complaint, and *Mr. William A. Mulvey* with him on the brief;

Sanders, Gravelle, Whitlock & Markey, by *Mr. Louis A. Gravelle* and *Mr. Harold F. Baker* of Washington, D. C., and *Godwin & Godwin*, by *Mr. Charles B. Godwin, Jr.*, of Suffolk, Virginia, for all respondents except The Columbian Peanut Company and the Edenton Peanut Company; *Mr. Charles L. Kaufman*, of Norfolk, Virginia, for respondent The Columbian Peanut Company; and *Battle, Winslow & Merrell*, by *Mr. Francis E. Winslow*, of Rocky Mount, North Carolina, for respondent The Edenton Peanut Company.

STATEMENT OF THE CASE

The Federal Trade Commission issued its complaint against the above-named respondents on October 29, 1953, charging them with the use of unfair methods of competition and unfair acts and practices in commerce in violation of the Federal Trade Commission Act. Copies of said complaint and notice of hearing were duly served upon respondents. Said complaint charges, in substance, that the respondents entered into an agreement and understanding to fix, and did fix, the prices of peanuts purchased by them during the 1952 crop season from the growers thereof, thereby tending to limit price competition among themselves and create a monopoly. Respondents appeared by counsel and filed answers to the complaint in which they denied, in substance, having engaged in any of the illegal practices alleged in the complaint.

After the holding of a pre-trial conference on January 6, 1954, which was attended by counsel for all respondents except The Edenton Peanut Company, hearings on the charges alleged in the complaint were held before the undersigned hearing examiner, theretofore duly designated by the Commission to hear this proceeding. Said hearings were conducted at Suffolk, Virginia, on various dates between January 18, 1954, and February 10, 1954. At such hearings testimony and other evidence were offered in support of the allegations of the complaint, which testimony and other evidence were duly recorded and filed in the office of the Commission. All parties were represented by counsel, participated in the hearings, and were afforded 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 respondents of motions to dismiss the complaint herein for failure of proof. Motions to dismiss and supporting briefs were thereafter filed by counsel for The Edenton Peanut Company on March 16, 1954, and by counsel for the other respondents on March 24, 1954. An answer and brief in opposition to said motions was filed by counsel supporting the complaint on May 5, 1954. Pursuant to leave granted, a joint reply brief on behalf of all respondents was filed on May 20, 1954. Said motions to dismiss are disposed of in accordance with the findings, conclusions and order hereinafter made.

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

FINDINGS OF FACT

I. The Business of Respondents

A. *Identity of the Parties*

Respondent The Virginia-Carolina Peanut Association, Inc., hereinafter referred to as respondent Association, is a corporation organized, existing and doing business under the laws of the State of Virginia with its principal office and place of business located in the American Bank and Trust Company Building, Suffolk, Virginia. Said respondent is a trade association to which all the respondents herein belong.

Respondents James W. Jordan, M. C. Jordan and Robert W. Winborne (erroneously spelled Winbone in the complaint), are partners, trading under the firm name and style of Verlina Peanut Company, erroneously named in the complaint as Virginia Peanut Company.

Respondents James I. Beale III, Margaret Beale Keller [1] and Ann E. Beale, are partners, trading under the firm name and style of

[1] The complaint erroneously names John Keller as a partner in the above firm. However, the answer filed on behalf of said firm denies that said John Keller is a partner in the firm, alleges that Margaret Beale Keller is the third partner in the firm, and waives service of process upon said person.

Franklin Peanut Company, with their principal office and place of business located at Factory Street, Suffolk, Virginia.

Respondents Binford E. Parker, Margaret Parker Pond and Sarah Parker Pond, are partners trading under the firm name and style of Parker Peanut Company, with their principal office and place of business located at Factory Street, Suffolk, Virginia.

Respondent The Suffolk Peanut Company is a corporation organized, existing and doing business under the laws of the State of Virginia, with its principal office and place of business located at 303 S. Saratoga Street, Suffolk, Virginia.

Respondent Planters Nut and Chocolate Company is a corporation organized, existing and doing business under the laws of the State of Pennsylvania, with its principal office and place of business located at 212 Johnson Avenue, Suffolk, Virginia.

Respondent The Columbian Peanut Company is a corporation organized, existing and doing business under the laws of the State of Virginia, with its principal office and place of business located at Wainright Building, 229 W. Bute Street, Norfolk, Virginia.

Respondent Old Dominion Nut Corporation is a corporation organized, existing and doing business under the laws of the State of Virginia, with its principal office and place of business located at Factory Street, Suffolk, Virginia.

Respondent Lummis & Company is a corporation organized, existing and doing business under the laws of the State of New Jersey, with its principal office and place of business located at 444 E. Washington Street, Suffolk, Virginia.

Respondent Severn Peanut Company is a corporation organized, existing and doing business under the laws of the State of North Carolina, with its principal office and place of business located at Severn, North Carolina.

Respondent Pond Brothers Peanut Company is a corporation organized, existing and doing business under the laws of the State of Virginia, with its principal office and place of business located at County Street, Suffolk, Virginia.

Respondents Robert L. Hancock III, Robert L. Hancock, Jr., G. S. Hancock and H. L. Hancock, are partners trading under the firm and style name of Hancock Peanut Company, with their office and principal place of business located at Courtland, Virginia.

Respondent The Edenton Peanut Company is a corporation organized, existing and doing business under the laws of the State of North Carolina, with its principal office and place of business located at Edenton, North Carolina.

Respondent Birdsong Storage Company, Inc., is a corporation organized, existing and doing business under the laws of the State of Virginia, with its principal office and place of business located at Suffolk, Virginia.

Respondent Farmers Cotton & Peanut Company, Inc., is a corporation organized, existing and doing business under the laws of the State of North Carolina, with its principal office and place of business located at Plymouth, North Carolina.

Respondent The Williamston Peanut Company is a corporation organized, existing, and doing business under the laws of the State of North Carolina, with its principal office and place of business located at Williamston, North Carolina.

Respondent Pretlow Peanut Company is a corporation organized, existing, and doing business under the laws of the State of Virginia, with its principal office and place of business located at Franklin Virginia.

Respondent John H. Maclin Peanut Company (erroneously named in the complaint as Maclin Peanut Company) is a corporation organized, existing, and doing business under the laws of the State of Virginia, with its principal office and place of business located at 103 Madison Street, Petersburg, Virginia.[2]

B. *The Peanut Industry*

The peanut industry is composed of three main levels. The first consists of the farmer who grows or produces the peanuts. The second is the cleaner and sheller, sometimes known as the miller, who performs intermediate processing operations on the peanuts before they are sold to the manufacturer or end-user. A few of the firms in this category merely perform cleaning operations and sell the peanuts in the shell. The bulk of the firms, however, also perform shelling operations. The cleaners and shellers purchase the peanuts directly from the grower or through intermediate independent buyers who receive a commission on purchases made for the account of the sheller. The third main category in the industry consists of the manufacturers or end-users who process the peanuts before their introduction into normal trade channels for sale to the consuming public. These consist of roasters, who roast and package the larger unshelled peanuts, salters who salt and package the shelled peanuts, and manufacturers of peanut butter, candy, and similar products, who use the peanuts in the manufacture of some product for sale to the public.

[2] For purposes of convenience, the respondent corporations and partnerships are sometime hereinafter referred to by the first portion of the firm name, e. g., Columbian for The Columbian Peanut Company, and Parker for the partnership, Parker Peanut Company.

Peanuts are grown in three main areas: the Virginia-Carolina area, consisting mainly of the States of Virginia and North Carolina and portions of certain joining States, the Southeastern area, and the Southwestern area. There are four main types of peanuts grown in the United States: Runner, Spanish, Valencia, and Virginia. The Virginia type, which is raised in the Virginia-Carolina area, is larger in size than the other types and is most frequently sold in the shell, after being roasted, and as large salted peanuts. The smaller type Virginia peanut is generally used in the manufacture of candy and peanut butter. The Spanish type, which is raised in the Southeastern and Southwestern areas, is a small round peanut, is generally used in the manufacture of peanut butter and candy, and also in salting processes. The Runner type, which is grown mainly in the Southeastern area, is a somewhat larger peanut than the Spanish peanut but smaller than the Virginia type, and is generally used in the manufacture of peanut butter and candy. The Valencia type, which is generally raised in the Southwestern area, is used in salting processes and for the manufacture of candy and peanut butter. Most of the above types, particularly those of the smaller variety, are also used for crushing into peanut oil.

C. *The Position of the Parties in the Industry*

With the exception of the respondent Association, all the other respondents are cleaners and shellers of peanuts in the Virginia-Carolina area. Two of the companies, Lummis & Company, and Planters Nut and Chocolate Company, are also end-users performing manufacturing operations at plants located in other parts of the country. The larger of the respondent shellers, including Birdsong, Pond, Lummis, Planters and Columbian, own or lease warehouses in a number of different sections in the Virginia-Carolina area and buy their peanuts generally throughout the area. The balance of the shellers operate within a more or less limited radius in the country-side adjacent to their mills. In the aggregate, the respondent shellers constitute substantially all of the cleaning and shelling section of the industry in the Virginia-Carolina area. During the 1952 marketing season, these respondents purchased approximately 440 million pounds of peanuts prior to March of 1953, out of a total yield of approximately 506 million pounds.

D. *The Interstate Commerce*

The respondent shellers sell, ship, and distribute or deliver, or cause to be shipped, distributed or delivered, peanuts in the various States of the United States and in the District of Columbia, and said respondents maintain, and at all times mentioned herein have maintained, a regular course and current of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act, in said peanuts, between and among the various States of the United States and the District of Columbia.

II. The Alleged Unlawful Practices

A. *Background and Issues*

1. The Government support program

During the period from 1933 to 1952 (with the exception of the years 1936 and 1937), the prices received by growers of peanuts were supported by the Federal Government pursuant to various Acts of Congress, beginning with the Agricultural Adjustment Act of 1933. The prices of farmers stock peanuts, i. e., peanuts which had not been shelled, crushed or cleaned (except for the removal of foreign matter), were supported through a program of acreage allotment, diversion of acreage to other crops, diversion to crushing for oil, loans to growers and purchases through designated cooperative associations. For some years prior to 1952, the peanut support program also involved the execution of marketing agreements between Commodity Credit Corporation and the cleaners and shellers. These agreements, which were commonly called "shellers contracts," provided for the purchase of farmers stock peanuts by the cleaners and shellers at a price not less than the existing support price for such peanuts. In return for such undertaking on the part of the sheller, the Commodity Credit Corporation agreed to reimburse them in an amount equal to the support price thereof for any unshelled peanuts which the sheller was unable to resell. For several years prior to 1951, the contracts also provided for reimbursement to the shellers, at a stipulated price, for certain shelled peanuts designated as No. 2 size, which were diverted for crushing to oil. The provision in the contract for reimbursement of the sheller was commonly referred to as the "bail-out clause."

During the latter part of 1951 and early 1952, meetings were held in Washington, D. C., under the auspices of the Production and Marketing Administration of the Department of Agriculture, which were attended by representatives of shellers, growers, and end-users of peanuts from various parts of the country to consider a change in the Government support program for peanuts. During the period from 1947 to 1951, the Government had sustained rather substantial financial losses in its peanut support program as a result of large crop surpluses in the post-war years.[3] In an effort to cut down on these losses and also with the hope of giving the producers an opportunity to take advantage of any increase in price which might result from a proposed cut in the acreage allotment, it was suggested that the existing direct support program based on the shellers contracts be dropped, and that there be substituted in lieu thereof a program providing for loans to farmers which would enable them to hold their peanuts for a possible rise in market.[4] Despite the opposition of farm groups, who expressed concern that the change in the program would result in a decrease in the price of peanuts, and of sheller representatives, who opposed the dropping of the shellers contracts, a new program was announced by the Department of Agriculture under the provisions of Public Law 285 (signed March 28, 1952), which provided for the elimination of the cleaners and shellers agreements. Under the new program the growers could procure a storage loan on their peanuts, either directly or through a growers cooperative, and could also enter into an agreement with the Commodity Credit Corporation, providing for the purchase of the peanuts by that agency on May 31, 1953, at the support price, i. e., 90 percent of parity, less certain deductions. The loan advance which the grower could receive under the program amounted to approximately 10 percent less than the support price.

2. The disposition of the 1952 crop

The harvesting of the peanut crop in the Virginia-Carolina area usually begins around the end of October each year and the main part of the crop is harvested during November and December. The farmers endeavor to dispose of their crop as soon after harvesting as possible, since most of them do not have adequate storage facilities and it would expose the crop to deterioration through moisture and

[3] These losses were as follows:

Crop year	*Losses (million dollars)*
1947	3.5
1948	25.6
1949	39.7
1950	17.1
1951	*1.9

*Through Dec. 31, 1951.

[4] While counsel supporting the complaint prefers to stress the factor of giving the growers a chance at higher prices as the basic reason for the change in program, the evidence indicates that it was the financial burden of the program which was a moving factor behind the calling of the meetings and the proposed change. Since peanuts were the only basic crop on a direct support program, a change to a loan support program was suggested lest the whole support program be lost. Although it was hoped that the loan program would afford the growers an opportunity for higher prices, this was not the overriding consideration which precipitated a re-examination of the existing program (R. 1132, 446, 525; CX 536, p. 5).

rattage to permit the crop to lie in the field. The bulk of the purchases made by the shellers usually occur during November and December, although there may be some purchases in October, when the crop matures early, and there is also some purchasing on a lesser scale after the first of the year.

In 1952 the crop began to be harvested around the third week of October. Some of the respondent shellers began purchasing peanuts about October 20. As usual, however, most of the crop was purchased during November and December. Aside from some variations at the beginning and end of the season, the bulk of the peanuts were purchased by the respondent shellers at prices which were the equivalent of the Government loan value of such peanuts. The prices paid varied according to the grade of the peanuts, as determined by Federal-State inspectors. In making most of their purchases and computing the prices paid by them, the respondent shellers used an identical schedule designated as: "Price Schedule 1952 Crop Virginia Type Farmers Stock." The schedule was a 16-page document, containing the prices of different grades of peanuts. The basic grade factor was the amount of "Sound Meat Kernel" in a given lot of peanuts, designated as "SMK." Each page of the schedule reflected the prices of peanut containing a different percentage of SMK, the first page containing the prices of peanuts with 58 percent SMK, and the last page showing the prices of peanuts with 73 per cent SMK. Each page of the schedule also reflected variations in price within a given grade of SMK, depending upon the amount of foreign material in a given lot of peanuts and the percentage of extra large peanuts. Each page of the schedule contained approximately 400 separate prices, on a per pound basis, carried to the third decimal point.

By paying the equivalent of loan value for the bulk of their peanuts, the respondent shellers were able to purchase approximately 440 million pounds of peanuts prior to March 1953, out of a total crop of about 506 million pounds. During the same period only about 18 million pounds of peanuts were pledged by farmers with the Growers Peanut Cooperative, a Government-recognized marketing agency, as security for loan advances made under the terms of the loan program.

3. The contentions

It is the contention of counsel in support of the complaint that the purchase by the respondent shellers of the bulk of the 1952 peanut crop at prices which were the equivalent of Government loan values and the use by them of an identical schedule of prices were the result of an agreement or understanding on their part to fix the prices of such peanuts. The case of counsel supporting the complaint rests largely on the circumstantial evidence, adduced through witnesses called from among the respondents, that the respondent shellers used the same price schedule and purchased the bulk of their peanuts at these prices. The respondent witnesses, while conceding the truth of these basic facts, denied that their conduct was the result of any agreement or understanding on their part to fix prices, and they sought to give an explanation for the coincidence of their actions. According to respondents, the fact that each company purchased most of its peanuts at loan value was due solely to economic conditions and was based on the individual decision of each company. With respect to the use of the same price schedule, respondents contended that the schedule was merely a replica of one issued by the Department of Agriculture for another crop area and that it was prepared by the bookkeepers employed by several of the shellers in order to facilitate the otherwise cumbersome process of computing the prices of peanuts which resulted from the change in the support program.

Since there is no dispute as to the basic facts presented by counsel in support of the complaint with respect to the prices at which most of the peanuts were purchased in 1952 by the respondent shellers and as to the use by them of an identical price schedule, the basic issue in the case resolves itself mainly into one of whether the explanations offered by respondents are sufficiently plausible and acceptable to overcome any inference which might otherwise arise from their common and parallel actions. To a consideration and evaluation of the evidence in this respect, the hearing examiner now turns.

B. *The Evidence*

1. The decision to pay loan value

It was the testimony of most of the respondent shellers that their decision to buy the bulk of their peanuts in 1952 at prices equivalent to the loan value thereof was based solely on economic factors and considerations. While there were some variations in emphasis and detail, the testimony of these witnesses was substantially similar with regard to the factors which caused them to conclude that loan value was the price at which they should bid for, and at which they could reasonably expect to purchase, farmers stock peanuts during the 1952 crop season. Boiled down to its essentials, the gravamen of their testimony was that due to a peanut surplus, both existing and prospective, and a stringency in the credit situation, they concluded it would be necessary for them to buy their peanuts at the cheapest possible price in order to stay in business. Since any price lower than loan value would encourage farmers to place their peanuts under Government loan, most of the respondent shellers concluded that loan value was the cheapest price at which they could expect to purchase farmers stock peanuts. Most of them offered the farmer the added inducement of paying him the cost of hauling the peanuts from the farm to the mill, whereas, under the Government loan program the farmer would have to pay the cost of hauling himself. Moreover, the quotation of prices, f. o. b. the farm, was traditional in the Virginia-Carolina area. It was the contention of the sheller witnesses that the coincidence of their substantially parallel actions resulted not from any understanding or agreement on their part, but from the fact that they were confronted with parallel economic factors which were widely known in the trade.

The testimony given by the shellers as to the economic factors which affected their respective judgments impressed the hearing examiner as being plausible and not unreasonable on the whole. With respect to the matter of the peanut surplus, a number of the witnesses referred to the fact that there were approximately 1¼ million unsold bags of Government-owned peanuts hanging over the market from the 1951 crop which could be dumped on the market at prices below parity in the event they were found to be deteriorating. Most of the sheller witnesses also testified that surveys which they customarily made in the fields prior to the harvesting of the crop convinced them that there would be another large peanut crop in 1952. Despite the fact that there had been a cut in acreage in 1952, it was their testimony that the farmers had usually managed by more efficient methods of cultivation to produce as great, if not a greater, yield on the reduced acreage. They further claimed that the cut in acreage was offset by the fact that in 1951 the Government had ceased its program of diverting shelled peanuts to crushing for oil, thus augmenting the supply available for the edible trade. Another factor mentioned by some of the shellers as contributing to the surplus was the fact that the Southeastern crop area, in which harvesting had begun prior to the Virginia-Carolina area, was giving indications of an unexpectedly large crop, particularly in the Runner-type peanuts, which were competitive to the No. 2 Virginia-type peanut and were sold at substantially lower prices. The crop surplus situation was, according to the sheller witnesses, reflected in the lower prices which were being offered by end-users for the cleaned and shelled peanuts and this, in turn, affected the shellers' judgment as to what they could afford to pay for farmers stock peanuts.

The testimony of the shellers regarding the 1952 crop and market situation was corroborated to a considerable degree by the weekly peanut reports of the Production and Marketing Administration of the Department of Agriculture, covering the period in question, which were offered in evidence by counsel supporting the complaint. Thus, the report of October 1, 1952, refers to the fact that the supply of peanuts "in commercial positions" as of August 31, 1952, was about one-third more than the holdings on that date in 1951, and that the holdings of farmers stock peanuts were three times as large as in the previous year, "principally due to large holdings of Government-owned farm stock peanuts in the Virginia-Carolina area." Concerning the matter of the demand for peanuts by end-users, the weekly report of October 8, 1952, states:

There was little demand for new crop future shipments, with the trade generally following a wait and see attitude.

The report of October 15, contains the following statement regarding the prospective size of the 1952 crop:

Indicated production in the *Virginia-Carolina area* increased about 2 percent during the month due to higher anticipated yields in Virginia. * * * Generally, a very good crop is in prospect in this area.

The report of October 22 refers to the fact that the yield of the 1952 crop "should be a little better than a year ago." The same report also refers to the fact that buying by end-users "is still light." The report of November 5 also emphasizes the lightness of the demand from end-users, stating:

Demand for cleaned and shelled goods for close up shipment has been only fair, with most buying for current needs.

The report of November 12 again refers to the "rather light" demand for cleaned and shelled peanuts and contains quotations of price futures on such peanuts which are generally below the 1951 average.

In addition to the above crop and market factors which affected their judgment, the sheller witnesses placed considerable emphasis on the matter of the credit stringency which confronted them in 1952. Most of the shellers have resources to finance only a small part of their crop purchases, the greater portion thereof being financed through bank loans. According to the testimony of the sheller witnesses, they were confronted in 1952 by a reluctance on the part of the banks to loan money as freely as in the past due, not only to the softening of the market, but to the fact that the shellers had lost the protection of the shellers contracts containing the bail-out clause. In past years the bail-out clause in their contracts had assured the shellers against losses on unsold farmers stock peanuts and, until 1951, also limited their losses on some of the shelled peanuts. While this clause was not frequently used in actual practice,[5] it facilitated their obtaining credit from the banks since it, in effect, gave them collateral for their loans. In 1952, with the collateral of the bail-out clause gone, the banks were more cautious in their loans to the shellers. The money was doled out on a gradual basis with instructions that the money was to be used to buy peanuts as cheaply as possible. At least one sheller, Farmers Cotton & Peanut Company, Inc., was instructed by its bank to pay no more than loan value for the peanuts. Another sheller, The Edenton Peanut Company, was required under its loan from the Reconstruction Finance Corporation not to expend the monies loaned for more than 80 percent "of the loan value" of the peanuts purchased. Several of the shellers testified that they had to go off the market prior to the end of the season due to a lack of funds with which to make further purchases.[6]

Another factor which influenced the thinking of a number of the shellers was the view that the new program established loan value, rather than the so-called support price, as the effective support level for farmers stock peanuts during the active buying season. While a farmer could, if he chose, hold his peanuts until May 31, 1953, and obtain the support price under his purchase agreement with the Commodity Credit Corporation, the actual difference between loan and support was more apparent than real since the deductions which would have to be made from the support price after May 31 (including allowance for shrinkage in weight, storage charges, interest on loan and other charges) would reduce the net amount received by the farmer substantially to the amount of the loan. Although it was possible that the farmer might still realize a profit if the Government resold the peanuts after May for more than support, this was a somewhat uncertain and speculative prospect when weighed against the natural inclination of the farmer to dispose of the crop as soon as possible and with a minimum of red tape. For this reason many of the shellers felt that in offering to pay a price equivalent to loan value during the active buying season, they were offering the farmer a price equal to the effective support price.

In his brief counsel supporting the complaint cites statements made by the Department of Agriculture, in announcing the new program, to the effect that they regarded it as offering growers an opportunity to

[5] The testimony reveals that the clause was taken advantage of for 1951 by respondent Columbian and that several other shellers gave serious consideration to availing themselves of their rights of resale under this clause at various times.

[6] This includes respondents Pond Brothers, Farmers Cotton, and Virlina. In obtaining its last loan during the season, respondent Pond Brothers was required to show that it had actual contracts of sale with reliable end-users.

secure prices above support. Counsel apparently regards these statements as belying the testimony of some of the respondent shellers that they considered loan value to be the effective support price. However, the minutes of the meetings in Washington which preceded the adoption of the 1952 loan program, reveal the widely held view by many segments of the industry that the practical result of the proposed new program would be to establish loan value as the effective support price. Thus, a farm representative from the Southeastern area stated that the proposal to establish a loan program providing for deductions of approximately 10 percent below support would establish loan value as the effective support price, since 90 percent of the farmers in his area would not avail themselves of farm loans.[7] A farm representative from the Virginia-Carolina area stated that with the large carryover from 1951 facing the market, any proposal for establishing a system of deductions below the support price would have the practical effect of reducing the price, and he suggested that the Government should stop "beating around the bush" and should tell the farmer it was going to cut the support price by the amount of the deduction.[8] Similar sentiments were voiced by others who were present at the meetings.[9] It should also be noted that great concern was voiced at the meetings, both by farmer representatives and shellers, that the shellers' difficulty in financing their purchases without the collateral of the shellers contracts would affect their ability to buy the crop.[10]

Recognition of the realistic nature of the views expressed at these meetings, as well as corroboration of the testimony of the respondent shellers, appears in the following prediction made by a county farm agent which appeared in a local newspaper just as the crop was beginning to move to market:

> Weather permitting, peanut picking will move into high gear shortly and right now it's impossible to predict how much of the crop will be stored under Government loan either on the farm or with the Growers Coop and how much will move directly into regular trade channels. *It's my guess that if buyers pay prices in line with the loan schedule a sizable portion of the crop will move directly from the picker to the mills.*[11] [Emphasis supplied.]

Although, as claimed by the respondent shellers, the laws of economic necessity naturally impelled them to the decision to pay loan value for their peanuts, it should be noted that there was no immediate and simultaneous unanimity in this decision. Thus, one of the

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7 RX 9, pp. 13–14.

8 RX 9, p. 35.

9 See, for example, RX 9, pp. 4, 6, 25.

10 CX 536, pp. 49–51; RX 9, pp. 21, 25, 26.

11 The above article appeared in the Suffolk News-Herald under date of October 26, 1952.

largest shellers, respondent Columbian, started out buying at a price midway between loan value and support value, but came down to loan value when it found it was able to buy all the peanuts it wanted to at the latter price. Another large sheller, respondent Birdsong, decided to pay loan value f. o. b. its mill, with the farmer bearing the cost of hauling the peanuts, but soon changed to loan value f. o. b. the farm, when it found that the shellers generally were paying for the hauling of the peanuts. The experience of respondent Williamston was similar to that of Birdsong. In the case of several of the smaller of the respondent shellers, who entered the market rather late, the decision to pay loan appears to have been based not merely on the economic factors above related, which caused them to proceed cautiously, but also on the fact that when they entered the market they found that loan value had already been established as the going rate. Since most of the shellers bought through independent buyers, who purchased peanuts on behalf of more than one company, it would not be difficult for these latecomers to find out what prices were being paid without receiving such information from other shellers.

It should also be noted that despite the fact the bulk of the peanuts handled by the respondent shellers were purchased at loan value, there were, nevertheless, significant variations from this price, in addition to those already mentioned of shellers who changed their price after entering the market. Thus, respondent Edenton purchased at least 20 per cent of its peanuts at prices other than loan value. The figures covering purchases by respondent Williamston during the period from November 1 to December 6, 1952, show that approximately 42 per cent of its purchases were made at prices other than loan. While figures are not available for the other respondents, most of them testified that after January 1, 1953, they paid above loan for peanuts, despite the fact that from January 31 to May 31, 1953, there was no price support under the Government program.[12]

Given the economic factors with which the respondent shellers were confronted in 1952, it does not tax credulity to accept their claim that the decision to pay loan value resulted from the individual action of each sheller, impelled by economic necessity, and not from any agreement or understanding among them. There is nothing about their testimony or about their demeanor in testifying which suggests that the examiner should not give credence to their claims. In considering the probabilities inherent in the situation, it should be noted that in 1951, when they were operating under the shellers contracts,

[12] Farmers who desired to enter into a loan and purchase agreement with the Government were required to do so before January 31, 1953.

all the respondent shellers purchased the bulk of their peanuts at exactly the minimum price required under the contracts, to wit, at the support price. No claim is here made that such unanimity of action resulted from anything other than the operation of normal market factors, including a crop surplus which was aggravated by the dropping of a portion of the protection of the shellers contracts with respect to No. 2 size shelled peanuts. It is not unreasonable, therefore, to believe that confronted with a worsening of the market situation in 1952, including the complete dropping of the shellers contracts, the shellers should once again decide to pay no more than was required by what they considered to be the effective support level under the new program, to wit, loan value.

Accordingly, the hearing examiner cannot conclude that, insofar as the respondent shellers decided to pay the equivalent of loan value for farmers stock peanuts in 1952 and proceeded to buy the bulk of their peanuts at such price, their decision and action were based on anything other than the individual judgment of each sheller taking into consideration the economic factors which were common to them all.

2. The use of the loan-value price schedule

The case of counsel in support of the complaint rests not merely on the fact that the respondent shellers bought the bulk of their peanuts at prices equivalent to the Government loan values thereof but, even more important, on the fact that the shellers used an identical 16-page price schedule in the preparation of which the bookkeepers of some of the respondents cooperated. The respondent shellers, while admitting that they all used the loan-value schedule during the course of the 1952 crop season, denied that it had any connection with an agreement or understanding on their part to fix prices. They sought to show that the schedule was merely an adaptation of one prepared by the Department of Agriculture, which came into use because of the difficulties they had experienced in computing prices under the new loan program, and that they had used similar schedules in previous years. The explanation of respondents concerning the origin and distribution of the schedule, and the contentions of counsel supporting the complaint in connection therewith, are considered in greater detail below.

a. *The explanation*

During the period when the shellers were obligated under the shellers contracts to pay not less than the support price for peanuts, the Department of Agriculture had issued a schedule reflecting the support prices of farmers stock peanuts on a per ton basis. Since peanuts in the Virginia-Carolina area were traditionally bought and sold on a per pound basis, it was necessary for the shellers to have a schedule translating the Government support prices to a pound basis. For a number of years this need was supplied by the bookkeeper of the respondent Pond Brothers, one Al Elliott, who prepared a schedule substantially similar to that issued by the Department of Agriculture, except that the prices were expressed on a per pound rather than a per ton basis. As to a private venture of his own, in which his employer did not participate, Elliott had copies of the schedule printed and sold them to other shellers at approximately five cents per copy. A similar schedule was prepared by Elliott in 1952 and distributed to the other shellers.

However, when it became apparent in the fall of that year that there was definitely going to be a loan program instead of the former direct support program,[13] many of the shellers found it necessary to have some more convenient method of computing loan values. This was important, not only because many of them had decided to pay loan value for their peanuts, but also because the farmers themselves, in deciding whether or not to accept a buyer's offer, would frequently want to know what they could get if they placed their peanuts under Government loan. In order to compute loan value, it was necessary to make a series of deductions from the support price, in accordance with a complicated formula prescribed in the loan program. The Department of Agriculture had issued a bulletin showing how these deductions were to be made from the support price in order to arrive at loan value. By using the Government schedule of support prices, expressed in a per ton basis, and making the deductions prescribed by the Government formula, it was possible to arrive at the loan value of farmer stock peanuts which could then be translated to a per pound basis. The same result could be achieved by using the Elliott schedule of support prices and making deductions therefrom in accordance with the Government formula. However, this procedure was cumbersome and time-consuming, requiring anywhere from 20 to 35 minutes to compute the loan value on a given lot of peanuts, and even longer where more than one grade of peanuts was involved in a transaction. As a result of this, the shellers found it necessary to have some more

[13] Although the new program had gone into effect in the spring of the year, many of the shellers were hopeful that some change might be effected which would restore the shellers contracts. Not until the late summer or early fall did it become definitely apparent that the loan program was going to control the 1952 crop, and not until about October 1 was detailed information received in the Virginia-Carolina area as to how the program was going to operate.

convenient method of computing peanut prices on a loan value basis, lest their payment system become bogged down in a mathematical morass.

The lead in preparing a schedule to meet this need was taken by E. K. Thompson, bookkeeper of respondent Birdsong. According to Thompson, when he told the president of his company that it took approximately 27 minutes to compute loan value on a given lot of peanuts, he was instructed by his employer to try to find some way of facilitating this task. Previous to this, Thompson and the bookkeepers of five or six other companies located in Suffolk had been to see a Mr. Johnson, head of the Growers Peanut Cooperative in Franklin, for the purpose of obtaining information which would aid them in computing the loan values of peanuts.[14] Johnson was not then able to help them. However, he subsequently sent them a table of instructions as to the method of making deductions from the support price in order to arrive at loan value. While the Government had issued a complete 21-page schedule of loan values on all grades of runner-type peanuts, it only issued a 1-page table of instructions illustrating how to compute such values on Virginia-type peanuts.

When Thompson realized that the Government was not going to issue detailed schedules for Virginia-type peanuts, he asked Elliott of Pond Brothers, who had had experience with price schedules in the past, if he would be interested in helping him prepare a schedule of loan values. Since Elliott also had need for such a schedule, he agreed to cooperate with Thompson.[15] Both of them worked out the format for the schedule, based substantially on that which had already been prepared by the Department of Agriculture for Runner-type peanuts. They also made the mathematical computations for the first two pages of the schedule. However, since there were over 6,000 computations to be made in working out the entire schedule and the harvesting of the 1952 crop was at hand, Thompson called in four of the other bookkeepers in Suffolk, most of whom had previously been with him on the visit to Franklin, to see if they would be interested in making the mathematical computations on the other pages of the schedule. Each of the bookkeepers agreed to make the computations

[14] The Cooperative was the officially recognized marketing agency under the loan program and received copies of releases from the Department of Agriculture pertaining to the program. It was apparently customary for the shellers to contact officials of the Cooperative from time to time for the purpose of obtaining information regarding the support-program.

[15] According to Elliott's employer, Elliott would have prepared a complete loan schedule himself, except for the fact that the assistant who had helped him in preparing the earlier schedules, had left the company's employ and Elliott did not have the facilities to do the complete job by himself.

on two or three pages of the schedule.[16] The work was begun around October 15 and was completed on October 21, when the schedule was sent to a printer in Norfolk for printing. With one exception, Thompson did not request permission from any of the employers for their bookkeepers to work on the schedule, and in most instances the employers were not aware that their bookkeepers were so engaged until after work on the schedule had commenced or was completed.[17]

In the meantime, and prior to the preparation of this schedule, some of the respondent shellers were already buying peanuts at loan value. Several made the necessary computations by the longhand method of calculating the prescribed deductions for loan value, while others had prepared their own schedules using an average figure of deductions from support to arrive at loan value. In some instances, complaints had been received from farmers that these computations did not accurately reflect Government loan values. As soon as the schedules prepared by Thompson and Elliott, with the cooperation of the four other bookkeepers, were received from the printer, copies were distributed to those firms whose bookkeepers had assisted in the preparation thereof. When the other shellers learned about the schedule they procured copies through Thompson or Elliott. A number of them learned about the new schedules from Elliott, from whom they had previously purchased a support schedule and whom they had called in the hopes that he might be preparing a loan schedule, after they had run into difficulty in paying for peanuts without an accurate detailed schedule of loan values. One of the largest of the shellers, respondent Columbian, learned about the schedule quite by accident through the printer, who was a friend of its president, and was able to get copies from the printer after permission had been obtained from Elliott or Thompson.[18]

b. *The contentions of counsel supporting the complaint*

Counsel in support of the complaint refers in his brief to several facts and circumstances which he apparently regards as reflecting unfavorably on the story of respondents concerning the preparation and distribution of the loan value schedules. First of all he points

[16] In addition to Thompson and Elliott, bookkeepers from the following four companies worked on the schedule: Planters, Lummis, Old Dominion, and Parker.

[17] Only in the case of Lummis' bookkeeper was permission requested for the bookkeeper to assist in the work.

[18] According to Columbian's President, William Woodley, when he first learned of the schedule, he made no effort to obtain copies because he had received the impression from Johnson of the Peanut Growers Cooperative that the Government was going to issue its own schedule. However, when he learned that this was not so, he called the printer again and the latter, after receiving permission from Thompson or Elliott, gave Woodley a number of copies.

out that, unlike the Elliott schedule which had been prepared as a private venture by Elliott and for which he received payment from the various shellers, none of the respondents, other than Birdsong, ever paid for the 1952 price schedule. Thompson, who took the lead in preparing the schedule, gave the following explanation as to why he had not been paid for the schedule:

At the time the schedules were printed, Thompson had contemplated charging for them, as had Elliott. He had 2,000 copies printed because Elliott had advised him that this was the number which he had customarily ordered, and because the printer had informed him the difference in price between printing 500 copies and 2,000 copies was very small. However, he had some difficulty in deciding which companies to charge and how much to charge for the schedule. He felt that he could not charge the companies whose bookkeepers had helped him prepare the schedule. By the time the schedules came back from the printer, Thompson was so busy handling payments for the peanuts which were then moving to market in substantial quantities, that he gave up the idea of charging for the schedules. Eventually, his employer paid the printing bill and no reimbursement was received from any of the other shellers.

A number of the shellers testified that they had fully expected to be billed for the schedules, as they had in the case of the Elliott support schedules, but that they had never received a bill. Some of them testified that they had been under the impression right along that their companies had paid for the schedules and did not learn to the contrary until they checked their files just prior to the commencement of this proceeding, at the request of a Commission investigator, and were surprised to find that they had never received a bill for the schedules.

In the opinion of the examiner, the fact that the schedules were or were not paid for is not a fact of any controlling significance. There is no showing that the cost of printing the schedules involved any considerable sum of money. Moreover, the fact that no payment was made by the other shellers does not necessarily require the drawing of any inference adverse to the position urged by respondents. In fact, if the shellers had shared the cost of printing the schedules this might more logically be cited as a circumstance tending to show that the printing and distribution thereof was part of a common plan of action.

Another fact cited by counsel supporting the complaint as tending to impugn the explanation of the respondent shellers concerning the use of the schedule is the fact that the schedule was headed: "*Price* schedule 1952 Crop Virginia Type Farmers Stock [Peanuts]." It is apparently the position of counsel that since the schedule was actually a schedule of loan values, it should have been called a "loan" schedule instead of a "price" schedule. Counsel in support of the complaint apparently regards the fact that the word "price" was used as tending to show that it was intended for use as part of a scheme to fix prices.

In the opinion of the examiner, the designation of the schedule as a "price" schedule is not a fact from which any adverse inference can be drawn. As pointed out by Thompson, the Elliott schedule upon which the loan schedule was in part modeled, also used the description "price schedule," although it was actually a schedule of support values. The reason it had been so designated was to avoid any possible misrepresentation to the farmers as to what the official Government support values were in the event an error in computation was inadvertently made in the schedule. In addition, the official instructions for computing loan values issued by the Department of Agriculture, which Thompson used as a model, also refer to the schedule as a "price table." Moreover, in view of the fact that respondent Birdsong had already decided to pay loan value for its peanuts there is nothing unusual about its bookkeeper calling the schedule, which he took the lead in preparing, a "Price Schedule."

Counsel in support of the complaint also cites as being of some significance, the dissimilarity between the Elliott support schedule and Thompson loan schedule, insofar as the size of each document is concerned. He points out that whereas the former was only a one-page document, the latter consists of sixteen pages. Counsel apparently accepts the Elliott schedule as being merely a bona fide effort to translate Government support prices from a per ton to a per pound basis, but regards any substantial deviation from the format of that schedule as having sinister implications.

In the opinion of the Examiner, the argument of counsel in support of the complaint based on the physical dissimilarity of the two documents rests on a distinction without a difference. The reason why the Elliott schedule was only one page was that the Government support schedule upon which it was patterned was also a one-page document. However, as a result of the complicated formula for deductions from support, set up under the 1952 loan program, it was necessary to have a separate schedule for each grade of peanuts according to the percentage of sound meat kernel (SMK). The Government instructions on how to compute loan value contain a separate table of base prices on a single grade of Virginia-type peanuts (65% SMK) and an additional table setting forth the formula for computing the loan values on all grades of peanuts. The same document also contains a complete model loan-value schedule for runner-type peanuts, consisting of 21 pages with a different schedule for each percentage of SMK. The Thompson schedule is patterned substantially after the format of the Government schedule for Runner-Type peanuts, except that it is applicable to Virgina-type peanuts.[19] Considering the fact that the Government schedules themselves became more complicated after the enactment of the loan program, the examiner cannot see anything sinister in the fact that the Thompson schedule consists of 16 pages, while the Elliott support schedule was only one page.

Viewed in the light of the record as a whole, the explanation by respondent shellers as to how the loan-value price schedule came to be prepared and as to how it came to be distributed among all the shellers, impressed the examiner as plausible and as not unreasonable on its face. There is nothing in the facts and circumstances referred to by counsel supporting the complaint nor in any of the other facts presented in the record which requires the examiner to reject this explanation.

3. The other evidence

In addition to the fact that the respondent shellers all used the same price schedule and purchased the bulk of their peanuts at loan value, counsel in support of the complaint relies upon several other facts and circumstances as tending to support his claim that respondents entered into an agreement to fix prices. These matters are separately discussed below.

a. *The speech by Woodley*

At a meeting of the respondent Association on November 2, 1951, William P. Woodley, President of respondent Columbian, made a talk to the members in which he stated, in part, as follows:

> We know there is nothing we can do to reduce the cost of our peanuts if we are operating under the Shellers Contract, and I think all of us should sign the contract. The price we pay is fixed by the contract, and although we cannot reduce our cost below this level, we can limit our cost by buying peanuts strictly on the price determined by the federal grade. The only way we can do this is not to price any lot of peanuts until after the grade has been determined by a Federal Grader at a grading point. This will take the guess work out of buying and, as you know, whenever we guess the value of a lot of peanuts, we have to pay additional if we have under-guessed, but if we over-guess. we have to absorb our mistakes.

[19] The complaint states, and it was conceded by counsel supporting the complaint at the hearings herein, that the Thompson schedule reflects "exactly" the amounts of Government loan values.

The peanuts being marketed in the Southeast are being sold in accordance with the grades established at receiving points, and already being overpriced in competition with the Southeastern type, it would seem to me that it is absolutely necessary that we follow their practice in buying at the minimum support price. This, of course, will enable us to move more peanuts into edible consumption than we would be able to move under a Program of careless buying, and I believe we will be doing the farmers of this area a service in trying to move a greater quantity of the crop into edible consumption rather than into Commodity Credit, and by doing so, we may be able to eliminate the necessity of radical acreage reduction next year.

Counsel in support of the complaint cities these remarks as indicating that the respondent shellers "were cooperatively discussing the reasons why it would be in their best interest to purchase peanuts at the minimum support price," and he seeks to have the examiner infer that they took similar action in 1952. Aside from the fact that, as counsel recognizes, the speech was made in connection with the 1951 crop and there is no evidence that any action was ever taken by the Association based on Woodley's suggestion, the speech itself contains no proposal that the shellers undertake any illegal action. The gravamen of Woodley's remarks at the meeting was that economic conditions required that the shellers cut their cost of peanuts and that since they could not cut the price because they were obligated under the shellers contracts to pay not less than the support price, they could at least see to it that the peanuts were properly graded before they made an offer as to price.[20]

When the full speech is read in context it tends, if anything, to confirm much of the testimony of respondents' witnesses. For example, the speech quotes from an article written by a banker in which reference is made to the economic problems confronting the industry and in which it was forecast that loans to shellers would have to be "very closely screened." Woodley's own remarks regarding the problem of competition with the Southeastern-type peanuts confirm the testimony of some of the shellers regarding the effect of the Southeastern crop on their own area. He also refers to the problem of the large probable carryover of peanuts from the old crop, thus indicating that the shellers were confronted in 1951 with a problem similar to that which faced them in 1952. Viewing Woodley's remarks as a whole, there is nothing in them which suggests that illegal action on the part of the shellers was contemplated as a means of rectifying the industry's problem.

[20] Insofar as the 1952 crop is concerned, the evidence shows that offers by buyers were usually at a particular price, subject to the proper grade being established by Federal-State inspectors. However, some buyers apparently made their own estimate of grade and bid on the peanuts without a proper Federal-State inspection. This presumably is what Woodley was referring to.

b. *The letter from Gilliam to B. M. Birdsong*

E. F. Gilliam, the general manager and treasurer of respondent Pretlow, on June 24, 1952, addressed a letter to B. M. Birdsong, "% Birdsong Storage Company, Inc.," in which the following statement appears:

> I am reminded of the old proverb that goes something like this: "The mountain strained and brought forth a mouse," and it looks like that's about all those fellows in Washington have done for us. I have about decided that it is useless to look to Washington for any help, so it looks like if *we* are going to buy this crop of peanuts to stay in business, the help is not coming from Washington but lies in what *we* can do. [Italics by counsel supporting complaint.]

Counsel in support of the complaint seeks to have the examiner infer that this letter contemplated illegal action on the part of the shellers, arguing that the letter "must have been taken to heart by respondent Birdsong, * * * as a hub about which the unlawful activities charged in the complaint revolved."

Although counsel supporting the complaint appears to take the position that this was a proposal made by one sheller to another, it should be noted that B. M. Birdsong was not only employed by respondent Birdsong Storage Company, Inc. (in what capacity it does not appear from the record) but he was also a stockholder and officer of respondent Pretlow Peanut Company, of which Gilliam was an official. The letter may therefore be regarded as being one from one official of Pretlow to another official of the same company. Furthermore, it should be noted that Gilliam had attended the meetings sponsored by the Department of Agriculture in Washington during early 1952, as a member of the Committee sent by the Virginia-Carolina shellers. At these meetings his group had taken the position that they wanted to have the shellers contracts continued in view of the protection which they were afforded thereunder. Viewed in this light, Gilliam's remarks in the letter to Birdsong may be regarded simply as an expression of his views that since Washington was not going to help the shellers (having definitely decided to drop the shellers contracts), the latter would have to rely entirely on their own resources to buy the crop if they wanted to stay in business.

There is no more reason for inferring that the "we" mentioned in the letter means both respondents Pretlow and Birdsong or that it refers to the shellers as a group, than there is in assuming that it has reference to Pretlow Peanut Company alone, of which both the sender and recipient of this letter were officials. Reading the letter in its context and in relation to the events which preceded it, the examiner is convinced that there is no necessary connection between the sending of the letter and any agreement or understanding between respondents Pretlow and Birdsong or any other group of shellers.[21]

c. The matter of warehouse space

At the hearings counsel in support of the complaint appeared to take the position that the respondent shellers had deliberately refused to make warehouse space available to the Government or to the Growers Cooperative, so as to force the farmers to sell their peanuts to the shellers due to the unavailability of warehouse space for storing peanuts placed under loan. It is not clear whether he has now abandoned this position since in the brief filed by him counsel merely refers to the lack of warehouse space as a factor which facilitated the plan of the shellers to fix prices. To the extent that counsel may still be urging the position which he appeared to take at the hearing, it is the opinion of the examiner that this contention is lacking in any substantial merit.

It is true that a number of the shellers declined to make warehouse space available to the Government or to the Co-op. However, according to the testimony of these shellers, the reason for this was that the Government never made any firm offer to use their warehouse space, but merely wanted the shellers to give the Co-op the option to use the space without committing it to take and pay for any definite amount of space. Even on the basis of this indefinite offer several of the shellers, including Pretlow and Maclin, actually offered to lease warehouse space to the Government but the space was never actually used or paid for. Several of the other shellers, particularly the smaller ones, made no offer to lease space because they did not have enough warehouse space for their own needs.

Aside from the fact that there is no substantial evidence of any effort on the part of the shellers, deliberate or otherwise, not to make warehouse space available to the Government, it is the opinion of the Examiner that the matter of warehouse space was not a significant factor in persuading the growers to accept the shellers' offer to pay loan value rather than place their crops under Government loan. While there may have been a shortage of warehouse space at the opening of the season, 35 warehouses were built during the season with funds provided by the Commodity Credit Corporation, some of them becoming available around the middle of November, and the balance by December 1, 1952. The testimony of the farmers who were called as witnesses in support of the complaint indicates that, generally speaking, the lack

[21] It may be noted that the balance of the letter, other than the portion above quoted, deals with personal matters and with certain business matters which were obviously being called to Birdsong's attention as an official of Pretlow.

of warehouse space was not a factor which persuaded them to sell to the shellers instead of availing themselves of a Government loan.[22]

d. *The alleged admissions of buyers*

Counsel in support of the complaint called a number of farmers who testified regarding their conversations with various buyers for the respondent shellers. In a number of instances the buyers had shown the farmers price schedules similar to those in general use among the respondent shellers, and had told them that they would be paid "according to the sheet." One of the farmers, Vernon K. Grizzard, testified that a buyer told him: "[W]e all have the same price. * * * We are buying on the same schedule as the Government price list." Another farmer, Joseph F. Turner, was also told by a buyer that the shellers were "all paying the same thing for the peanuts, and buying on that particular sheet * * *."

If this testimony has any value, it must be as admissions by agents of the shellers that the latter had fixed the prices at which they were buying farmers stock peanuts. In the opinion of the examiner, the testimony of the farmers cannot be so regarded. Insofar as they testified about being shown copies of price schedules by buyers, their testimony is not of any particular significance. All of the shellers admittedly gave their buyers copies of the schedules and so it was natural that the latter would show them to the farmers as reflecting the prices they were paying. Insofar as any buyer may have made the statement that all the companies were paying the same price, i. e., the price on the Government schedule, they were merely stating a fact which had become generally known in the market but which, under the circumstances, did not necessarily mean that there was any agreement or understanding on the part of the shellers with regard to this price.

The examiner has already discussed the reasons why the shellers decided to pay loan value and how they came to use the same schedule. The fact that the buyers made the statement that the shellers were paying loan value and using the same schedule does not add anything to the picture. Most of the buyers bought for several companies and it may be assumed that as a result of the instructions received from

[22] Farmer Paul C. Marks testified that he had warehouse space available near him but did not use it, although he was fully aware of what the Government loan program was. Fred Jones testified that although he was fully aware of the loan program, he made up his mind to sell his peanuts to one of the shellers because he had never stored any peanuts in a warehouse and, moreover, there was so much publicity about the Government losing money on the peanuts that he preferred to dispose of them himself. Francis A. Simmons testified that there were Government warehouses available near him and he was aware of the loan program. Likewise, Vernon K. Grizzard testified that he was familiar with the loan program and that he put part of his crop in a warehouse on loan and sold the rest to shellers.

their various principals and the wide distribution of the schedules, they became generally aware as to what the shellers were paying—not only their own principals but other companies as well. For this reason, the statements made by them cannot be regarded as admissions that their principals or employers had, in effect, fixed prices.

C. *Summary and Concluding Findings*

1. Summary

The contention of counsel supporting the complaint that respondents entered into an illegal agreement to fix the prices of farmers stock peanuts rests almost entirely on the circumstantial evidence that the respondent shellers bought the bulk of the 1952 peanut crop at prices which were the equivalent of Government loan values and that they all used an identical schedule embodying such values, in the preparation of which schedule the employees of some of the shellers participated. There is no substantial direct evidence in the form of correspondence, minutes or reports of Association meetings, or otherwise, that the respondents entered into any agreement or understanding such as that charged in the complaint or, indeed, that the subject of prices to be paid during the 1952 crop season was even discussed among respondents at Association meetings or elsewhere. While counsel in support of the complaint did seek to draw support for his position from certain statements made in a speech by one of the shellers at an Association meeting in 1951 and from a letter written by a sheller in 1952, as well as from statements made to farmers by peanut buyers, this evidence, which has been discussed above, is so ambiguous and inconclusive that it has no substantial probative value. It is clear, therefore, that the case of counsel supporting the complaint must stand or fall on the circumstantial evidence introduced with respect to the preparation and use by the respondent shellers of the same price schedule.

The respondent shellers, while admitting the basic facts relied on by counsel in support of the complaint, sought to show that their decision to buy at loan value and their use of the same schedule were based on circumstances having no connection with any agreement to fix prices. They explained that the basic decision which they made with respect to the 1952 crop, viz., to pay loan value, was compelled by economic circumstances beyond their control and was not the result of any understanding or agreement on their part. These economic circumstances included a large carryover of peanuts from the previous crop, a large prospective yield for the ensuing year, and a large yield of the lower-priced competitive Runner-type peanuts grown in the

Southeastern area, all of which factors spelled out a peanut crop surplus and were reflected in a softening of the prices quoted by end-users of peanuts. Equalling these factors in importance was the fact that the banks, which financed the greater portion of their purchases, became very restrictive in their commitments to the shellers as a result of the dropping of the shellers contracts containing the so-called bail-out clause. The amount of the loans were reduced and, in some instances, limitations were placed on the prices at which shellers could buy.

With these conditions facing them, the shellers contended that it was natural, in fact that it was imperative, for them to try to buy farmers stock peanuts as cheaply as possible. Since the Government loan program had the effect of establishing a floor under peanut prices, it was inevitable that they would all eventually arrive at the same price as the cheapest price at which they believed peanuts could be bought, viz., loan value. Since the farmers had to be offered some inducement for selling to the shellers rather than placing their peanuts under loan, most of the shellers offered to pay the cost of hauling the peanuts from the farm to the mill, a practice which was traditional in the area anyway. Even in this, there was no immediate unanimity since several shellers, including Birdsong Storage Company, one of the largest companies in the area, started out paying loan value f.o.b. their mill and another large sheller, Columbian Peanut Company, started out paying a price midway between loan value and the support price.

Insofar as the explanations given by the shellers for their decision to buy peanuts at loan value are concerned, they impressed the examiner as being plausible and worthy of credit on the whole. As previously indicated, their testimony regarding the economic conditions which they claimed motivated their decision was corroborated to a considerable extent by documentary evidence in the record. No evidence was offered by counsel in support of the complaint to show that the conditions which the shellers claimed confronted them did not exist or that this was not the true reason why each of the shellers decided to, and bought, the bulk of its peanuts at loan value.

While there may be cases, some of which will hereafter be discussed, where the fact that a given group of competitors buy or sell at precisely the same price can have no rational explanation other than that such action resulted from a common agreement or understanding among them, the circumstances of this case do not require the drawing of any such inference. Here there is a perfectly logical and non-culpatory explanation, which does not do violence to the laws of probability, as to how all the shellers came to pay the same price for the bulk of their peanuts. Actually, the decision which preceded their purchases was not so much a decision to buy at a particular price, as it was a decision to buy as cheaply as possible. The price which each decided upon was not some arbitrary figure in which the coincidence of their decision would logically point to a combination of some kind, but was an amount predetermined to a large extent by the Government support program as the minimum figure at which the farmers would have an incentive in selling to the trade rather than placing their peanuts under loan. The fact that the shellers ultimately all arrived at substantially the same decision does not, under the facts here present, require the drawing of any inference that their decision was the result of collusive action. Significantly, in the year 1951, when they were confronted with similar, although not as acute, economic factors, they all arrived at substantially the same decision and bought the bulk of their peanuts at the cheapest price permitted under their contracts with the Government, to wit, the support price. No charge is here made that such action resulted from any agreement or understanding among the shellers.

The other significant fact upon which counsel in support of the complaint relies is that the shellers did not merely make a similar decision as to price but that they all used an identical price schedule, in the preparation of which some of their employees cooperated. However, here again the shellers gave a plausible and logical explanation which it does not tax credulity to accept. Thus the shellers showed that in past years they had all used a similar schedule of support prices which they purchased from the bookkeeper of one of the shellers; that this schedule, the so-called Elliott schedule, translated Government support prices from a per ton to a per pound basis and was needed because support was the minimum price which could be paid under the shellers contracts with the Government; that for the 1952 crop it was necessary to know what the loan value of the different grades of peanuts were, not only because most of the shellers had decided this was the price at which they could and should purchase farmers stock peanuts, but because the farmers themselves wanted to know what the loan values were; that it was burdensome and time consuming to compute such values without some schedule or other means of ready reference; that a number of the shellers had been led to believe that a schedule of loan values would be issued by the Department of Agriculture but that when the schedule was issued, it was for another type of peanuts grown predominantly in the Southeastern area, with only a single table showing how to compute loan values for Virginia-type peanuts; that when it became apparent that the Government was not going to issue a usable schedule some of the bookkeepers, because of their mutual need and in most cases without instructions from their employers, cooperatively assisted in preparing a schedule patterned substantially on the model supplied by the Government; and that in the normal course of events other shellers who had previously purchased the Elliott schedule found out about the new schedule and obtained copies. The shellers further showed that prior to the receipt of the schedule, a number of them were already paying loan value and were computing payments either by the longhand method of deductions or by using a homemade schedule in which deductions were approximated.

While the fact that a given group of competitors has used the same or a similar price list with a "to the last penny" correlation has, as pointed out by counsel supporting the complaint, been considered sufficient to support an inference that the group was acting in concert, no such inference is justified by the facts in this case. The "to the last penny" correlation here can logically be explained on a basis other than the existence of an agreement to fix prices, viz., that the price list used by the competitors merely reflected the official Government loan values reduced to a per pound basis. Accepting the apparently credible testimony of the shellers as to how each of them, acting independently, arrived at the basic decision to pay loan value, there is nothing unusual about the fact that they all began to use a schedule reflecting such values. Had they all prepared separate schedules containing the same amounts, based on the Government figures, this would not give rise to an inference that they were acting in concert. The fact that several of their bookkeepers, acting in most instances without the knowledge of their employers, collaborated in preparing such a schedule does not, in the opinion of the examiner, require any different conclusion concerning the bona fides of their action, particularly in the light of the fact that they had all used identical price schedules in the past originating from a common source.

2. Application of the legal authorities

Counsel supporting the complaint states in his brief that he does "not necessarily rely on any express agreement among respondent shellers respecting the promulgation of the 1952 price schedule and its use," and cites a number of legal authorities for the proposition that it is not necessary to show any actual or express agreement, simultaneously entered into, in order to establish a case under the Federal Trade Commission Act or the related Provisions of the Sherman Act. Counsel then argues that the "joint preparation" of the price schedule and the use thereof by the respondents in paying "to the penny" prices for the bulk of their peanuts "constitutes such a set of circumstances that the respondent shellers would be per se in violation of the Federal Trade Commission Act."

While it may be that no express agreement, simultaneously entered into, need be shown, the evidence must be such that it can reasonably be inferred that the parallelism of respondent's conduct resulted from some concert of aciton in which all of them deliberately and intentionally participated, albeit without any formal agreement and without necessarily entering into the arrangement at precisely the same moment. It is clear from the various cases cited by counsel supporting the complaint that in order to sustain a charge of illegal price-fixing under the Federal Trade Commission Act or the related Sherman Act something more than the fact that respondents, consciously or otherwise, engaged in parallel action must be shown. Thus, in the *Interstate Circuit* case,[23] while the court stated that a "conspiracy may be * * * formed without simultaneous action or agreement on the part of the conspirators," it recognizes that there must be "[*a*]*cceptance* by competitors * * * of an *invitation to participate in a plan*," even though there was no previous agreement, and it concluded that the uniform action of respondents could not have occurred "without some *understanding* that all were to join" (emphasis supplied). Similarly, in the *Fort Howard Paper Co.* case,[24] the court while stating that "no formal agreement" was necessary and that the "essential combination or conspiracy may be found in a course of dealings or other circumstances as well as in any exchange of words," recognized that "[i]t is the *agreement* to fix prices in *concert* that renders the conspiracy illegal." [Emphasis supplied.] Any doubt on the subject of whether parallel business behavior is ipso facto illegal was recently laid at rest by the Supreme Court in *Theater Enterprises, Inc.* v. *Paramount*, 346 U. S. 537, where the court in interpreting the analogous provisions of the Sherman Act, stated:

> The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. * * * But this court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.

[23] *Interstate Circuit, Inc.*, v. *U. S.*, 306 U. S. 208, 227.
[24] *Fort Howard Paper Co.* v. *FTC*, 156 F. 2d 899, 905 (C. A. 7).

The examiner is not unmindful of the cases holding that a course of parallel conduct which falls short of a "combination" or "conspiracy" under the Sherman Act may, under some circumstances, constitute an unfair method of competition under the Federal Trade Commission Act.[25] However, these have involved situations where not only was the method of competition (use of basing point system) considered to be illegal, but there was evidence of actual collusion among the parties. Whatever may be the validity of the argument that such cases support the doctrine of "conscious parallelism," [26] the Commission has made it clear that it regards the "inherent evidence of *collusion*" in these pricing systems as being the gravamen of the offense charged and that "mere uniformity" of prices does not provide a basis for prosecution.[27] In the instant case there is not involved any inherently illegal pricing system and, moreover, the complaint is based on the alleged existence of an agreement or understanding among respondents to fix prices and not on any claim of mere parallel behavior.[28]

Insofar as the cases cited by counsel supporting the complaint hold that a finding of agreement or conspiracy may be based on a showing of conscious parallel action, they involve situations where the facts indicate that there was no reasonable explanation for the unanimity of action among respondents other than that it resulted from an agreement or conspiracy on their part. In such cases, the respondents either offered no explanation of their parallel conduct or the explanations offered by them were patently unacceptable. Thus, in the *Eugene Dietzgen Co.* case,[29] the court noted that respondents had made "[n]o rational or satisfactory explanation" for their identical bids on Government contracts and held that "concerted action" may be inferred from an "artificial price level not related to supply and demand * * *." Similarly, in the *Fort Howard Paper Co.* case, *supra*, the court held that the "artificiality and arbitrariness of the zone structure [on which respondents' prices were based] is so appar-

[25] *FTC* v. *Cement Institute*, 333 U. S. 683, 721, fn. 19; *Triangle Conduit & Cable Co.* v. *FTC*, 168 F. 2d 175 (C. A. 7).

[26] See Rahl, Conspiracy and the Anti-Trust Laws, 44 *Ill. L. Rev.* 743, 761 (1950).

[27] *Commission Policy Toward Geographic Pricing Practices*, October 12, 1948, 3 CCH Trade Reg. Rep., par. 10,412.

[28] The complaint here charges that the price list was circulated among respondents "for the purpose, and with the object and effect, of fixing [prices]" and that the prices therein set forth were adopted by respondents "in accordance with the agreement, understanding, desire, purpose and design of said respondents" to fix prices. In the *Triangle Conduit* case, *supra*, the complaint not only charged the existence of a conspiracy to use the basing point system, but also alleged in a separate count that respondents had adopted the basing point system "with knowledge that each did likewise," thereby restricting competition.

[29] *Eugene Dietzgen Co.* v. *FTC*, 142 F. 2d 321, 327, 332 (C. A. 7).

ent that it cannot withstand the inference of agreement." The court in the *Allied Paper Mills* case [30] also cited the "artificiality and arbitrariness" of the price structure as supporting an "influence of agreement." In the *Interstate Circuit* case, *supra*, the Court found that the unanimity of action among the defendants resulted in "such far-reaching changes in their business methods" that it taxed credulity to believe that such changes could have occurred without some understanding that all were to join" and, furthermore, that it was "beyond the range of probability that [this] was the result of mere chance."

The instant case does not fall within this category. The prices reflected in respondents' price schedules were neither artificial nor arbitrary but were directly related to the Government loan program. The respondents gave a rational and satisfactory explanation as to why they decided to pay such prices and also as to how the employees of some of them happened to cooperate in the preparation of a price schedule reflecting these prices. The actions of the respondent shellers do not represent any startling change from past industry practices, under which the prices paid by the shellers appear to have borne a considerable degree of relationship to the minimum price guaranteed to the grower under the Government support program, and in which schedules reflecting such prices and based on Government-supplied data have been widely used.[31]

It is clear from the foregoing that (1) in order to establish the charge that respondents have engaged in illegal price-fixing, as alleged in the complaint, counsel supporting the complaint must establish that the action of the respondent shellers in adopting identical prices was the result of some agreement or understanding on their part, tacit or express; and (2) that proof of parallel business behavior does not ipso facto establish the existence of such an agreement or understanding, except insofar as agreement may be inferred from the context of such parallel action. The question here presented is whether the evidence that the respondent shellers engaged in substantially parallel business behavior is sufficient, in the face of the explanations given

[30] *Allied Paper Mills* v. *FTC*, 168 F. 2d 600, 608 (C. A. 7).

[31] Counsel in support of the complaint has sought to analogize the position of respondents, based on past industry practices, to the position taken by their opposite numbers in cases such as the *Socony Vacuum* case (*U. S.* v. *Socony Vacuum Oil Co.*, 333 U. S. 150) where it was held that the fact certain illegal cooperative practices had been initiated during the period of the NRA with the knowledge and acquiescence of officials of the Federal Government, did not immunize such practices from prosecution where they were continued after the NRA period. However, the examiner does not understand the position of respondents here to be based on any claim of immunity gained from Government acquiescence in illegal practices engaged in during the period of the shellers contracts. Rather it is their position that the practices engaged in prior to 1952 were entirely legal and, so far as appears from the record, there is no evidence to the contrary.

by them, to justify the drawing of an inference that such parallelism of action resulted from a common understanding or agreement on their part. The criterion to be followed in resolving this question is well stated in *Wesson* v. *United States*, 172 F. 2d 931, 933 (C. A. 8), as follows:

> Inferences must be based upon proven facts or facts of which judicial notice must be taken and one inference cannot be based upon another inference. To sustain a finding of fact the circumstances must lead to the conclusion with reasonable certainty and must be of such probative force as to create the basis for a legal inference and not mere suspicion. *Circumstantial evidence* * * * *is not sufficient to establish a conclusion where the circumstances are merely consistent with such a conclusion or where they give equal support to inconsistent conclusions.*[32] [Emphasis supplied.]

In the opinion of the examiner the explanation given by the respondent shellers for their use of the same price schedule and their payment of similar prices for the bulk of their peanuts, if it does not affirmatively establish the nonexistence of an agreement or understanding to fix prices, at least gives equal support to an inference that their parallel action was noncollusive in nature as it does to one that such action was the result of agreement or understanding among them.[33] Under these circumstances, the examiner cannot draw any inference adverse to respondents from their parallel activities.

3. Concluding findings

It is concluded and found, for the reasons above stated that the evidence introduced by counsel in support of the complaint is insufficient to establish a prima facie case that the respondent shellers entered into an agreement or understanding to fix the prices at which they would purchase farmer stock peanuts during the 1952 crop season. With respect to the respondent Association, it is found that there is a complete failure of proof that it participated in any illegal activities as charged in the complaint.

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[32] See also *Pevely Dairy Co.* v. *United States,* 178 F. 2d 363, 370, (C. A. 8), in which the rationale of the *Wesson* case was adopted by the court, in reversing a conviction for engagement in a price-fixing conspiracy, where the evidence of conspiracy rested largely on the adoption of parallel prices and the defendants gave a detailed plausible explanation as to the economic reasons why each adopted these prices.

[33] In his brief counsel supporting the complaint urges that the explanation of respondents not be accepted in the light of the holding in *United States* v. *U. S. Gypsum Co.,* 333 U. S. 364, 395, in which the Court stated that "little weight" could be given to the denials of witnesses that they had acted in concert "[w]here such testimony is in conflict with contemporaneous documents." However, unlike the *U. S. Gypsum* case, there are no contemporaneous documents here which contradict the explanations or denials of respondents. The primary documentary evidence is the price schedules themselves, and there is no necessary inconsistency between these documents and the explanations of respondents. Cf. *C. H. Musselman Co.,* Docket No. 6041 (September 23, 1954), where the Commission declined to accept explanations in clear variance with written reports.

CONCLUSION OF LAW

It is concluded that counsel in support of the complaint has failed to establish by reliable, probative and substantial evidence that respondents have engaged in any unlawful conduct in violation of Section 5 of the Federal Trade Commission Act. The motion of respondents to dismiss the complaint herein, on the ground that no violation of said Act has been established by the evidence, should, accordingly, be granted.

ORDER

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

FINAL ORDER ON APPEAL

Counsel in support of the complaint having filed, on December 31, 1954, their appeal from the initial decision of the hearing examiner in this proceeding; and the matter having been heard by the Commission on the whole record, including briefs and oral argument; and

The Commission having concluded that the hearing examiner's initial decision is correct, both on the law and the facts, and that the appeal of counsel supporting the complaint in all respects is without merit:

It is ordered, That the initial decision of the hearing examiner dismissing the complaint be, and it hereby is, affirmed and that the appeal therefrom filed by counsel in support of the complaint be, and it hereby is, denied.

Commissioner Howrey not participating, and Commissioner Mead dissenting.

IN THE MATTER OF

DEAN ROSS PIANO STUDIOS, INC., ET AL.

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

Docket 6229. Complaint, June 29, 1954—Decision, May 19, 1955

Consent order requiring a company in New York City to cease advertising falsely that by means of its home-study course of piano instruction consisting of a booklet and a device designated "Automatic Chord Selector," a person could play the piano with both hands the first day and, within a short time, read and play hymns, ballads, and sheet music.

Before *Mr. Loren H. Laughlin*, hearing examiner.
Mr. Frederick J. McManus for the Commission.
Mr. Benjamin E. Winston, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Dean Ross Piano Studios, Inc., a corporation, and Leonard Greene, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Dean Ross Piano Studios, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business at 45 West 45th Street, New York, New York. It is now, and for some time last past has been, engaged in the sale of a home study course in piano instruction known as Dean Ross Piano Course. The course consists of a booklet and a device designated "Automatic Chord Selector." Respondent, Leonard Greene, is president of said corporation. He individually formulates, directs and controls the policies, acts and practices of said corporate respondent. His address is the same as that of the corporate respondent.

PAR. 2. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their home study course, when sold, to be transported from their place of business in the State of New York to purchasers thereof located in other States of the

United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce between and among the various States of the United States and the District of Columbia.

PAR. 3. In the course and conduct of their business, and for the purpose of inducing the sale of their said course of instruction, respondents have made various statements with respect to the results that will follow the study and use of the materials furnished with said course, in advertisements published in various newspapers and other periodicals and by means of radio continuities. Among and typical, but not all inclusive, of said advertisements are the following:

Play Piano with BOTH Hands the FIRST
Day—or Don't Pay!
Amazing, New, Patented Self-Teaching
Device Gives "Secret"

You, too, can play piano with BOTH hands at once! Thousands have learned to play this fast, easy A-B-C way with the amazing invention, the AUTOMATIC CHORD SELECTOR, there's nothing to it. This is no trick method. You actually read and play any sheet music. And, the Patented AUTOMATIC CHORD SELECTOR guides your fingers every note of the way. No scales, no exercises, no boring practice. You play the minute you sit at the piano. In no time at all you're playing Hit Parade numbers, or hymns, or beautiful old ballads . . . or all three! Send for this marvelous Dean Ross Piano Course today. Consists of 30 illustrated lessons, 50 songs with words and music, special Dean Ross play-at-once arrangements, and the Patented AUTOMATIC CHORD SELECTOR. Only $1.98 complete. You have nothing to lose and Popularity and fun to gain, so mail the 10-day FREE-TRIAL coupon now.

This is no trick method. You actually read and play any sheet music.

I can personally Guarantee to teach you to play any sheet music.

PAR. 4. Through the use of the statements appearing in said advertisement, and others of the same import but not specifically set out herein, respondents represented, directly or by implication, that by means of their course of instruction a person is able to play the piano with both hands the first day and, within a short time, to read and play hymns and ballads as well as sheet music such as is featured on the Hit Parade.

PAR. 5. The aforesaid statements and representations are false, misleading and deceptive. In truth and in fact, the ability to play the piano gained by respondents' course of instruction is limited to the playing of simple, single note melodies with one hand and simple bass chord accompaniments with the other. The instruction provided will not teach or enable a person to play hymns, ballads or sheet music unless they have been specially prepared so as to permit the use of respondents' course of instruction and then only in the manner above set forth.

PAR. 6. The use of the aforesaid false, misleading and deceptive statements and representations and the failure to disclose the limitations of the results that may be obtained through the purchase and use of respondents' course of instruction has had, and now has, the capacity and tendency to induce members of the purchasing public into the erroneous and mistaken belief that all of such statements and representations are true and into the purchase of a substantial number of said courses of instruction as a result of such erroneous and mistaken belief.

PAR. 7. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices within the intent and meaning of the Federal Trade Commission Act.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (hereinafter referred to as the Commission) on June 30, 1954, issued its complaint herein under the Federal Trade Commission Act against the above-named respondents, charging them in certain particulars with having violated the provisions of said Act. The respondents were duly served with process and thereafter filed their answer.

On March 11, 1955, the respondents, however, stipulated in writing with counsel supporting the complaint, therein withdrawing their answer and waiving the filing of another answer and agreeing that a consent order against the respondents be entered herein in terms identical with those contained in the notice issued and served on respondents as a part of the complaint herein except that in paragraph 2 of said proposed order in said notice the following words were stricken: "has been specifically prepared so as to permit the use of respondents' course of instruction," and the following words have been inserted in lieu thereof: "it is arranged for or is adaptable to respondents' course of instruction." Such written stipulation was approved in writing by the Director and Assistant Director of the Commission's Bureau of Litigation.

By said stipulation, among other things, respondents have admitted all the jurisdictional allegations of the complaint and agreed that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations; that the parties expressly waive a hearing before the Hearing Examiner or the Commission and all further and other procedure to which the respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission; and that the order to cease and desist issued in accordance with said stipulation shall have the same force and effect as if made after a full hearing, the parties having waived specifically therein any and all right, power or privilege to challenge or contest the validity of said order. It was also stipulated and agreed therein that the complaint herein may be used in construing the terms of the order provided for in said stipulation which may be altered, modified or set aside in the manner provided by the Statute for the orders of the Commission.

The aforesaid stipulation for consent order as so approved was submitted on March 18, 1955, to the above-named hearing examiner for his consideration in accordance with Rule V of the Commission's Rules of Practice. And upon due consideration of the complaint and the stipulation for consent order, which is hereby accepted and ordered filed as part of the record herein, it having been stipulated they shall be the entire record herein on which such order may be entered, the hearing examiner finds that the Commission has jurisdiction of the subject matter of this proceeding and of each of the parties respondent herein; that the complaint, which is not denied, states a legal cause for complaint under the Federal Trade Commission Act against respondents as an entirety and as to each of the particular advertisements alleged as violations of law therein; that this proceeding is in the interest of the public; that the following order as proposed in said stipulation is appropriate for the disposition of this proceeding, the same not to become final unless and until it becomes the order of the Commission; and that said order therefore shall be, and hereby is, entered as follows:

ORDER

It is ordered, That Dean Ross Piano Studios, Inc., a corporation, and its officers, Leonard Greene, individually and as an officer of said corporation, and respondents' representatives, agents and employees, in connection with the offering for sale, sale and distribution of their home study courses in piano instruction, known as Dean Ross Piano Course, or any other course of instruction of the same nature, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

1. That by employing said course of instruction persons are able to play the piano, unless it is clearly and conspicuously disclosed that such playing is limited to simple, single note melodies with one hand and simple bass chord accompaniments with the other.

2. That by employing said course of instruction persons are able to play hymns, ballads or sheet music unless it is clearly and conspicuously disclosed that such music cannot be played unless it is arranged for or is adaptable to respondents' course of instruction and is limited to simple, single note melodies with one hand and simple bass chord accompaniments with the other.

ORDERS AND DECISION OF THE COMMISSION

Order modifying initial decision, adopting initial decision as modified as Commission's decision, and directing that report of compliance be filed, Docket 6229, May 19, 1955, follows:

This matter having come on to be heard by the Commission upon its review of the hearing examiner's initial decision herein; and

The Commission having duly considered the entire record herein, and it appearing that the stipulation containing a consent order, upon which the hearing examiner's initial decision is based, provides no basis for the hearing examiner's finding that the allegations of the complaint, other than those admitted in the stipulation, are true, and that, therefore, the initial decision should be modified to eliminate said finding:

It is ordered, That the hearing examiner's initial decision be, and it hereby is, modified by striking from the fourth paragraph thereof the words "and the allegations of which I therefore find to be true, state" and substituting therefor the word "states."

It is further ordered, That the initial decision of the hearing examiner as herein modified shall, on the 19th day of May 1955, become the decision of the Commission.

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

IN THE MATTER OF

BOHN ALUMINUM & BRASS CORPORATION ET AL.

Docket 5720. Complaint, Dec. 20, 1949—Decision, May 22, 1955

Order dismissing, because of discontinuance of business by respondents in the automotive parts replacement service field, complaint charging discrimination in price in violation of sec. 2(a) of the Clayton Act as amended.

Mr. Eldon P. Schrup, *Mr. James E. Corkey* and *Mr. Francis C. Mayer* for the Commission.

Butzel, Eaman, Long, Gust & Kennedy, of Detroit, Mich., for respondents.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is before the Hearing Examiner upon motion of respondents to dismiss this proceeding, affidavit in support thereof, and answer to respondents' motion filed by counsel in support of the complaint.

The complaint in this proceeding was issued December 20, 1949. Thereafter, under date of February 9, 1951, counsel for respondents and counsel supporting the complaint entered into a stipulation as to the facts. This stipulation stated in part that during the period from 1943 through 1949 respondent Clawson & Bals, Inc., was a wholly owned subsidiary of respondent Bohn Aluminum & Brass Corporation and, under date of December 31, 1949, said Clawson & Bals, Inc., was liquidated and since that time the business formerly conducted by it has been carried as a division of Bohn Aluminum & Brass Corporation. It was stated in said stipulation that the respondents had discontinued the practices charged by the complaint to be in violation of subsection (a) of Section 2 of the Clayton Act, and further provided that the stipulation be incorporated into the record in this proceeding and the matter adjourned until thirty days after final disposition of the matter now pending before the Federal Trade Commission against Federal-Mogul Corporation, Docket No. 5769.

In his affidavit in support of the motion to dismiss, Clyde M. Adams, Vice President of Bohn Aluminum & Brass Corporation stated that in the year 1953 Bohn Aluminum & Brass Corporation liquidated and otherwise disposed of its automotive replacement parts division and since that time had not been and is not now interested in the operation of the automotive parts replacement business in the automotive after-market field, nor has it any present intention of re-entering such business.

In their answer to respondents' motion and affidavit, counsel in support of the complaint stated that they have no objection to the motion to dismiss this proceeding, and as part of said answer attached thereto photostatic copies of certain correspondence and documents showing a sale by Bohn Aluminum & Brass Corporation of its inventory of automotive parts to the Thompson Products, Inc., on or about August 7, 1953, and notice to customers that it had discontinued doing business in the replacement service field.

The Hearing Examiner, having considered said motion and affidavit in support thereof, and answer thereto filed by counsel in support of the complaint and documents attached to said answer, and the record herein, and being now duly advised in the premises, is of the opinion that further proceedings in this matter would not be in the public interest.

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

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, the initial decision of the hearing examiner shall on May 22, 1955, become the decision of the Commission.

IN THE MATTER OF

THE MAICO COMPANY, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 3 OF THE CLAYTON ACT

Docket 5822. Complaint, Oct. 24, 1950—Decision, May 22, 1955

Consent order requiring a manufacturer of hearing aid instruments and parts and accessories in Minneapolis, Minn., to cease violating sec. 3 of the Clayton Act by entering into such exclusive contracts with distributors as require them to agree to carry its products only, to clear their stocks of competitive products, and not to order any more of such products for resale.

Before *Mr. Webster Ballinger* and *Mr. Frank Hier*, hearing examiners.

Mr. William C. Kern and *Mr. Andrew C. Goodhope* for the Commission.

Dorsey, Colman, Barker, Scott & Barber, of Minneapolis, Minn., for respondent.

COMPLAINT

Pursuant to the provisions of an Act of Congress approved October 15, 1914, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for other purposes," commonly known as the Clayton Act, the Federal Trade Commission having reason to believe that the Maico Company, Inc., a corporation, hereinafter designated and referred to as respondent, has violated the provisions of Section 3 of said Act, the Commission hereby issues its complaint stating its charges in such respects as follows:

PARAGRAPH 1. Respondent, The Maico Company, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Minnesota, and having its principal office and place of business at 21 North Third Street, Minneapolis, Minnesota.

PAR. 2. Respondent is now, and for many years last past has been, engaged in the manufacture, distribution and sale of hearing aid instruments and parts and accessories; the principal line of products manufactured, distributed and sold by respondent is now, and has been, a line of hearing aid instruments which are advertised and sold under the trade name "Maico." Such products are sold by respondent for resale and use within the United States and the District of Columbia. Respondent's hearing aid instruments are nationally advertised, enjoy wide sales throughout the various States of the United States, and respondent is one of the larger manufacturers and distributors of hearing aid instruments in the hearing aid industry.

Respondent's annual sales were approximately two million dollars during the year 1948. Respondent now sells, and for many years last past has been selling, its said products above-described to approximately 155 distributors located throughout the several States of the United States, the Territories thereof, and in the District of Columbia, causing said products when sold to be transported from the place of manufacture to the purchasers thereof located in States other than the place of manufacture, and there is now and has been for many years last past, a constant current of trade and commerce in said products between and among the various States of the United States, the Territories thereof, and in the District of Columbia.

PAR. 3. In the course and conduct of its said business, as herein described, respondent has been for many years last past in substantial competition in the sale of hearing aid instruments and parts and accessories therefor, in commerce between and among the various States of the United States, the Territories thereof, and in the District of Columbia, with other corporations and with persons, firms and partnerships.

PAR. 4. In the course and conduct of its business in commerce respondent has made sales and contracts for sale of its products and is still making sales and contracts for sale of its products or fixing a price charged therefor or discount from or rebate upon such price, on the condition, agreement or understanding that the purchasers thereof shall not use or deal in goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of respondent.

Among such contracts for sale, but not limited thereto, have been and are those which respondent entered into with its distributors. This contract is a form contract prepared by respondent and used by it in contracting with all its distributors. Paragraph Two of the contract now being used by respondent in contracting with its distributors provides as follows:

"2. Distributor agrees to order and purchase exclusively from Company and Company agrees to sell to Distributor, on terms as hereinafter set forth and subject to Company's ability to make delivery, Distributor's requirements of the products described in Paragraph One (1) hereof, and Distributor further agrees to devote his entire time and attention and his best efforts to promote the sale of Company products; to maintain a suitable sales office, or offices, adequately staffed for local and territorial sales coverage; to render adequate service to users of Company's products; to conform to Company's credit, sales, guarantee and service policies as set forth in Company's Distributor Policy Manual, Franchise Supplement, current bulletins, and in its advertising to the public, and to refrain from selling, marketing, distributing, or otherwise dealing in other brand or second-hand merchandise or indulging in any trade practices or doing anything which may in any way impair or adversely affect the good-will or reputation of the Company."

Among such sales and contracts for sale, but not limited thereto, have been and are those in which respondent, in selling its products to its distributor has required the distributors, either orally or in writing, or both, to agree to carry respondent's products only and to clear their stocks of products other than those sold by respondent and not to order any more of such items for resale by the distributor.

PAR. 5. The effect of said sales and contracts for sale on such conditions, agreements and understandings may be to substantially lessen competition in the line of commerce in which the respondent is engaged and in the line of commerce in which the customers and purchasers of respondent are engaged; and tend to create a monopoly in respondent in the manufacture and sale of hearing aid instruments and parts and accessories therefor and other goods, wares and merchandise in the manufacture and sale of which respondent has been and now is engaged.

PAR. 6. The aforesaid acts of respondent, The Maico Company, Inc., constitute a violation of the provisions of Section 3 of the hereinabove-mentioned act of Congress entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act).

Interlocutory opinion of January 21, 1955, sustaining hearing examiner's overruling of motion to quash subpoenas calling for production at hearing of records, etc., showing total sales of hearing aid batteries to each of respondent's competitors, in proceeding concerned with manufacturer's exclusive-dealing contracts with its distributors.

ORDER DENYING APPEALS FROM RULING DENYING MOTIONS TO QUASH SUBPOENAS DUCES TECUM

This matter having come before the Commission upon the appeals of General Dry Batteries, Inc., and National Carbon Company, a division of Union Carbide & Carbon Company, from the ruling of the hearing examiner of June 23, 1954, denying their motions to quash subpoenaes duces tecum addressed to them in this proceeding, and upon the motion of P. R. Mallory & Co., Inc., objecting to the hearing examiner's refusal to quash a similar subpoena addressed to it; and

The Commission having determined, for the reasons stated in the accompanying opinion, that the motions to quash were properly denied, and that the offer of compliance with the subpoenaes in an alternative manner satisfactory to respondent was improperly rejected by the hearing examiner:

It is ordered, That said appeals and said motion of P. R. Mallory & Co., Inc., are hereby denied.

It is further ordered, That the hearing examiner's ruling, requiring the parties subject to the subpoenaes duces tecum to reveal the names of their customers and the dollar value of purchases of each in compliance with these subpoenaes despite respondent's willingness to waive this requirement, is hereby reversed.

Commissioner MEAD dissenting.

OPINION OF THE COMMISSION

By GWYNNE, Commissioner:

Involved here are appeals of General Dry Batteries, Inc., and National Carbon Company from rulings of the hearing examiner denying motions to quash subpoenas duces tecum. P. R. Mallory & Co., Inc., did not file notice of appeal but did file a memorandum with the Commission stating its objections to the hearing examiner's rulings.

The complaint was issued under Section 3 of the Clayton Act and charged respondent Maico Company, Inc., with entering into exclusive dealing contracts with its distributors which had the effect of substantially lessening competition and which "tend to create a monopoly in respondent in the manufacture and sale of hearing aid instruments and parts and accessories therefor and other goods, wares and merchandise in the manufacture and sale of which respondent has been and is now engaged."

The hearing examiner found that the exclusive dealing contracts did have the effect of substantially lessening competition and tending to create a monopoly. Upon appeal the opinion by Mason, Commissioner, states: [1]

"The hearing examiner rejected all of respondent's attempts to present evidence for the purpose of showing (1) that there has been an increase in the number of its competitors, (2) that the volume of business of its competitors has increased, (3) that its share of the

[1] 50 F. T. C. 485.

market has been decreasing, (4) that its dealers constitute a small percentage of the total number of hearing aid dealers in the country, and (5) other matters relating to effect on competition.

"These factors, in our opinion, all have a very real bearing on whether there may be, or already has been, a substantial lessening of competition due to respondent's exclusive dealing contracts."

Accordingly, the case was remanded to the hearing examiner for the development of a record sufficient to enable the Commission to determine the actual effect upon competition. After the hearing had been resumed, the respondent secured and served on the proper officials of the three battery companies named in paragraph one hereof subpoenas duces tecum. The subpoenas called for the production at the hearing of the following.

"Books and records of said company showing the total sales of said company, of hearing aid batteries, by types, amounts, and dollar volume to each hearing aid manufacturer or their respective dealers or distributors to whom it sold batteries for each of the years 1949 through 1954, inclusive."

Instead of complying literally with the subpoena, the National Carbon Company, by agreement with the respondent, brought to the hearings a document which for identification purposes was marked Respondent's Exhibit 68. This was a list sworn to have been made from the books and records of the company, showing the relative position of the 15 largest purchasers of hearing aid batteries during the years 1949 to 1953, inclusive, as determined by dollar purchases. The list did not give the dollar volume of purchases nor the names of the customers with the exception of respondent. All others were identified by letters of the alphabet. Counsel for the complaint objected to the introduction as being incompetent to show respondent's position in the hearing aid industry and also because the names of the customers were not included. The objection was overruled with the reservation that counsel might move at the proper time to strike the evidence. On cross-examination the witness declined to reveal the names of customers and the dollar value of purchases and counsel for the complaint then moved that the exhibit be stricken. The hearing examiner indicated that counsel was entitled to have the information sought on cross-examination and gave the witness until the next morning to produce it or to move to quash the subpoenas. On that day the National Carbon Company moved to quash the subpoena on the ground that it is unreasonable in scope since it has to do with confidential business information, that it is irrelevant and immaterial and that compliance therewith would work an undue hardship. This motion was overruled.

The record in regard to General Dry Batteries Company is substantially the same. P. R. Mallory & Co., Inc., appeared by counsel, and stated it was ready and willing to put in the required evidence. However, in view of the stand taken by its two competitors, it also moved to quash the subpoena.

Thus it appears that respondent was not insisting upon literal compliance with its subpoena. An arrangement had been worked out which was satisfactory to both parties. This called for the introduction of certain evidence, which the hearing examiner held was not at that stage in the proceedings subject to the objection of irrelevancy. Upon cross-examination the witness claimed his privilege of not divulging certain information. This he had a right to do. As was said in *Finn* v. *Winneshiek* District Court 1909 Iowa 123 N. W. 1066, "If question calls for privileged matter the witness may decline to answer, subject to proceedings for contempt." Just why the hearing examiner, considering the state of the record, gave the witness the alternative of complying literally with the subpoena or moving to quash it is not entirely clear.

That there is some privilege in the matter of divulging "trade secrets" is well settled. This privilege extends, not merely to the chemical and physical composition of substances employed and to the mechanical structure of tools and machines, but also to such other facts of a possibly private nature as the names of customers, the subjects and amounts of expense and the like. Wigmore on Evidence, 3rd edition Volume 8 Section 2212.

The privilege is not an absolute one. Nor can the "public interest" be automatically held up as an excuse for denying it, although it is always an important consideration. In *E. B. Muller & Company* v. *F. T. C.*, 1944 142 F. 2d 511, the court ordered Schanzer (repondent's only competitor and the party claiming to be injured) either to produce his books and records or to furnish data therefrom giving petitioners the information to which they were entitled. Schanzer furnished certain information but refused to give the names of his customers. The court affirmed the action of the Commission in not requiring such a disclosure. In *Moore* v. *Crown*, L. R. 7 Ch. the court said "The court does not, when discovery is a matter of indifference to the defendant, weigh in golden scales the question of materiality or immateriality; but where the nature of the discovery required is such that the giving of it may be prejudicial to the defendant, the court takes into consideration the special circumstances of the case, and whilst, on the one hand, it takes care that the plaintiff obtain all the discovery which can be of use to him, on the other hand, it is bound to protect the defendant against undue inquisition into his affairs."

It should also be noted that the question arose on the cross-examination of the witness. Respondent elected to waive certain requirements of the subpoena. He offered evidence tending to show only the relative position of 15 customers, including the respondent. In this limited field, opposing counsel had the right of cross-examination, to bring out facts showing how the books and the records were kept, how the list was prepared and any other facts bearing upon the credibility of the witness and the value of the evidence submitted. There is nothing in the record to indicate that inquiry as to matters, ordinarily confidential, was necessary for that purpose.

In the *Robinson* v. *Phila. R. R. Company*, 1886, 28 Fed. 340, which was an action to compel answers to interrogatories, the court said "Witnesses before an examiner, will be compelled to answer, when it seems probable the testimony will be relevant; but care must be exercised to avoid unnecessary and improper inquiry into private affairs." In *Moxie Nerve-Food Company* v. *Beach*, 1888, 35 Fed. 465, it was held that where a witness for plaintiff testified on direct, only as to the uses and effects of Moxie Nerve-Food, he cannot on cross-examination be required to disclose particular ingredients of the preparation, that being a trade secret, the disclosure of which would injure plaintiff's business.

Witnesses, like jurors, are often required to put aside their personal affairs and desires to aid in the settlement of disputes between litigants. This is the indispensable requirement for the operation of judicial tribunals and courts in a free society. Consequently, all concerned in the litigation should cooperate in protecting against disclosure of confidential matters, to the fullest extent compatible with the interests of the litigants and of the public. The record here discloses that various procedures along this line are under consideration. In fact, all the parties seem cooperative and we have no reason to doubt that the necessary facts can be adduced without undue injury to anyone.

Under the facts disclosed in the record, we conclude that the witnesses should not be required to disclose the names of their hearing aid battery customers or the dollar amount of sales to each.

Applicants next raise the question that the evidence sought is irrelevant. They point out the following: their records do not distinguish between sales of batteries for new instruments and for replacements; that there is a great difference in the useful life of different batteries depending upon their use, etc.; that many batteries are interchangeable; that the use of a new device known as a transistor in some instruments prolongs the life of the battery; that the necessary information can best be secured from competing hearing aid manufacturers.

If the status of the hearing aid business and the effect of the battery sales on it were the sole question, there would be considerable force to this argument. However, the complaint covers not only hearing aid instruments but also parts and accessories thereof. Both counsel for the complaint and counsel for the respondent agree that batteries are included thereunder.

Respondent points out that sales of batteries constitute about 20% of its total sales; that under the exclusive dealing contracts, its dealers and distributors buy batteries only from Maico, whereas many dealers of their competitors buy direct from battery manufacturers; consequently, the true picture of the status of respondent in the battery field will not be shown by the books of hearing aid manufacturers alone, the facts can only be shown by the records of the 2400 dealers or by records of the battery manufacturers, which supply the larger share of the batteries used.

We think the evidence sought might have some value in determining respondents status in the battery field and, in conjunction with other proposed testimony, might also bear on the matter of hearing aid instrument sales. We agree that the motion to quash the subpoenas was properly overruled.

It is therefore directed that the appeals be dismissed and that the case be remanded to the hearing examiner for further proceedings in accordance with this opinion.

Commissioner MEAD dissents.

DISSENTING OPINION OF COMMISSIONER MEAD

This is a Section 3 Clayton Act case. Maico, a manufacturer of hearing aids, distributes its hearing aids and accessories through its dealers. Maico requires its dealers to contract with Maico not to handle the products of competitors of Maico.

There is no controversy in this case as to the jurisdiction of the Commission or the existence and enforcement of the exclusive dealing contracts by Maico.

This case at an earlier date was before the Commission on the merits. The Commission decided that there were not sufficient facts in the record to determine whether or not the requisite statutory injury had resulted from the exclusive dealing contract. The Majority of the Commission rendered an Opinion discussing in general terms the evidentiary facts the Commission should consider in Section 3 cases. I concurred in the order of the Commission remanding the case to the Hearing Examiner for the taking of additional evidence on the question of injury to competition. I did not concur in the Opinion of the Commission. My view was that the wording of the Opinion was so broad that it might encourage the introduction into trial records of economic and other data not necessary for the proper and expeditious trial and consideration of Section 3 cases.

Section 3 of the Clayton Act is based on the proposition that, generally speaking, it is contrary to the public interest:

1. for a seller by contract, agreement or understanding to deprive competitors of the opportunity to sell to customers of the seller; and

2. for a seller by contract, agreement or understanding to deprive his customers of the opportunity to buy from competitors of the seller; when the effect of such arbitrary requirements may be to substantially lessen competition or tend to create a monopoly.

The Congress could have prohibited all of such contracts, etc. solely because they are arbitrary and restrictive, regardless of the dollar volume or the number of units involved or the effect on competition. Congress did not do so. In its wisdom Congress decided that Section 3 of the Clayton Act should not be concerned with what might be termed for want of a better description as "arbitrary trifles," which have no adverse effect on competition.

Congress did provide in effect in Section 3 that if by restrictive exclusive dealing contracts, merchants are foreclosed from competing for a substantial share of the line of commerce affected, then this Commission is authorized to conclude from such facts that the result may be to substantially lessen competition or tend to create a monopoly.

Business transactions are measured in terms of unit and dollar volumes. Alert merchants desire to increase their volumes and thereby survive and prosper in the competitive struggle. When these merchants are deprived by arbitrary action by one competitor of their opportunity to compete for a substantial share of the market the result (in the absence of unusual factors) is probably to substantially lessen competition.

In this case the Hearing Examiner, acting on the basis of the broad order of reference from the Commission, issued subpoenas at the request of Maico, which ordered officials of three battery manufacturing corporations to produce books and records "showing the total sales of said Company of batteries by types, amounts and dollar volume to each hearing aid manufacturer or their respective dealers or distributors to whom it sold batteries for each of the years 1949 through 1954, inclusive." These subpoenas are not directed at hearing aid manufacturers who are competitors of Maico, but are directed to the suppliers of one item to the competitors of Maico and their dealers. It is indicated in the record that Maico may request subpoenas be issued directing other suppliers of Maico competitors to produce their books and records.

As indicated above, I understand that the basic question in this case is whether or not the use of these arbitrary exclusive dealing contracts by Maico has foreclosed other business concerns of their opportunity to compete for a substantial share of the market in the products involved. In the light of the record now before the Commission and of the requirements of Section 3 of the Clayton Act, I am not convinced of the necessity for directing these supplier corporations who are not parties to this litigation and who are not competitors of Maico to produce their books and records.

I understand the desire of the Majority of the Commission to have before it all of the relevant data in these very important cases in order that informed decisions can be made. I am concerned, however, particularly after reading the briefs and listening to the oral arguments of counsel in this case that the trial records in these Section 3 cases may be unnecessarily lengthened. I believe that the Majority also wishes to avoid such an undesirable result. The difference here may be only a question of degree, but such questions may be very important in the enforcement of the antitrust laws.

I do not believe the record now before the Commission adequately supports the contention that the issuance of these subpoenas is necessary for the trial of this case. In the absence of such a showing, I would quash the subpoenas.

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 May 22, 1955, the initial decision in the instant matter of hearing examiner Frank Hier, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Clayton Act, as amended by the Robinson-Patman Act (15 U. S. C. A. 12), the Federal Trade Commission on October 24, 1950, issued its complaint in this proceeding against respondent, upon whom such complaint was duly served and thereafter answered.

Respondent is a Minnesota corporation located at 21 North Third Street, Minneapolis, Minnesota and is engaged in the manufacture and sale of hearing aids, parts and accessories under the trade name "Maico."

Subsequent to service of the complaint and answer thereto a number of hearings were held at which evidence in support of and in opposition to the allegations of the complaint was taken and thereafter on November 10, 1952, the hearing examiner rendered his initial decision from which respondent appealed and on December 7, 1953, the Commission granted said appeal, set aside the initial decision and remanded the proceeding for the taking of further evidence and for the reconsideration of various exclusionary rulings of the hearing examiner.

The hearing examiner, previously presiding, being then about to retire (mandatorily), the proceeding was transferred to the undersigned hearing examiner who thereafter proceeded to carry out the command of the remand and pursuant thereto further evidence was taken in support of the allegations of the complaint and some evidence offered by respondent in opposition thereto.

On March 28, 1955, counsel for the parties hereto entered into a stipulation providing for entry of a consent order disposing of this proceeding under the Rules of Practice of the Commission, which stipulation appears of record. By the terms thereof, respondent admits all of the jurisdictional allegations set forth in the complaint and stipulates that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations. Respondent expressly withdraws its answer previously filed herein and waives a hearing before the hearing examiner or the Commission, the making of findings of fact or conclusions of law by the hearing examiner or the Commission and waives all other and further procedures before the hearing examiner and the Commission to which respondent may be entitled under the aforesaid Clayton Act or the Rules of Practice of the Commission.

Respondent agrees by said stipulation that the order hereinafter entered shall have the same force and effect as if made after a full hearing, presentation of evidence, findings and conclusions thereon and respondent specifically waives any and all right, power and privilege to challenge or contest the validity of the order entered in accordance with the stipulation. By the terms of said stipulation, respondent further agrees that the stipulation, together with the complaint, shall constitute the entire record herein; that the complaint herein may be used in construing the terms of the order hereinafter entered, which order, upon motion of respondent or of counsel supporting the complaint or upon motion of the Commission, may be altered, modified or set aside in the manner provided by the statute for the orders of the Commission. Respondent further agrees that the stipulation is subject to approval in accordance with Rules V and XXII of the Commission's Rules of Practice and that the order hereinafter entered shall have no force and effect unless and until it becomes the order of the Commission.

Counsel for the parties so stipulating and on the basis of the foregoing, the undersigned hearing examiner concludes on the basis of the foregoing and in conformity therewith makes the following order:

ORDER

It is ordered, That respondent, The Maico Company, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of hearing aids, audiometers, other medical acoustic products, batteries, parts and accessories therefor, or other similar or related products in commerce as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

1. Selling or making any contract or agreement for the sale of any such products on the condition, agreement or understanding that the purchaser thereof shall not use, or deal in, or sell any such products supplied by any competitor or competitors of the respondent.
2. Enforcing or continuing in operation or effect any condition, agreement or understanding in, or in connection with, any existing contract of sale, which condition, agreement or understanding is to the effect that the purchaser of said products from respondent shall not use, or deal in, or sell any such products supplied by any competitor or competitors of respondent.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist [as required by said declaratory decision and order of May 22, 1955].

IN THE MATTER OF

C. G. OPTICAL COMPANY ET AL.

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

Docket 6260. Complaint, Nov. 5, 1954—Decision, May 22, 1955

Consent order requiring a seller of eyeglasses in Chicago, Ill., to cease representing falsely in "Test Your Own Eyes" advertising that eyeglasses made according to prescriptions furnished by customers using his "Self-Test Optometer" for the measurement of the face and nose would correct defects in vision of all persons.

Before *Mr. Earl J. Kolb*, hearing examiner.

Mr. Jesse D. Kash and *Mr. Frederick J. McManus* for the Commission.

Frank E. & Arthur Gettleman and *Mr. Benjamin D. Ritholz* for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that C. G. Optical Company, a corporation, and Benjamin D. Ritholz, individually, hereinafter referred to as respondents, have violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, C. G. Optical Company, is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its place of business located at 20 E. Delaware Place, Chicago, Illinois. The business of respondent, C. G. Optical Company, while ostensibly that of a corporation is actually the business of respondent Benjamin D. Ritholz which he carries on under the name of the corporation. This individual formulates the policy of said corporation and directs, controls and puts into effect all of its acts and practices including those hereinafter referred to. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now and for more than one year last past have been engaged in the business of selling eyeglasses and as an inducement or instrumentality in the sale of said glasses make use of a certain device designated a "Self-Test Opto-meter" and other devices for the measurement of the face and nose. Eyeglasses are a device as "device" is defined in the Federal Trade Commission Act.

Respondents cause said devices, together with printed instructions for the use thereof, and an order blank upon which spaces are provided for the insertions of various measurements obtained by the use of said devices, to be transported from their place of business in the State of Illinois, to prospective purchasers and eyeglasses to the purchasers thereof located in various other States of the United States. Respondents maintain and at all times mentioned herein have maintained a course of trade in said eyeglasses in connection with said "Self-Test Opto-meter" and other devices, and instructions for the use thereof in commerce, between and among the various States of the United States.

PAR. 3. In the course and conduct of their business, respondents have disseminated and caused the dissemination of advertisements concerning said eyeglasses and of the devices referred to above, by United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements inserted in newspapers and periodicals and by means of circulars and form letters, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of their said eyeglasses; respondents have also disseminated and caused the dissemination of advertisements concerning their said eyeglasses and the devices referred to above, including but not limited to the advertisement media referred to above, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of their said eyeglasses in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements and representations contained in the said advertisements are the following:

> GLASSES BY MAIL!
> (Pictorial representation
> of a pair of glasses.)
> SAVE UP TO $15.00 30 Day Trial
> Test your eyes at home for far
> or near with our HOME EYE TESTER.
> Save money.
> Send name, address, age, agents wanted
> FREE! for 30 Day Trial Offer.
> Free Eye Tester. Latest
> Style Catalog and full
> information
> C. G. OPTICAL CO., DEPT. C-552
> 20 E. Delaware Place, Chicago 11, Ill.

Sensational Device
TESTS EYES
(Pictorial representation of a
man using the Tester and a pair
of eyeglasses.)
SAVE up to $15.00
ON GLASSES
Big news to the Millions
of Spectacle Wearers and
prospects. Means Free-
dom from outrageous prices.
Sold on Money-Back Guarantee.
MAKE BIG MONEY
Show it to friends and others. Let them
use it Free and watch their amazement over
this self testing system. Here is a great
new opportunity in a tremendous new field
of unlimited possibilities. Spare or
full time. No experience needed. Write
for complete sample kit.
C. G. OPTICAL CO., Dept. A–108
20 E. Delaware Place Chicago 11, Ill.
GET YOUR OWN GLASSES AS A BONUS!
—and Make Big Money Besides

Will you share your good fortune with your friends—will you give them the benefit or our amazingly low prices? Your friends will be grateful to you. Surely you are interested in them and want to see them benefited.

Take our tester to their homes. Let them use it. Make out an order for them on one of the order blanks in the book and send it in. The first sheet in the book is for your own order—the others for friends' orders. Collect a deposit of $2.00 and we will ship the glasses direct to your friends, who will pay the postman only the balance due plus postage. In other words, your friends pay you a deposit of $2.00 and the balance upon delivery.

Keep the $2.00 deposit you collect, as your pay. It is your profit. Take only a few orders and you have collected enough to pay for your own glasses so that they become yours, without cost. Take as many orders as you can. You make $2.00 profit on each. This is a splendid way to earn extra money. Many who have dealt with us in the past have done it. You'll be surprised at the money you can make just by rendering your friends a great service which they need and will appreciate. Profits of $35.00 a week for spare time or $75.00 a week for full time are well within your reach. *Of course you need not take orders unless you want to, but may order only one pair of glasses for yourself at our low price.*

Rush your order at once, also as many orders as you can get from friends and others. More order books will be supplied on request. This offer applies to all orders for glasses selected from Style Sheet.
C. G. OPTICAL CO. 20 E. Delaware Pl., Chicago, Ill.

PAR. 4. Respondents' "Test Your Own Eyes" advertising disseminated by them as aforesaid is being and has been answered by persons in various States of the United States. Said persons, in answering such advertising, have requested that respondents kit of free samples, including the various devices above referred to, for use in testing of the eyes, be sent to them. Said kits have been ordered alike by individuals desiring to purchase eyeglasses for themselves and by other individuals desiring to sell glasses by acting as agents of respondents. Individuals receiving respondents' kits have attempted to use the devices contained therein to determine the eyeglasses necessary to correct defects in their vision, have written out their own prescriptions for respondents' eyeglasses upon the forms provided by respondents, have mailed the prescriptions to respondents and respondents have shipped to them the eyeglasses ordered pursuant to said prescriptions.

Sales agents of respondents, located in various States of the United States, receiving respondents' said kits have attempted to use the devices contained therein to determine the eyeglasses necessary to correct the defects in the vision of others and have written prescriptions or assisted in the writing of prescriptions for respondents' eyeglasses upon the forms provided by respondents, have mailed the prescriptions to respondents and respondents have shipped said glasses ordered pursuant to said prescriptions to various customers.

PAR. 5. Through the use of the advertisements containing the statements hereinabove set forth and explanatory literature and directions which accompany the eye testing kit sent by respondents to those requesting it, respondents represented, directly and by implication, that the eyeglasses sold by them, made pursuant to the results of tests of the eyes using respondents' devices, will correct the defects in vision of all persons.

PAR. 6. Said advertisements were and are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, the eyeglasses sold by respondents, made pursuant to the results of tests of the eyes using respondents' devices, will not correct defects in vision of all persons. On the contrary, such glasses are capable of correcting defects in vision of only those persons approximately forty years of age and older who do not have astigmatism or diseases of the eye and who require only simple magnifying or reducing lenses.

PAR. 7. The use by the respondents of the foregoing advertisements containing the false, misleading and deceptive statements, and representations above referred to have had and now have the capacity and tendency to mislead and deceive substantial numbers of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true and into the use of respondents' devices and the purchase of substantial quantities of respondents' eyeglasses, because of such erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and constitute 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 May 22, 1955, the initial decision in the instant matter of hearing examiner Earl J. Kolb, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

The complaint in this proceeding charges the respondents C. G. Optical Company, a corporation, and Benjamin D. Ritholz, an individual, with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of the Federal Trade Commission Act, in connection with the sale and distribution of eyeglasses through and by means of a self-testing device designated as "Self-Test Opto-meter."

After the issuance of said complaint and the filing of their answer thereto, the respondents entered into a stipulation for a consent order with counsel for the complaint, disposing of all the issues in this proceeding, which stipulation was duly approved by the Director and Assistant Director of the Bureau of Litigation.

Respondents, pursuant to the aforesaid stipulation, admitted all of the jurisdictional allegations of the complaint and agreed that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations. Said stipulation further provides that the answer heretofore filed by respondents is to be withdrawn and that the parties expressly waive a hearing before the Hearing Examiner or the Commission, the filing of exceptions or oral argument before the Commission, and all other procedure before the Hearing Examiner and the Commission to which the respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission.

In said stipulation, respondents further agreed that the order to cease and desist issued in accordance with 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 waived all right, power and privilege to challenge or contest the validity of such order.

It was further provided that said stipulation, together with the complaint, shall constitute the entire record herein; that the complaint herein may be used in construing the terms of the order issued pursuant to said stipulation; and that said order may be altered, modified or set aside in the manner prescribed by statute for the orders of the Commission.

The Hearing Examiner has considered such stipulation and the order therein contained, and it appearing that said stipulation and order provides for an appropriate disposition of this proceeding the same is hereby accepted and made a part of the record, and the following jurisdictional findings made, and the following order issued:

1. Respondent C. G. Optical Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its place of business located at 20 East Delaware Place, Chicago, Illinois. The business of respondent C. G. Optical Company, while ostensibly that of a corporation, is actually the business of respondent Benjamin D. Ritholz which he carries on under the name of the corporation. This individual respondent formulates the policy of said corporation and directs, controls and puts into effect all of its acts and practices.

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

ORDER

It is ordered, That respondents, C. G. Optical Company, a corporation, and its officers, and respondent Benjamin D. Ritholz, individually, and respondents' agents, representatives and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of eyeglasses, do forthwith cease and desist from:

1. Disseminating, or causing to be disseminated, any advertisement by means of the United States mails, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents, directly or by implication, that the eyeglasses sold by respondents, made pursuant to the results of tests of the eyes using respondents' devices, will correct, or are capable of

correcting, defects in vision of persons unless expressly limited to those persons approximately forty years of age and older who do not have astigmatism or diseases of the eye and who require only simple magnifying or reducing lenses.

2. Disseminating, or causing to be disseminated, any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of their eyeglasses in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains the representation prohibited in paragraph 1 hereof.

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 May 22, 1955].

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