IN THE MATTER OF

MOOG INDUSTRIES, INC.

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

Docket 5723. Complaint, Dec. 20, 1949—Decision, Apr. 29, 1955

Order requiring a manufacturer of automotive replacement parts in St. Louis, Mo., to cease discriminating in price between different customers by selling its products of like grade and quality at higher and less favorable prices to numerous small businessmen than to their larger competitors, in violation of sec. 2 (a) of the Clayton Act as amended.

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

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

Mr. Edwin S. D. Butterfield, of Chicago, Ill., *Halfpenny, Hahn & Cassedy*, of Washington, D. C., and *Rosenblum, Mellitz & Frank*, of St. Louis, Mo., for respondent.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is before the undersigned Hearing Examiner for final consideration on the complaint, answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel.

1. The complaint in this proceeding charges that the respondent Moog Industries, Inc., has discriminated in price between different purchasers of its products in violation of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U. S. C. title 15, section 13).

2. The price differentials which are charged to be in violation of the Clayton Act arise from respondent's pricing practices, involving the granting of an annual retroactive volume rebate to its customers and also in the granting of such retroactive volume rebate to group purchasers on the basis of their aggregate purchases instead of upon the individual purchases of the members.

3. The general system of pricing used by the respondent, as developed by the record, and the variations therefrom in the case of group buyers, is not disputed by the respondent but was instead defended on the basis that the merchandise sold by the respondent to its various customers was not of like grade and quality; that the pricing practices of respondent has not resulted in any injury to

competition; and that respondent's prices, discounts and allowances were made to meet competition. No attempt was made by respondent to justify its price differentials on the basis of differences in cost of manufacture, sale or delivery. Evidence as to primary line injury to competition between respondent and its competitors is not sufficient to warrant any finding, and consideration of this matter must be limited to secondary line injury to competing customers of the respondent.

4. Respondent Moog Industries, Inc., is a Missouri corporation with its principal office and place of business located at 6650 Easton Avenue, St. Louis, Missouri, with selling and distributing subsidiaries known as the St. Louis Spring Suspension Service Company of Texas, Moog Industries, Inc., of Tennessee, Moog Industries, Inc., of Colorado, and St. Louis Spring Suspension Service Company of Nebraska.

5. Since June 1936, the respondent has been engaged in the manufacture and in the sale and distribution in interstate commerce of automotive replacement parts, consisting of coil action parts, leaf springs, coil springs, chassis parts, piston rings and other related items in competition with other concerns who were also engaged in the sale and distribution of similar products in interstate commerce.

6. The market in automotive replacement parts is highly competitive. The amount of business transacted by the respondent in the replacement parts field is substantial. In an advertising circular distributed by respondent to its customers in 1949, it was stated "The company with a small beginning back in 1919, has become one of the country's large industries and recently consolidated its manufacturing divisions: St. Louis Spring Co., Moog Coil Action Parts Co., and Moog Piston Ring Company, into Moog Industries, Inc." The respondent sells its products in every state of the United States and in 1950 maintained 25 branches and warehouses in the principal cities.

7. The respondent, during the times mentioned herein, has sold its replacement parts to jobbers, who were designated by the respondent as distributors, who resold such products to garages, service stations, fleet owners and to other jobbers. The respondent separated its products into three classifications (a) leaf spring line, which consists of leaf springs, coil springs, tie rod ends, shackles and kingbolts; (b) coil action line, which consists of front wheel spring assembly parts exclusive of coil springs; and (c) piston ring line. A portion of the replacement parts in each of these lines was sold in the form of kits or packages containing complete unit installations for various makes of cars. From time to time respondent issued its distributor's price list on each of these lines which listed the basic prices used by the

respondent in the sale and distribution of its various replacement parts. Any discounts, allowances or rebates were off said distributor's price list. Respondent also from time to time issued suggested resale price lists for use by distributors and dealers in the resale of respondent's products. During the year 1949, respondent sold approximately 1,200 coil action accounts, 800 leaf spring and chassis parts accounts, and 400 piston ring accounts. In relation to total sales, the leaf spring line and coil action line have always predominated with the piston ring line accounting for a small proportion of the total overall sales.

8. The net purchase price paid by distributors for respondent's products is the purchase price paid subject to and following all applicable rebates, discounts and allowances. The automotive replacement parts sold and distributed by respondent were all of one grade and quality. Respondent sold such products of like grade and quality to its distributors at varying net prices. Such distributors of respondent were competitively engaged in the resale of respondent's replacement parts in the various territories and places where such distributors carried on their businesses.

9. The annual volume rebates, provided for in respondent's pricing plan, were incorporated in, and made a part of, its distributor franchise agreement. The volume rebate on the coil action line and the piston ring line has been a retroactive volume rebate in substantially the same amount since 1947. Prior to July 1, 1949, respondent allowed a non-retroactive rebate on its leaf spring line, but subsequent thereto had granted a retroactive volume rebate. The retroactive volume rebates as set out in respondent's franchise agreements with its distributors are as follows:

COIL ACTION PARTS

Nte purchases during each fiscal year	Retroactive rebate	Net purchases during each fiscal year	Retroactive rebate
	Percent		*Percent*
Under $1,000	None	$15,000–$17,499	14
$1,000–$4,999	5	$17,500–$19,999	15
$5,000–$7,499	7½	$20,000–$22,499	16
$7,500–$9,999	9	$22,500–$24,999	17
$10,000–$12,499	10	$25,000–$27,499	18
$12,500–$14,999	12	$27,500 and over	19

PISTON RING LINE

	Percent		*Percent*
Under $2,000	None	$9,000–$9,999	13
$2,000–$2,999	2	$10,000–$11,999	14
$3,000–$3,999	5	$12,000–$14,999	15
$4,000–$4,999	7	$15,000–$17,999	16
$5,000–$5,999	9	$18,000–$20,999	17
$6,000–$6,999	10	$21,000–$24,999	18
$7,000–$7,999	11	$25,000–$29,999	19
$8,000–$8,999	12	$30,000 and over	20

LEAF SPRING LINE, INCLUDING COIL SPRINGS AND CHASSIS PARTS

	Percent		Percent
Under $1,000	None	$11,000–$14,999	11
$1,000–$2,999	5	$15,000–$19,999	12
$3,000–$4,999	7	$20,000–$27,499	13
$5,000–$7,999	9	$27,500–$34,999	14
$8,000–$10,999	10	$35,000 and over	15

In addition to the above volume rebate, the respondent allowed a 10 percent warehousing and redistributing commission to distributors who resold respondent's products to other jobbers who had been approved by the respondent, provided the combined earnings of the warehousing and redistributing commission and the volume rebate on any line cannot exceed the earnings figured at the maximum rebate for that line. The retroactive volume rebate was paid by respondent on all purchases of the distributor including merchandise resold by the distributor to other jobbers.

10. Under the retroactive rebate plan, purchasers were granted and received rebates on all their individual purchases according to the rebate bracket applicable to their total annual purchases. Any individual purchase price was retroactively determined by the total of all purchases during the year according to the terms of the retroactive rebate plan.

11. The amounts involved in the granting by respondent of the volume rebates were substantial and reflect the importance which was attached to said rebates by the various purchasers. Rebates were granted by respondent and received by some, but not all, the purchasers of the coil action line for the following years in the following amounts:

1947	$163,392.66
1948	203,478.53
1949	106,255.91

Rebates were also granted by respondent and received by some, but not all, the purchasers of the piston ring line for the following years in the following amounts:

1947	$57,561.89
1948	21,011.19
1949	22,380.88

Rebates were likewise granted by respondent and received by some, but not all, purchasers on purchases of the leaf spring line in the year 1950 in the amount of $81,300.

12. During the year 1949, respondent sold its products to jobber members of various group buying organizations, entering into the Moog distributor's franchise agreement. Sales were made during 1949 to members of the following group buying organizations:

Name	*Address*
Ark-La-Tex Warehouse Distributors, Inc	Marshall, Texas
Associated Parts Company	Somerville, Mass.
Automotive Jobbers, Inc	Cleveland, Ohio
Automotive Parts Distributors, Inc	Athens, Ga.
Automotive Southwest, Inc	Dallas, Texas
Cotton States, Inc	Greenwood, Miss.
Metropolitan Automotive Wholesalers	New York, N. Y.
Mid-South Distributors, Inc	Memphis, Tenn.
Mid-West Warehouse Distributors	Kansas City, Mo.
Ozburn-Crow & Yantis Co	Memphis, Tenn.
Six-States Associates	Boston, Mass.
Southern California Jobbers, Inc	Los Angeles, Calif.
Southwest Automotive Distributors	Los Angeles, Calif.
Southwestern Warehouse Distributors	Dallas, Texas
Warehouse Distributors, Inc	Chattanooga, Tenn.

13. The purchase procedure in a group buying operation provided for the forwarding of purchase orders by the individual jobber member to the seller directly or through the group office. Merchandise so ordered was shipped by the respondent direct to the individual jobber member with billing for same being directed to the group office. Monthly settlements were made between respondent and the group office for the aggregate purchase orders of all the jobber members so received and each jobber member also settles monthly with the group office for his own individual purchases so made. The annual volume rebate allowed by the respondent was based upon the aggregate purchases of the group members and was paid to the group office, which in turn distributed such volume rebate to the jobber members in proportion to the amount of such jobber's individual purchases. The rebates and discounts, as shown by the tabulations in evidence, were granted and allowed by respondent to each individual member of the said buying groups on the basis of the total purchases of all the members irrespective of whether or not the amount of such individual member's purchases met with the requirements of any particular bracket of respondent's volume rebate schedules set forth in the respondent's distributors' franchise agreement. The group buying organization was in reality a bookkeeping device for the collection of rebates, discounts and allowances received from sellers on purchases made by its jobber members. Such jobber members, in fact, purchase their requirements of respondent's products direct from the respondent and at the same

time receive a more favorable price or higher rebate based upon the combined purchases of all of the members.

14. Illustrative of the monetary benefits derived by the individual jobber member of such group buying organizations, as opposed to those individual purchasers buying without the benefits of such group consolidation of purchases is the following tabulation taken from Commission's Exhibits 21–V and 21–W, dealing with the transactions between respondent and the Mid-South Distributors, Inc.:

Automotive jobber "group-buying" method of purchasing

Manufacturer's published discount schedule to trade		1	2	3	4	5	6
Net purchases	Retroactive rebate	Actual net purchases each member jobber	Manufacturer's schedule discount rate applicable	Manufacturer's schedule discount amount due	Manufacturer's "group" discount rate	Manufacturer's "group" discount amount paid	Actual price difference
	Percent		*Percent*		*Percent*		
		1. $1,369.08	5	$68.45	19	$260.13	$191.68
		2. 2,408.24	5	120.41	19	457.57	337.16
Under $1,000	None	3. 1,530.00	5	76.50	19	290.70	214.20
$1,000–$4,999	5	4. 585.96	None		19	111.33	111.33
$5,000–$7,499	7½	5. 2,594.97	5	129.75	19	493.05	363.30
$7,500–$9,999	9	6. 1,483.65	5	74.18	19	281.89	207.71
$10,000–$12,499	10	7. 3,728.45	5	186.42	19	708.41	521.99
$12,500–$14,999	12	8. 6,656.06	7½	609.20	19	1,264.65	655.45
$15,000–$17,499	14	9. 2,759.69	5	137.98	19	524.34	386.36
$17,500–$19,999	15	10. 3,440.61	5	172.03	19	653.72	481.69
$20,000–$22,499	16	11. 1,492.70	5	74.64	19	283.61	208.97
$22,500–$24,999	17	12. 750.92	None		19	142.67	142.67
$25,000–$27,499	18	13. 3,610.53	5	180.53	19	686.00	505.47
$27,500 and over	19	14. 1,072.02	5	53.60	19	203.68	150.08
Total		33,482.88		1,883.69		6,361.75	4,478.06

15. In following the pricing practices hereinabove described, respondent has discriminated in price by means of rebates allowed by it in the sale of its various automotive products and related items as between respondent's competing distributors and also between respondent's distributors and competing group buying jobbers, and the effect of such discriminations may be to substantially lessen, injure, destroy or prevent competition between customers receiving the benefit of said discriminations and the customers who do not receive the benefit of such discriminations.

16. The respondent did not grant exclusive territory to any of its customers and has had more than one distributor in various trade areas who were, in fact, in competition with each other and also in competition with group buying jobbers, who sold respondent's replacement parts to dealers and other purchasers in their respective trade areas. The price discriminations received by some distributors as compared with others, competing with them in the same trade area, as a result of respondent's pricing plan, is shown by a number of tabula-

tions taken from the respondent's books and records which were received in evidence as Commission's Exhibits 61 through 79–G, inclusive. These tabulations show the prices paid and the rebates received by purchasers located in various trade areas throughout the United States during the years 1947 through 1950. Testimony was taken of distributors of the respondent in four trading areas, as shown on the tabulations—New Orleans, Memphis, Denver, and Dallas. The amounts purchased by the distributors in these areas and the discounts and rebates received by them on both the leaf spring line and the coil action line are as follows:

LEAF SPRING, COIL SPRING AND CHASSIS PARTS LINE

Name of purchaser	Net purchases	Amount	Percentages
New Orleans:			
Greiner Auto Parts Co.[1]	$3,373.71	$472.32	14.00
Auto Chassis & Spring Co	1,687.68	84.38	5.00
Dealers Truckstell Sales, Inc	447.30	22.36	5.00
Memphis:			
Mills-Morris Co.[1]	5,301.09	792.84	14.96
Ozburn-Abston & Co.[1]	14,681.31	2,201.12	14.99
J. B. Cook Auto Machine Co	1,260.25	189.04	15.00
Dealers Truckstell Sales, Inc	922.54	46.13	5.00
McKee-Moog Spring Co	26,230.04	3,409.91	13.00
Dallas:			
Automotive Appliance Co.[1]	216.63	26.00	12.00
Motor Supply Co. of Dallas [1]	1,301.62	156.19	12.00
American Gear & Parts Co.[1]	553.76	74.59	13.47
Terry Automotive Supply [1]	955.42	143.31	15.00
Henderson Auto Parts	523.18		
Truett-Worrell Spring & Aligning	4,090.16	298.15	7.29

[1] Greiner Auto Parts Co. was a member of Cotton States Inc., a group buying organization; Mills-Morris Co., a member of Mid-South Distributors, Inc.; Ozburn-Abston & Co., a member of Ozburn-Crow & Yantis Co.: Automotive Appliance Co. and Motor Supply Co. of Dallas, members of Ark-La-Tex Warehouse Distributors, Inc.; American Gear & Parts Co., a member of Automotive Southwest, Inc.; and Terry Automotive Supply, a member of Southwestern Warehouse Distributors.

COIL ACTION LINE

Name of purchaser	Net purchase after deducting cash discount and excise tax and other credits	Amount of rebate	Percentage
New Orleans:			*Percent*
Auto Spring & Brake Serv	$5,765.40	$432.41	7½
Auto Chassis & Spring Co	296.30		
Auto Shock Absorber Sales	1,241.69	[2] 66.69	5
Greiner Auto Parts Co.[1]	749.88	67.48	9
Memphis:			
J. B. Cook Auto & Machine Co	1,643.60	164.36	10
McKee-Moog Spring Co	5,497.27	412.30	7½
Ozburn-Abston Co.[1]	9,101.10	1,729.21	19
Mills-Morris Co.[1]	1,546.91	247.51	16
Denver:			
Foster Auto Supply Co	56.83	[2] 10.83	17
Steckel Auto Supply Co	2,646.06	132.30	5
B. K. Sweeney Elec. Co	3,548.45	177.42	5
Western Spring Service Co.[1]	900.67		

[1] Greiner Auto Parts Co. was a member of Cotton States Inc., a group buying organization; Ozburn-Abston Co., a member of Ozburn-Crow & Yantis Co.; and Mills-Morris Co., a member of Mid-South Distributors, Inc.

[2] Computed on "Net Sales" before deducting "Cash Discount" and "Excise Tax."

There is nothing in the record to indicate that the above trading areas are unique or different from other trading areas where respondent sells its products at differing prices. It is therefore concluded that competitive conditions shown to exist in these four areas, with respect to purchase and resale of respondent's products are typical and representative of the other areas in the United States and that respondent's distributors reselling respondent's products in the same trading area are in competition with each other in the resale of such products.

18. The inequities arising from the annual volume rebate plan based solely on total yearly purchases and which completely ignores the size and quantity of individual purchases is illustrated by Commission's Exhibit 69 which is set out as follows:

D. 5723—Moog Industries, Inc.

Summary by discount brackets of number of customers and average annual coil action purchases—1947, 1948, and 1949]

Net purchases	Rebate	1947		1948		1949	
		Number of customers	Average annual purchases	Number of customers	Average annual purchases	Number of customers	Average annual purchases
	Percent						
Under $1,000	None						
$1,000–$4,999	5	369	$2,238	426	$2,143	352	$1,911
$5,000–$7,499	7½	38	6,235	59	5,895	27	5,499
$7,500–$9,999	9	22	8,279	26	7,705	4	8,372
$10,000–$12,499	10	8	11,031	8	8,770	6	10,660
$12,500–$14,999	12	5	13,676	10	11,945	4	13,667
$15,000–$17,499	14	2	16,237	2	13,715	5	9,277
$17,500–$19,999	15	3	18,966	5	15,138	2	18,735
$20,000–$22,499	16	1	20,940	0	----------	0	----------
$22,500–$24,999	17	1	22,734	1	22,987	1	23,444
$25,000–$27,499	18	0	----------	0	----------	1	26,887
$27,500 and over	19	7	38,488	11	36,065	5	33,471

This exhibit shows that in 1947, 456 purchasers participated in the rebate plan on coil action line sales; in 1948, 557 purchasers participated; and in 1949, 407 purchasers participated in the rebate plan. In none of the years selected did as many as half of the purchasers from respondent receive a rebate on their purchases, and for the most part, only approximately one-third of the purchasers from respondent were favored with the lower prices resulting from the granting of said rebates.

19. The record, based upon the tabulations in evidence in this proceeding, disclosed substantial differences in the net purchase prices paid by competing purchasers of respondent's products for resale. The substantiality of the amount represented by such price differences with relation to the purchasers' net profit margin is conclusively shown

when compared with the competitive effect of the amount represented by the 2 percent cash discount. Distributors of respondent, who testified in this proceeding, stated that they invariably took advantage of the 2 percent cash discount as being essential in the conduct of their respective businesses and that such discount reduced the cost of acquisition of respondent's products. This 2 percent reduction in cost of acquisition is substantial and may account for a substantial portion of the margin of profit. One jobber of respondent, ranking third or fourth in the Dallas, Texas, trade area, testified that the overall net profit for his company ran less than 4 percent. By the very nature of the business operated by the various jobber customers of respondent their profit was necessarily based upon an accumulation of small margins of profit on many items. Some of the witnesses handled 15 to 75 lines, involving an aggregate of thousands of items. Practically all of respondent's jobber customers extend the same cash discount they receive to their customers, however, on a mark-up of acquisition cost, the discount actually given by such customer to its purchaser on resale will be greater than the 2 percent cash discount.

20. In the course of this proceeding it was the contention of the respondent that no injury to competition existed by reason of respondent's pricing practices because its customers generally followed the suggested resale price lists, issued by the respondent, in the resale to their respective customers. In support of this contention, the respondent introduced testimony of a number of distributors that they had not suffered any injury by reason of differing or higher prices paid by them as compared with prices paid by competitors in their respective trade areas. On cross-examination, these witnesses admitted that their reasons for stating that they had not been competitively injured was due to the fact that their competitors all followed the suggested resale price of the respondent and that there was no price competition in their particular trade areas.

21. The fact that price competition may have been eliminated in some areas because of uniformity of resale price does not eliminate the question of injury to competition. Any saving or advantage in price obtained by one competitor as against another increases his margin of profit, permits additional services to be extended to customers, the use of additional salesmen, the carrying of larger and more varied stocks, and the establishment of branch houses for expansion of the business. While price competition among customers was more or less non-existent, except in isolated instances, in the areas where testimony was taken, the possibility of price competition is ever present where lower prices to certain competing customers exists.

22. The contention by the respondents that no injury to competition can be proven or inferred where the discriminatory discount has not been used to reduce the sale price, is without merit as a defense in this proceeding and has been so held by the United States Supreme Court. In *F. T. C.* v. *Morton Salt Company*, 334 U. S. 37, the Supreme Court held that where purchasers, buying and competing in the resale of the same merchandise, are charged different prices therefor, the conclusion is inescapable that injury to the competitive efforts of the unfavored purchasers is present. In this connection the Court said, "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." In the present case the evidence more than meets this test.

23. It was also contended by the respondent that the replacement parts sold by it to competing customers have not been shown to be of like grade and quality, and as a basis for this contention respondent has taken the position that such parts to be of like grade and quality, under Section 2 (a) of the Clayton Act, must pass the test of interchangeability. This would, in effect, be saying that merchandise to be of like grade and quality must be identical. If Congress had intended to so require it would have said so. We do not have here different grades of merchandise designed to sell at different price levels, such as first quality line and a second or inferior quality line. All of respondent's products are of the same grade and quality.

24. Respondent's distributors purchased respondent's replacement parts, not as individual items, but as part of a line designed to supply the needs of garages and others engaged in the repair of motor vehicles. The respondent has grouped its automotive replacement parts for discount purposes into three separate categories which are referred to as respondent's coil action line, leaf spring line and piston ring line. Each one of these lines carries a separate and different retroactive volume rebate. Respondent has made the selection of the parts to go into the various lines, and the rebates granted to purchasers of such lines apply to each and every item in the line. Having grouped its parts for discount purposes, the respondent cannot logically contend that items within the group are not of like grade and quality, or that distributors in the same trade area, who purchase items within the group for resale, are not competitive.

25. The Robinson-Patman Act is an antitrust statute designed to preserve equal competitive opportunity. Respondent's contention of interchangeability places the existence of like grade and quality solely on functional similarity and thereby ignores the effect upon competitive opportunity. When the respondent sells replacement parts, classified into the three lines described above, to its distributors, who resell in competition with each other in their respective trade areas, the functional similarity of the individual items in each class is no longer of consequence because from a competitive standpoint they are all of like grade and quality. It also appears from the record that distributors in order to supply the needs of their garage customers would purchase substantially all of the items in respondent's various lines over a period of time, their purchases of the items being dependent upon the demands of their customers. It must accordingly be concluded that the discriminations in price herein found were, in fact, made in connection with the sale and distribution of merchandise of like grade and quality and that the defense that such products must pass the test of interchangeability is without merit.

26. The respondent in its answer did not assert a defense of meeting competition under Section 2 (b) of the Clayton Act and did not request a finding on this issue in its proposed findings submitted to the Hearing Examiner. However, the attorney for the respondent did announce on the record that he intended to introduce testimony on the defense of meeting competition. While respondent did consider and compare competitors' prices in preparing its price list, the price differentials and the discriminations in price did not occur from the use of the price list or deviations from such price list to individual customers, but instead arose out of the pricing practice involved in the use of a pricing plan consisting principally of a non-retroactive volume rebate. There is no evidence that the respondent either met the price of a competitor or any rebate or discount schedule used by a competitor. In fact, there was no uniformity in the discount schedules of competitors; some used a retroactive volume rebate; some a non-retroactive volume rebate; some a flat percentage discount; and others an incentive rebate based on turnover of merchandise or maintenance of stock.

27. The activity of the respondent in meeting competition was summed up by respondent's executive vice president who said, in referring to the use by respondent of the discount schedule of the Wausau Motor Parts Co., in determining respondent's pricing policy, "We would examine it. We would try to evaluate the effect of Wausau on our market, how close we would have to come to meeting the competi-

tive offer and how far away we should stay because of certain pitfalls which it may lead us into, and upon examination of this we would use our own good judgment and experience to try and work this thing in with all of the others and come out with a contract and a schedule which we feel would earn us the greatest amount of profit and lose us the smallest number of customers and attract the most." This might be adopting a pricing practice or sales system best suitable for the respondent in a competitive market, irrespective of any discriminating effect, but it does not constitute a showing that lower prices to some favored customers, resulting from the pricing practice, were made in good faith to meet an equally low price of a competitor.

28. Section 2 (b) of the Clayton Act does not mean that a seller can use a sales plan which constantly results in his getting more money for like goods from some customers than he does from other customers competing with them. This was definitely decided by the United States Supreme Court in *F. T. C.* v. *A. E. Staley*, 374 U. S. 746, 753, in which the Court stated that Section 2 (b) "does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor'. The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition. We think the conclusion is inadmissible, in view of the clear Congressional purpose not to sanction by Section 2 (b) the excuse that the person charged with a violation of the law was merely adopting a similarly unlawful practice of another." It must therefore be concluded that respondent's price discriminations were not made in good faith to meet an equally low price of a competitor and that respondent's attempted defense under Section 2 (b) of the Clayton Act is without merit.

CONCLUSION

The aforesaid discriminations in price by the respondent as herein found constitute violations of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

It is ordered, That the respondent Moog Industries, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale for replacement purposes of automotive replacement parts, consisting of coil action parts, leaf spring, coil spring, chassis parts, piston rings and

other related items in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating in the price of such products of like grade and quality:

By selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale and distribution of respondent's products.

OPINION OF THE COMMISSION

By SECREST, Commissioner:

This case is before us on respondent's appeal from the hearing examiner's initial decision.

Respondent, Moog Industries, Inc., is charged with having discriminated in price between different purchasers of its automotive replacement parts in violation of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act.[1] Hearings were held at which testimony and other evidence in support of and in opposition to the complaint were introduced and the hearing examiner, after considering the entire record, made his initial decision in which he found that respondent's pricing practices have resulted in price discriminations between competing customers and that the effect of the discriminations "may be to substantially lessen, injure, destroy or prevent competition between customers receiving the benefit of said discriminations and the customers who do not receive the benefit of such discriminations." The order in the initial decision prohibits respondent from discriminating in price:

"By selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying a higher price in the resale and distribution of respondent's products."

Respondent, in its appeal, takes exception to specific findings and conclusions in the initial decision as well as to certain procedural matters, including rulings of the hearing examiner. Exception is also taken to the substance and form of the hearing examiner's order to cease and desist. We consider first respondent's contention that as a result of certain alleged procedural errors it has not been accorded a fair and impartial hearing.

During the course of the proceeding respondent made two requests for a bill of particulars, the first before it filed its answer and the second at the conclusion of the taking of evidence in support of the com-

[1] 15 U. S. C., sec. 13.

plaint. The Commission denied respondent's first request and the hearing examiner denied the second. Respondent claims that by such denials prejudicial error was committed. In its order denying respondent's original request for a bill of particulars, the Commission expressed the view that the complaint was sufficient to advise respondent of the nature of the charges against it. We are still of that view.

We are also of the view that the hearing examiner's refusal to grant respondent's motion for a bill of particulars was not prejudicial. The function of a bill of particulars is to enable the moving party to prepare for responsive pleadings and then only to the extent that it is required for that purpose; the office of the bill is related to pleading, not to trial. During the presentation of the case in support of the complaint respondent became fully informed as to the scope and details of the charges against it. Continuances are freely granted in Commission proceedings and respondent had full opportunity to study the record before proceeding. There was no possibility of "surprise" to the respondent or inopportunity properly to prepare its case.

During the course of the hearings respondent moved the hearing examiner to issue a rule requiring counsel supporting the complaint to make certain elections from the evidence which would be relied upon to constitute the case against the respondent. As grounds for the motion respondent stated, in substance, that by virtue of the undue proliferation of evidence which had been offered and received over respondent's objection, including voluminous tabulations with respect to sales by respondent to customers in many different communities during many months and years, involving hundreds of different automotive parts and thousands of invoices, there had been placed upon the respondent the almost insurmountable burden of analyses and proof, requiring the breakdown of thousands of invoices and cost allocations, requiring thousands of man hours of time and extensive, exorbitant and needless work, and causing respondent to be faced with the situation wherein it was impossible for it to receive a fair and impartial hearing. The hearing examiner denied respondent's motion and the Commission refused to entertain respondent's appeal from that ruling.

Respondent's motion was made at a hearing held on June 23, 1953. Counsel supporting the complaint rested their case on June 2, 1952. In the interval between those dates, at hearings held in St. Louis, Denver, Dallas, New Orleans, Memphis and New York, respondent introduced considerable evidence in opposition to the complaint. There is no indication that respondent did not know the issues it must meet during the presentation of this evidence. The evidence introduced in support of the complaint was that which counsel supporting

the complaint believed necessary to establish respondent's practice of price discrimination. It does not appear that respondent has advanced any defense to this proceeding which would require it to analyze or break down each of the numerous transactions represented in the tabulations. We think the motion was properly denied by the hearing examiner and are accordingly rejecting respondent's contention that prejudicial procedural errors were committed which prevented it from having a fair and impartial hearing.

Respondent does a substantial business in the manufacture and sale of automotive replacement parts consisting of coil action parts, leaf springs, coil springs, chassis parts, piston rings and related items. Respondent has classified the products itself into three lines, namely, leaf springs line, including coil springs and chassis parts, coil action line and piston ring line. Respondent sells its products in every State of the United States and in 1950 maintained 25 branches and warehouses in the principal cities. In 1949 respondent sold its products to approximately 1,200 coil action accounts, 800 leaf spring accounts, and 400 piston ring accounts.

During the period covered by this proceeding respondent sold its products to customers designated by respondent as distributors at the prices appearing in respondent's distributor net price sheets, less specified discounts, allowances and rebates. Respondent's customers resold these products to garages, service stations, fleet owners and other jobbers. Respondent from time to time issued suggested resale price lists for use by distributors and dealers in the resale of respondent's products. Respondent's base price was the same to all customers. The price differences with which we are concerned arose from the practice of granting discounts or paying rebates to customers, the amount being determined by each customer's total annual net purchases or, in the case of purchasers who purchased through a group buying organization, by the aggregate annual net purchases by all members of a particular group.

The annual volume rebates available to customers were incorporated in and made a part of the franchise agreement which respondent entered into with its distributors and group buying organizations. A different volume rebate schedule was applicable to each of the three lines. For example, on the coil action line the amount of the retroactive volume rebate ranged from 5% on annual net purchases of $1,000 to 19% on annual net purchases of $27,500 or more. On the piston ring line the range was from 2% on annual net purchases of $2,000 to 20% on annual net purchases of $30,000 or more. On the leaf spring line the retroactive volume rebate schedule adopted as of July 1, 1949,

provided for rebates ranging from 5% on annual net purchases of $1,000 to 15% on annual net purchases of $35,000 or more. In addition to the volume rebate, respondent allowed a 10% warehousing and redistributing commission to distributors who resold respondent's products to jobbers who had been approved by respondent, provided the combined earnings of the warehousing and redistributing commission and the volume rebate on any line could not exceed the earnings figured at the maximum volume rebate for that line.

In 1949, respondent had franchise agreements with 15 group buying organizations. The jobber members of these groups forwarded their orders for respondent's merchandise either directly to respondent or through the group office. The merchandise was shipped by respondent direct to the jobber members but the billing for same was to the group office. The annual volume rebate, which was computed on the basis of the aggregate of the purchases by all members of a group, was paid to the group office, which in turn made distribution to the jobber members on the basis of each member's purchases. In other words, under this arrangement members of the group buying organizations were granted discounts or paid rebates based on the total purchases by all members of the group rather than on the total purchases of the individual member, with the result that many such purchasers received a more favorable price or higher rebate than other competing purchasers who did not purchase through group buying organizations.

Substantial differences in the net purchase prices paid by competing purchasers have resulted from the above-described pricing practices. The record contains a number of tabulations prepared from respondent's accounts and records showing details of respondent's sales of two of its three lines to customers in a number of different trading areas. These tabulations reflect differences in net buying prices between customers in the same trading area of varying amounts and percentages, with some differences amounting to as much as 19%. For example, respondent, in 1950, sold its leaf springs line to six customers in Dallas, Texas, all of whom were in competition with each other in the resale of respondent's products. Four of these purchasers purchased through group buying organizations at net prices ranging from 12% to 15% off list price. One customer received no discount or rebate on its purchases and the largest purchaser received a rebate of 7.29% on its total net purchases.

The inequities of respondent's annual volume rebate plan are further demonstrated by the fact that in 1949, for instance, of the approximately 1,200 purchasers of respondent's coil action line, there were only 407 purchasers who received a rebate on their purchases, and

that 352 of these 407 received a rebate of only 5%, all as illustrated by the following tabulation:

Net purchases	Rebate	Number of customers	Average annual purchases
	Percent		
Under $1,000	None		
$1,000–$4,999	5	352	$1,911
$5,000 $7,499	7½	27	5,499
$7,500–$9,999	9	4	8,372
$10,000–$12,499	10	6	10,660
$12,500–$14,999	12	4	13,667
$15,000–$17,499	14	5	9,277
$17,500–$19,999	15	2	18,735
$20,000–$22,499	16	0	
$22,500–$24,999	17	1	23,444
$25,000–$27,499	18	1	26,887
$27,500 and over	19	5	33,471

The substantiality of respondent's price differences and the probability of injury to competition can best be shown by comparing it with the competitive effect of the amount represented by respondent's standard 2% discount for cash given to all customers. Distributors of respondent testified that they invariably took advantage of this 2% cash discount and that this discount was essential to the conduct of their respective businesses. Testimony in the record also indicates that the market in which these distributors compete is highly competitive with many dealers handling from 15 to 75 different lines of automotive products consisting of thousands of items, many of which sell for only a few cents. The dealers' financial life depends on the aggregate of small margins of profits made on a number of individual automotive items. One jobber in Dallas, Texas, ranking third or fourth in that area, testified that his overall net profit on automotive items ran less than 4%. With overall net profit so low discounts to favored customers, ranging up to 19%, could well mean the difference between commercial life and death if these discounts were extended to a sufficient number of items purchased by a distributor. Nor is it controlling that the items herein considered may constitute only a very small part of the dealers' total sales. As the Supreme Court said in the *Morton Salt* case:[2]

"There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect the merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery stock consists of many comparatively small articles, there is no possible way to effectively protect a

[2] *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37 (1948).

grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store."

Respondent contends that the evidence in the record does not support the hearing examiner's finding that "the effect of such discriminations may be to substantially lessen, injure, destroy or prevent competition between customers receiving the benefit of said discriminations and customers who do not receive the benefit of such discriminations." This contention appears to be based largely on the fact that respondent's customers testified generally that they had not been injured by reason of the higher prices paid by them as compared with prices paid by their competitors in the same trading area. On cross examination, however, these same witnesses admitted that their reasons for so testifying was due to the fact that both they and their competitors followed the suggested resale prices of the respondent and that there was no price competition in their particular trade areas. The adherence by respondent's customers to its suggested resale prices does not eliminate the question of injury to competition. As the Supreme Court said in the *Corn Products* case: [3]

"But it is asserted that there is no evidence that the allowances ever were reflected in the purchasers' resale prices. This argument loses sight of the statutory command. As we have said, the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect. We think that it was permissible for the Commission to infer that these discriminatory allowances were a substantial threat to competition."

The hearing examiner in his initial decision found that:

"Any saving or advantage in price obtained by one competitor as against another increases his margin of profit, permits additional services to be extended to customers, the use of additional salesmen, the carrying of larger and more varied stocks, and the establishment of branch houses for expansion of the business. While price competition among customers was more or less non-existent, except in isolated instances, in the areas where testimony was taken, the possibility of price competition is ever present where lower prices to certain competing customers exist." [4]

In support of the hearing examiner's finding of the requisite statutory injury, there is in the record reliable respectable probative evidence in the form of testimony that respondent's 2% discounts for

[3] *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726, 742 (1945).

[4] Cf. Initial Decision of the Hearing Examiner, Docket 5771, In the Matter of Namsco, Inc., adopted by the Commission March 17, 1953.

cash were invariably taken by respondent's customers and that these customers considered this discount essential to the conduct of their business. Additionally, some witnesses testified that in order to expand their business, it would be necessary to hire additional salesmen, handle more lines, and provide additional services to customers which could only be effected through increased profits. We believe that the hearing examiner was justified in concluding that respondent's annual volume rebate plan resulted in price discriminations violative of the Robinson-Patman Act.

Respondent further contends that the evidence does not establish that it has discriminated in price between any specifically named purchaser of the same type of automotive products or supplies of like grade and quality who were competitively engaged in the resale thereof during the same period of time and in the same market area. Respondent's customers do not purchase respondent's products as individual items. They purchase them as part of a line designed to supply the needs of garages and others to whom the products are resold. The rebates were not granted on the basis of the individual items purchased but on the basis of the total dollar purchases of a particular line. The price differentials involved did not arise from any difference in the grade or quality of the products sold to different customers. Instead, they arose from varying rebates on an entire line. The very nature of the businesses carried on by respondent's customers required that they carry substantially all of the items in a particular line, and many purchasers of the same line of respondent's products were in competition with each other in the resale of such products to garages, service stations, and others. We think the hearing examiner properly found that the discriminations in price were made in connection with the sale and distribution of merchandise of like grade and quality.

We now consider respondent's objection to the order to cease and desist in the initial decision. Respondent contends that the order is too broad in its scope and exceeds the authority of the Commission by including the officers, representatives, agents and employees of the respondent and by covering "piston rings" and "other related items". Respondent additionally contends that the order is faulty in that it is not limited to prohibiting price discriminations which injure secondary line competition; that it is not limited to prohibiting price discriminations in the sale of specific types of automotive replacement parts, and that it contains no guiding yardstick by means of which respondent can determine the lawfulness or unlawfulness of its pricing practices.

In support of its argument that the order should not run against its officers, representatives and employees, respondent cites the decision of the United States Court of Appeals for the Seventh Circuit in the *Reynolds Tobacco* case [5] which involved an order issued pursuant to the Federal Trade Commission Act. The Seventh Circuit Court in its more recent decision in the *Anchor Serum* case [6] held, however, that the order in a Clayton Act case was properly directed against the "officers, representatives and employees" of the corporate respondent and this same holding appears appropriate here.

The further argument that the order should not include "piston rings" and "other related items" appears to be without merit. The record shows that respondent sells piston rings to the same type of purchasers, that is, automotive jobbers, as it sells its other products, and that similar pricing practices were employed. The Commission's power is not limited to prohibiting the identical practices which have resulted in illegal price discriminations. It has the authority and duty to also prohibit acts of the same type or class as those which have been committed in the past.[7]

The Supreme Court in the *Ruberoid* case [8] considered arguments with respect to the breadth of Commission orders to cease and desist in a Section 2 (a) proceeding similar to those here presented by respondent. The Court observed that:

"Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity."

In rejecting respondent's contention that the order to cease and desist in the initial decision is too broad in scope, it is pointed out that under the decision in the *Ruberoid* case the fact that the order does not spell out in detail every phase of the statute does not in any way prejudice the respondent. Implicit in every Commission order are all the statutory defenses by means of which respondent can determine the lawfulness or unlawfulness of its practices just as if the order

[5] *Reynolds Tobacco Co.* v. *F. T. C.*, 192 F. 2d 535 (1951).
[6] *Anchor Serum Co.* v. *F. T. C.*, 217 F. 2d 867 (1954).
[7] *Hershey Chocolate Co.* v. *F. T. C.*, 121 F. 2d 968 (1941).
[8] *F. T. C.* v. *Ruberoid Company*, 343 U. S. 470 (1952).

had set them out *in extenso*. We believe that the order, as drafted, is proper and that the statute and the courts have provided respondent with a proper yardstick for determining, under the order, the lawfulness or unlawfulness of its future practices.

Finally, we consider respondent's contention that:

"Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, as construed and applied in this proceeding offends the constitutional standards of definiteness and reasonableness of due process of law under the Fifth Amendment to the Constitution of the United States."

Respondent argues under this contention that Section 2 (a) of the amended Clayton Act "is admittedly a vague, indefinite ambiguous statute", and that it is well settled that "a statute may be so vague as to violate the due process clause of the Fifth Amendment to the Constitution of the United States". If, as we construe it, respondent's contention in this regard can be interpreted as raising the issue of the constitutionality of Section 2 (a) of the amended Clayton Act, the obvious answer is that it is not within the province of this Commission to pass upon the constitutionality of the statutes it is charged with administering.

" * * * an administrative agency, invested with discretion, has no jurisdiction to entertain constitutional questions where no provision has been made therefor." [9]

We believe that the initial decision of the hearing examiner is adequate and appropriate to dispose of this proceeding, and respondent's appeal therefrom is accordingly denied.

Commissioner Mason dissents.

Chairman HOWREY, concurring:

The record contains direct and substantial evidence showing probability of injury to competition in the secondary line, namely, in the distribution of automotive parts through jobbers and dealers. For this reason I concur in the majority opinion.

DISSENTING OPINION

By MASON, Commissioner:

This is a Section 2 (a) Clayton Act case. Three elements must be found present to legitimatize a cease and desist order here. They are:

1. Interstate commerce;

2. Disparate discounts or rebates to competing customers (these

[9] *Engineers Public Service Co. v. Securities & Exchange Commission*, 138 F. 2d 936, April 29, 1955.

two we need not consider because in the instant case both sides concede their existence); and

3. The disparate discounts must have at least one of the following effects:

a. May substantially lessen competition;

b. Tend to create a monopoly;

c. Injure, destroy or prevent competition.

As long as the billion dollar auto parts makers are around, we need not fear defendant Moog will destroy General Motors, Ford, Chrysler, et al., nor is this independent auto parts maker apt to create monopoly or substantially lessen, destroy or prevent competition with these or any of the other big companies in the primary line of commerce.

This leaves but one question for us to answer. Has there been injury in the secondary line of commerce; that is, injury to those customers of Moog who got smaller quantity discounts than others?

The Supreme Court has always held that an inference of injury can be drawn from the substantial difference in discounts alone, without any direct testimony of injury. For as the late Mr. Justice Jackson once opined:

"The law of this case, in a nutshell, is that no quantity discount is valid if the Commission chooses to say it is not." [10]

Relying on this carte blanche authority granted us,[11] the prosecutor based his case on the disparate discounts admitted by both sides.

At this stage in the case if the Commission chose to infer (and it did) that the discounts injured some of Moog's customers, it could do so, and well enough. The prosecution's contention that injury to competition existed was based upon inferences drawn from the fact that there were differences in discounts and rebates.

This is as far as the prosecution had to go, though, of course, the direct and most sensible way to ascertain the real truth regarding injury would be to call those who were supposed to be injured; that is, Moog's customers who received the smaller quantity discounts.

These, the prosecution by-passed.

However, before the trial was over, the defendant himself subpenaed the missing witnesses.

This meant traveling all over the country—Dallas, Denver, New Orleans, Memphis and New York City. Of course, defendant could have avoided these long journeys if it had been willing to admit for the sake of the record that it had injured its customers, but it refused

[10] *F. T. C.* v. *Morton Salt Co.*, 334 U. S. 37, at page 58.

[11] "The Commission is authorized by the Act to bar discriminatory prices upon the 'reasonable possibility' that different prices for like goods to competing purchasers may have the defined effect on competition." *F. T. C.* v. *Morton Salt Co.*, 334 U. S. at page 47.

to do so. In the ensuing safari, every witness called positively denied he suffered any competitive injury from the challenged discounts or rebates [12]—a position they all stoutly maintained in spite of the badgering the prosecutor gave them for ruining the Government's case.

In this day and age of phony informers, it is heartening to behold American businessmen reject Government's cozening of witnesses to get them to say they were injured, when in fact they weren't. The Government's position is faintly reminiscent of the personal injury lawyer whose advice at the scene of an accident was to "lie down and groan until the claim agent arrives."

Only in the instant case the so-called "injured competitors" refused to lie down or groan.

To top all of this, the Government was finally forced to concede that if all other jobber witnesses who received the lesser discounts were to be summoned to the stand, they, too, would deny they had been injured.[13]

If there had been no direct evidence on the question of injury, inferences could fill in the empty spaces. But the spaces had best be empty of direct facts before an inference is invited in.

With many hundreds of witnesses [14] admittedly ready to back up the testimony of a dozen or more who had already denied the injury, and with not a soul willing to impeach their assertions of no injury, we find an entirely different aspect put upon the case.

Justice requires that we give precedence to direct evidence over inferences.

For inferences and facts are two different things. Their standing might be compared to mistresses and wives.

Inferences are compliant things, swaying to the whim of those who draw them. While facts, like wives, can be harsh, unbending, and often block the selfish aims of those who must live with them; they do nevertheless carry a badge of legitimacy that no unsupported inference has ever been able to achieve.

To prevent predelictions guiding our judgments rather than cold facts, reviewing courts frown on us if our orders are based on inferences when direct testimony to the contrary bars the way. For as Mr. Justice Stephens says in *United States* v. *U. S. Gypsum*:

"A fact may not be inferred from a proven fact or facts where unimpeached and uncontradicted testimony consistent with such proven

[12] See digest of testimony in appendix.

[13] R. p. 943.

[14] The number of defendant's accounts is not set out with exactitude, but the Hearing Examiner's report indicates they run into the thousands.

fact or facts but inconsistent with the fact sought to be inferred, is in the record." [15]

Like a belligerent wife crashing in on an assignation with a hussy, the direct testimony of the alleged injured customers that they in fact were not injured, broke up the inference of injury so necessary to the Government's case.

In spite of this, my learned majority of the Commission has

Divorced Cold Solid Reason from its bed
And taken Inferences Instead.[16]

On such a pretense Government has snatched itself a victory, but at what a cost.

In my opinion, the effectiveness of cease and desist orders rests on the respect their paternity commands.

An order born from the legitimate union of direct facts naturally ranks highest. In the absence of direct factual testimony, findings on inferences may support an order, but it will be countenanced with about the same degree of condescension a common law wife receives in polite society.

But not even this low degree of acceptance will be accorded the order in the instant case, for in the face of direct testimony controverting the inferences of guilt, the Commission has drawn an order which commands neither the respect of the public nor, in my opinion, will it receive the approval of reviewing courts.

We are judged by the level at which we solve our problems.

To take inferences that serve our ends and reject facts presents an inaccurate and unhappy picture of what should be our most sacred institution—the judiciary.

The Commission has won a cease and desist order.

But I doubt if the ends are worth the means.

For myself—

I am against it.

APPENDIX

(Digest of testimony, R. pages 617–899)

Q. Have the pricing practices of Moog in the leaf spring line or in this coil action sales line, have either or both of them injured you competitively necessarily?

A. No.

* * * * * * *

Q. I will ask you whether you know whether or not the fact that an allowance of 15 percent was made to the Terry Automotive Supply Company injured your company, American Gear and Parts Company, competitively in the distribution

[15] 67 F. Supp. 397 (1946) at page 450.

[16] With apologies to Omar Khayyam.

of Moog Industries' leaf springs, coil springs, and chassis parts during the period indicated?

A. No, sir.

Q. Do you know whether it did?

A. No, sir. Frankly, I didn't know Terry Automotive had Moog up until three or four months ago.

Q. Well, were you injured competitively by it?

A. No, sir.

Q. By virtue of the spread you were not?

A. No, sir.

* * * * * * *

Q. And I will ask you if you know whether or not you were injured competitively during that period of time by virtue of the fact of this differential spread on allowances off distributor's net prices in the purchase of Moog leaf springs, coil springs and chassis parts resold by you to your customers?

A. Yes.

Q. You were so injured?

A. No.

Q. I ask you if you know whether or not for that period of time the Motor Supply Company of Dallas suffered any competitive injury by virtue of this differential in allowances off of distributor's net prices in purchases of leaf springs, coil springs and chassis parts from Moog Industries, which they purchased from Moog and resold to its customers? Do you know whether or not you were injured?

A. I do.

Q. Were you so injured?

A. No.

* * * * * * *

Q. And I will ask you would you know whether or not by virtue of the spread and differential in allowances off of distributor's net prices the Henderson Auto Parts Company was competitively injured in the purchase of leaf springs, coil springs and chassis parts from Moog Industries, Inc., in the sale of such products to its customers?

A. Yes.

Q. Was it so injured?

A. I do not think so.

* * * * * * *

Q. Do you know whether by virtue of this difference in percentages in payment for coil action parts from Moog Industries by your company and the other companies shown there, do you know whether or not you were injured competitively?

A. Yes, I know.

Q. Were you injured competitively?

A. No, I was not injured competitively, in my opinion.

* * * * * * *

Q. Now do you know whether for that period of time so shown on that exhibit Auto Chassis and Spring Company was injured competitively in the purchase and sale of Moog coil action parts in New Orleans, by virtue of that differential from the distributor's net prices or difference in allowances?

A. No, it was not.

Q. It was not?

A. It was not hurt.

* * * * * * *

Q. Do you know whether you suffered an injury or not?

A. No, I didn't suffer.

COUNSEL FOR PROSECUTION. Just a minute. We aren't so interested in getting your answer you are making as we are to find out whether or not you have the knowledge, yes or no, whether you know, and at that time I would like to make my objection.

The WITNESS. You want to know what, now? What is your question?

COUNSEL FOR PROSECUTION. I think Mr. Butterfield has a question pending.

TRIAL EXAMINER. Mr. Witness, the question is directed to your knowledge as to whether or not you know, not whether or not you did or did not, but whether or not you know whether you did or not. That calls for a yes or no answer.

The WITNESS. Whether I know I was injured, that is the question he asked me, was I injured.

TRIAL EXAMINER. Do you know whether or not you were injured? You know or you don't know. He will ask you a further question on that.

The WITNESS. My answer still was no.

COUNSEL FOR PROSECUTION. I think the witness misunderstands the question.

The WITNESS. You asked me if I was injured.

COUNSEL FOR DEFENDANT. I ask if you know whether or not you were injured.

The WITNESS. Do I know whether or not I was injured?

Q. Yes.

A. The answer is I don't think I was injured. I don't see how I could be injured. I would say, whether I know whether I was injured or not?

Q. Yes, do you know?

A. I don't know as far as either way. I am not injured in any way. I mean, the question was asked, am I injured. We have, all the fellows are competitors.

Q. Who in your organization would know better than you whether you were injured or not?

A. Whether I was injured, in what way are you asking? Your question is whether or not I was injured?

Q. That is right.

A. No, I am not injured.

COUNSEL FOR PROSECUTION. I still move that answer be stricken and we have a yes or no answer to the question.

TRIAL EXAMINER. We will let the answer stand.

COUNSEL FOR DEFENDANT. You may cross examine.

TRIAL EXAMINER. It is too complicated to get straightened out.

* * * * * * *

TRIAL EXAMINER. The question is whether or not you know; not whether or not you were injured, but whether or not you know whether or not you were injured.

WITNESS. Yes, I would know.

COUNSEL FOR DEFENDANT. Were you so injured? What was the company, how was the company injured by virtue of the differentials?

WITNESS. We were not to my knowledge.

* * * * * * *

Q. I ask you to study this exhibit showing these sales and rebates, and I ask you if, by virtue of any of the differentials shown in rebates or commissions or differences on this sheet, whether you know if American Motor Specialties was

injured competitively in its resale of the coil action parts of Moog Industries, Inc. for the years indicated?

A. No. The same as it was in the other case.

Q. And by "no" you mean that you were not injured competitively by reason of the differentials shown on this sheet.

* * * * * * *

Q. Do you know whether you were competitively injured?

A. No, I don't believe I have been.

Q. By that you mean that you have not been competitively injured?

A. No.

* * * * * * *

COUNSEL FOR DEFENDANT. I will ask you to examine this chart and tell me whether or not you know whether Sapiro Auto Parts Company was or was not competitively injured by virtue of the differentials in rebates shown on that chart?

COUNSEL FOR PROSECUTION. We have the same objection we have had heretofore.

TRIAL EXAMINER. Objection overruled.

WITNESS. As far as I can say, we in Sapiro Auto Parts Company more or less mind our own business, and we are not interested in what Clinton Square Auto Parts gets, or what they do, because there seems to be enough business in the territory for all of us, and we all get our share of the business, and we all make our profit.

COUNSEL FOR DEFENDANT. Do you know whether or not you were injured competitively by virtue of these differentials?

WITNESS. Not as far as I know, no.

Q. By "not as far as you know," you mean that you were not injured competitively?

A. That is right.

* * * * * * *

FINAL ORDER

Respondent Moog Industries, Inc., having filed on July 13, 1954, its appeal 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 Commission having rendered its decision denying the appeal and affirming the initial decision:

It is ordered, That respondent Moog Industries, Inc., 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 contained in said initial decision.

Commissioner Mason dissenting.

IN THE MATTER OF

WHITAKER CABLE CORPORATION

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

Docket 5722. Complaint, Dec. 20, 1949—Decision, Apr. 29, 1955

Order requiring a manufacturer of automotive replacement cable products and related items in North Kansas City, Mo., to cease discriminating in price between different customers by selling its products of like grade and quality at higher and less favorable prices to numerous small businessmen than to their larger competitors, in violation of sec. 2 (a) of the Clayton Act as amended.

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

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

Mr. Edwin S. D. Butterfield, of Chicago, Ill., for respondent.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

Pursuant to the provisions of the Clayton Act and the Federal Trade Commission Act, the Federal Trade Commission on December 20, 1949, issued and subsequently served its complaint in this proceeding upon the respondent Whitaker Cable Corporation, a corporation, charging it with the violation of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. After the filing of answer to the complaint, hearings were held at which testimony and other evidence in support of, and in opposition to, the allegations of the complaint were introduced before the above-named Hearing Examiner, theretofore duly designated by the Commission, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final consideration by said Hearing Examiner on the complaint, answer thereto, testimony and other evidence and proposed findings as to the facts and conclusions presented by counsel and said Hearing Examiner having duly considered the record herein makes the following findings as to the facts, conclusions drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Whitaker Cable Corporation is a Delaware corporation with its principal office and place of business located at 13th and Burlington Streets, North Kansas City, Missouri, and factory branches at St. Joseph, Missouri, Philadelphia, Pennsylvania, and Los Angeles, California. Said respondent was originally incorporated in 1928 as the Whitaker Battery Supply Co., which corporate name was changed in 1944 to Whitaker Cable Corporation.

PAR. 2. Since its incorporation in 1928, respondent has been engaged in the manufacture and in the sale and distribution in interstate commerce of automotive replacement parts, consisting of automotive cable products and related items, in competition with other concerns who were engaged in the sale and distribution of similar products in interstate commerce. The amount of business transacted by the respondent in the after market replacement field is substantial. The market in automotive replacement parts is a highly competitive one both between respondent and its competitors and between respondent's customers. It was testified by the President of respondent that the total after market replacement volume for automotive parts was around 3 billion dollars. He further testified that respondent sells less than 1 percent of products competitive with its own in the automotive replacement field and sells 8½ percent of the 14,000 jobbers in the United States who sell automotive replacement parts. No relationship between the 3 billion dollars total and products competitive with those sold by respondent was shown. This witness further testified that after 33 years the respondent had a very substantial business in replacements throughout the automotive field and was recognized as one of the leaders in the after market replacement field because of its effective ethics and manner of doing business. In 1949 the respondent published a brochure describing the development of the company over the 25 years of its existence, which was circulated to the trade, stockholders and suppliers. In said brochure it was stated that in 1920 the company "established the first line of after market automotive replacement cables on the American market" and that "during the succeeding years Whitaker Battery Supply Company continued to maintain its position as the largest manufacturer in the world of automobile battery cables and terminals for after market replacement" and by the addition of bulk cable, ignition terminals and wiring assemblies in 1929 became "the most complete line of its kind on the market." (CX 23)

PAR. 3. From time to time the respondent issued its Jobber Price List which listed the basic prices used by respondent in the sale and

distribution of its products in the automotive after market replacement field. Any discounts, allowances or rebates were off said Jobber Price Lists. Respondent also from time to time issued suggested resale price lists for use by jobbers and dealers in the resale of respondent's products.

PAR. 4. In the course and conduct of its business, the respondent sold its replacement parts, all of which were of like grade and quality, at varying prices to purchasers for resale to dealers and other purchasers. Such customers of the respondent were competitively engaged in the resale of respondent's replacement parts in the various territories and places where customers carried on their business. These customers of the respondent have been variously classified as follows:

1. *Whitaker Warehouse Jobbers.*—Customers so classified operated under the Whitaker Warehouse Jobber Contract and purchased respondent's products on the current Whitaker Jobber Price List subject to annual volume rebates payable by respondent to such customers as follows:

REBATE SCHEDULE—

On net purchases of:

$ 600.00 or less	No Sales Rebate
$ 600.00–$1000.00	5% Sales Rebate
$1000.00–$1500.00	7½% Sales Rebate
$1500.00–$2000.00	10% Sales Rebate
$2000.00–$3000.00	12½% Sales Rebate
$3000.00 and over	17½% Sales Rebate

Rebates in each bracket will be accumulated to make up total rebate, but are not retroactive.

In addition to the above annual volume rebates, Whitaker Warehouse Jobbers also received a freight allowance on shipments of a certain minimum size and a 5 percent trade discount on shipments in excess of $150.00. Certain warehouse jobber customers, purchasing in large volume received a 20 percent discount from Jobber List Price in lieu of both the foregoing rebates and the 5 percent trade allowance. Although the Whitaker Warehouse Jobber Contract provides for the signature of the purchasing jobber and the Whitaker Cable Corporation, many customers so classified by Whitaker purchase under the above terms without having signed any such formal agreement. Whitaker Warehouse Jobber customers purchasing from Whitaker are approximately about 450 in number.

2. *Whitaker Group Buying Jobbers.*—Customers so classified purchased respondent's products on the current Whitaker Jobber Price List subject to a freight allowance and 20 percent discount from the Jobber Price List in the case of 4 groups, and 17½ percent discount

from the Jobber Price List plus 5 percent trade discount and freight allowance in the case of another group. In the operation of the group buying procedure, purchase orders of jobber members were forwarded to the respondent either direct by such members or through the group office. Respondent in turn shipped the merchandise so ordered direct to the group member and bills therefor were sent to the group organization and paid by it. Rebates and other discounts earned on such purchases were paid to the group office which in turn distributed the net, after deduction of operating expenses, to the jobber members in proportion to their individual purchases. The group buying organization is in reality a bookkeeping device for the collection of rebates, discounts and allowances received from sellers on purchases made by its jobber members. Such jobber members, in fact, purchase their requirements of respondent's products direct from the respondent and at the same time receive a more favorable price or higher rebate based upon the combined purchases of all of the members.

3. *Whitaker Wholesale Distributor Jobbers.*—Customers so classified purchased respondent's products through the Whitaker Warehouse Jobber on the basis of the current Whitaker Jobber Price List subject to the same rebate schedule as contained in the Whitaker Warehouse Jobber Contract. Merchandise so ordered was shipped and billed by the Whitaker Warehouse Jobber. The warehouse distributor was usually located in the same territory covered by the warehouse jobber through whom he purchased respondent's products and consequently was engaged in competition with all warehouse jobbers and other warehouse distributors in his trade area. The Wholesale Distributor Contract, entered into between the wholesale distributor and the respondent, provided for the forwarding of orders of the wholesale distributor to the warehouse jobber, the respondent to furnish the wholesale distributor with necessary catalogs, price sheets and such advertising material as may be issued from time to time to promote respondent's sales. The cumulative rebate was paid by respondent to the wholesale distributor direct when approved by the warehouse jobber. The warehouse jobber obtained the benefit of the volume purchases by both himself and the wholesale distributor giving him a higher rebate based upon the greater volume of purchases. Each wholesale distributor contract issued by respondent specifically provided for the signature of the wholesale distributor, the signature of respondent's district manager, and the approving signature of the Whitaker Warehouse Jobber and the Whitaker Cable Corporation. The degree of control exercised by respondent over sales to the wholesale distributor accounts was such that said sales were in all essential

respects sales by respondent. The wholesale distributor is therefore a purchaser from respondent within the meaning of the Clayton Act, as amended. There are approximately 700 wholesale distributors so classified purchasing respondent's products.

4. *Private Brand Customers.*—Customers so classified purchased respondent's replacement parts, bearing their individual brand names, for resale to dealers and other purchasers, at discounts from respondent's Jobber Price List as follows:

(*a*) American Oil Company ("Amoco") at 20 percent of Jobber List Price, plus 2 percent boxing allowance;

(*b*) Phillips Petroleum Company ("Phillips 66") at 20 percent off Jobber List Price, plus 2 percent boxing allowance;

(*c*) Sun Oil Company ("Sunoco") at 20 percent off Jobber List Price, plus 3 percent boxing allowance prior to May 24, 1949, and after that date at 28.5 percent discount on most items, including battery cables and one cable assortment, and 26 percent discount on the remainder of the line, covering the items other than battery cables; and

(*d*) The Goodyear Tire and Rubber Company at 30 percent discount off Jobber List Price, plus 3 percent battery cable boxing allowance until February 2, 1949, then after that date 30 percent to 35 percent off Jobber List Price.

All of said private brand purchasers sold to jobbers and direct to retail dealers and to this extent were in competition with respondent's direct and indirect purchasers hereinabove described.

PAR. 5. In addition to the customers listed in the foregoing paragraph, evidence was introduced in this proceeding with reference to transactions between respondent and the Willard Storage Battery Company on the theory that the contractual relationship between the respondent and Willard and its customers was such as to constitute Willard customers as purchasers from respondent. The record in this proceeding, however, does not support this position, and, consequently, the testimony and other evidence in connection with the Willard Storage Battery Company transactions are not material to the issues in this proceeding.

PAR. 6. Evidence was also introduced with reference to certain purchasers of respondent's products who were classified as service distributors. In sales to these purchasers the Whitaker Service Distributor Contract was used which provided for the signature of the service distributor as purchaser, the Whitaker Warehouse Jobber, the Whitaker Warehouse Jobber salesman, and the approving signature of the Whitaker Cable Corporation. This contract provided that the service distributor should carry a representative stock of respondent's prod-

ucts and required the placing of an initial order of $25.00 or more to entitle the purchaser to buy at Whitaker Service Distributor prices. Under the contract the service distributor placed his orders with the Whitaker Warehouse Jobber or a Whitaker Wholesale Distributor, who in turn delivered the merchandise to and billed the service distributor. The degree of control exercised by respondent through the execution of the Whitaker Service Distributor Contract was such as to constitute the Whitaker Service Distributor a purchaser from respondent within the meaning of the Clayton Act, as amended. However, the testimony and other evidence in this proceeding is not sufficient to support a finding with respect to competition so far as the Whitaker Service Distributor is concerned.

PAR. 7. In following the pricing practices hereinbefore described, the respondent has discriminated in price by means of the discounts, rebates and allowances allowed by it in the sale of automotive cable products and related items as between (1) respondent's warehouse jobbers; (2) respondent's direct purchasers, namely, warehouse jobbers, group buyers and private brand buyers; (3) respondent's direct purchasers and its indirect purchasers, such as wholesale distributors, and the effect of such discriminations may be to substantially lessen, injure, destroy or prevent competition between customers receiving the benefit of said discriminations and the customers who do not receive the benefit of such discriminations.

PAR. 8. The respondent did not grant exclusive territory to any of its customers and has had more than one warehouse jobber in various trade areas who were, in fact, in competition with each other and also in competition with Whitaker Wholesale Jobbers, groups buyers and private brand buyers, who sell respondent's replacement parts to dealers and other purchasers in their respective trade areas.

PAR. 9. In the record in this proceeding there are a number of tabulations taken from respondent's books and records which were received in evidence as Commission's Exhibits 37–53, inclusive, showing the prices paid and the discounts received by purchasers located in various trade areas throughout the United States during the year 1949. Testimony was taken of purchasers from respondent in three trading areas shown on these tabulations, Denver, Dallas and New Orleans. There is nothing in the record to indicate that these trading areas are unique or different from other trading areas where respondent sells its products at differing prices. It is therefore concluded that competitive conditions shown to exist in these three areas with respect to purchase and resale of respondent's products are typical and representative of the other areas in the United States and that respondent's

customers reselling it products in the same trading area are in competition with each other in the resale of respondent's products.

PAR. 10. In the Denver area there were six purchasers of respondent's products: three warehouse jobbers, Auto Equipment Co., Colorado Jobbers Supply Co., Hendrie & Bolthoff Co.; two private brand purchasers, Goodyear Tire and Rubber Company, Phillips Petroleum Co.; and one wholesale distributor, Automotive Supply Company. All of these purchasers in the Denver area were in competition with each other in the resale of respondent's products.

In the Dallas area there were seven purchasers of respondent's products: six warehouse jobbers, Automatic Appliance Co., Dallas Parts Service Co., English Equipment Co., Meggs Co., Robertson & King Motor Supply, Texas Auto Parts; and one private brand purchaser, Goodyear Tire and Rubber Co. All of these purchasers in the Dallas area were in competition with each other in the resale of respondent's products.

In the New Orleans area there were five purchasers of respondent's products: three warehouse jobbers, Automotive Wholesalers, Delta Distributors, Inc., Parts Service Co.; one private brand purchaser, Goodyear Tire and Rubber Co.; and one group purchaser, Greiner Auto Parts Co. All of these purchasers in the New Orleans area were in competition with each other in the resale of respondent's products.

The amounts purchased and discounts and rebates received by the purchasers in the above areas, during the year 1949, were as follows:

Name of customer and trading area	Net purchase after deducting freight and allowance	Combined discounts and rebates	
		Amount	Percent of net price
Denver:			
Auto Equipment Co	$12,561.93	$2,512.35	20.00
Colorado Jobbers Supply Co	3,167.22	405.59	12.81
Goodyear Tire and Rubber Co	15.79	5.61	35.53
Hendrie & Bolthoff Co	22,059.52	4,487.22	20.34
Phillips Petroleum Co	987.96	197.60	20.00
Automotive Supply Company	852.12	12.62	1.48
Dallas:			
Automatic Appliance Co	1,994.35	197.66	9.91
Dallas Parts Service Co	1,868.99	162.94	8.72
English Equipment Co	888.17	54.05	6.09
Goodyear Tire and Rubber Co	215.18	86.88	[1] 40.38
Meggs Co	7,423.85	1,482.05	19.96
Robertson & King Motor Supply	934.86	43.79	4.68
Texas Auto Parts	1,265.76	98.57	7.79
New Orleans:			
Automotive Wholesalers	687.03	36.69	5.34
Delta Distributors, Inc	2,857.90	327.93	11.47
Goodyear Tire and Rubber Co	1,133.32	396.93	[1] 35.02
Greiner Auto Parts Co	4,301.03	860.19	20.00
Parts Service Co	2,292.31	244.13	10.65

[1] Based on prices in effect February 1 to May 2, 1949.

PAR. 11. In the course of this proceeding it was the contention of the respondent that no injury to competition existed by reason of respondent's pricing practices because its customers generally followed the suggested resale price lists issued by the respondent in the resale to their respective customers. In support of this contention, the respondent introduced testimony of a number of jobbers that they had not suffered any injury by reason of differing or higher prices paid by them as compared with prices paid by competitors in their respective trade areas. On cross-examination, these witnesses admitted that their reasons for stating that they had not been competitively injured was due to the fact that their competitors all followed the suggested resale price of the respondent and that there was no price competition in their particular trade areas. Practically all of the witnesses, who purchased respondent's products, whether called in support of, or in opposition to, the charges of the complaint, testified that the respondent uniformly gave a 2 percent cash discount and that they invariably took advantage of this cash discount as being essential in the conduct of their respective businesses and that such discount reduced the cost of acquisition of respondent's products. This 2 percent reduction in cost of acquisition is substantial and may account for a substantial portion of the margin of profit. One jobber of respondent, ranking third or fourth in the Dallas, Texas, area, testified that the overall net profit for his company ran between 3 percent or 4 percent.

PAR. 12. The net purchase price paid by respondent's jobber customers is the price paid subject to and following all applicable rebates, discounts and allowances. By the very nature of the business operated by the various jobber customers of respondent their profit was necessarily based upon an accumulation of small margins of profit on many items. Some of the witnesses handled 15 to 75 lines involving an aggregate of thousands of items. Practically all of respondent's jobber customers extend the same cash discount they received to their customers, however, on a mark-up of acquisition cost, the discount actually given by such customer to its purchaser on resale will be greater than the 2 percent cash discount.

PAR. 13. The fact that price competition may have been eliminated in some areas because of uniformity of resale price does not eliminate the question of injury to competition. Any saving or advantage in price obtained by one competitor as against another increases his margin of profit, permits additional services to be extended to customers, the use of additional salesmen, the carrying of larger and more varied stocks, and the establishment of branch houses for expansion of the business. While price competition was more or less

non existent, except perhaps in isolated instances, in the areas where testimony was taken, the possibility of price competition is ever present where lower prices to certain competing customers exists. In fact, one witness in New York testified that he deviated from the suggested resale prices on certain large orders. It must therefore be concluded that respondent's defense in this particular is without merit and that respondent's discrimination in price between customers competing in the resale of its products has had, and may have, the effect of substantially lessening competition among its customers and of injuring and preventing competition among them.

PAR. 14. In its answer, the respondent asserted a defense of meeting competition under Section 2(b) of the Clayton Act. The evidence in this proceeding does not support this defense. The president of respondent corporation testified that about 15 or 18 years ago The Electric Auto-Lite Company came out with a volume rebate plan which respondent considered good and which it adopted. He further testified that it had been the practice of respondent to be the highest priced line in the market, relying on quality of its merchandise and greater amount of selling effort to maintain its competitive position. While respondent did consider and compare competitors' prices in preparing its price lists, the price differentials and the discriminations in price did not occur from the use of the price lists or deviations from such price lists to individual customers, but instead arose out of the pricing practice involving the use of a pricing plan consisting of rebates, discounts and allowances. The defense of meeting competition as provided for under Section 2(b) of the Clayton Act, does not permit "a seller to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others." [1]

CONCLUSIONS

1. Respondent's private brand customers: American Oil Company, Phillips Petroleum Company, Sun Oil Company and Goodyear Tire and Rubber Company; and respondent's jobber customers, Whitaker Warehouse Jobbers, Whitaker Group Buying Jobbers and Whitaker Wholesale Distributors, were all engaged in the resale of respondent's products as wholesalers to dealers and other purchasers and as such were all in competition each with the other in their respective trade areas in the resale of respondent's products.

2. Respondent's pricing plan, which was used in selling to its various customers and the various rebates, discounts and allowances allowed by such pricing plan, resulted in a substantially lower price being paid

[1] *F. T. C. v. Cement Institute*, 333 U. S. 683, 725.

by some of its customers than was paid by other of respondent's customers competing in the same trade area in the resale of respondent's products.

3. Such lower price, when reflected in the resale price of respondent's products, enables favored purchasers to attract business away from non-favored purchasers or force the latter to sell at a substantially reduced profit. Said lower purchase price, in the observance of a suggested resale price, enables the favored purchaser to resell said products at a substantially higher profit margin than that obtainable by the non-favored purchaser in such resale.

4. Respondent's contention that no injury to competition can be proven or inferred where the discriminatory discount has not been used to reduce the resale price, is without merit as a defense in this proceeding and has been so held by the United States Supreme Court. In *F. T. C.* v. *Morton Salt Company*, 334 U. S. 37, the Supreme Court held that where purchasers, buying and competing in the resale of the same merchandise, are charged different prices therefor, the conclusion is inescapable that injury to the competitive efforts of the unfavored purchasers is present. In this connection the Court said, "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." In the present case the evidence more than meets this test.

5. The aforesaid discriminations in price by the respondent as herein found constitute violation of subsection (a) of Section 2 of "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" approved October 15, 1914 (Clayton Act) and amended by Act of Congress June 19, 1936 (Robinson-Patman Act).

ORDER

It is ordered, That the respondent Whitaker Cable Corporation, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale for replacement purposes of automotive cable products and related items in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating in the price of such products of like grade and quality—

1. By selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale and distribution of respondent's products.

2. By selling to any indirect purchaser at net prices higher than the net prices charged any other direct or indirect purchaser who, in fact, competes with the purchaser paying the higher price in the resale and distribution of respondent's products.

ONINION OF THE COMMISSION

By SECREST, Commissioner:

This case is before the Commission on cross appeals from the hearing examiner's initial decision.

Respondent, Whitaker Cable Corporation, is charged with violation of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act,[2] by discriminating in price between purchasers of its automotive replacement parts. Hearings were held at which testimony and other evidence in support of and in opposition to the complaint were introduced and the hearing examiner, after considering the entire record, made his initial decision in which he found that respondent's pricing practices have resulted in price discriminations as between (1) respondent's warehouse jobbers; (2) respondent's direct purchasers, including warehouse jobbers, group buyers and private brand buyers; and (3) respondent's direct and its indirect purchasers, such as wholesale distributors. The hearing examiner found that the effect of respondent's discriminations in price "may be to substantially lessen, injure, destroy or prevent competition between customers receiving the benefit of said discriminations and the customers who do not receive the benefit of such discriminations," and issued his order accordingly.

Respondent in its appeal excepts to numerous specific findings and conclusions of fact and law in the initial decision, as well as to certain conduct and rulings of the hearing examiner and to the hearing examiner's failure to make certain findings. The appeal of counsel supporting the complaint relates only to the hearing examiner's finding that the contractual relationship between respondent and Willard Storage Battery Company and its customers was not such as to constitute Willard's customers as "purchasers" from respondent within the meaning of the Act.[3]

[2] 15 U. S. C. sec. 13.
[3] Ibid.

We turn our attention first to respondent's exceptions to the hearing examiner's conduct and rulings. Respondent contends that the hearing examiner erred in accepting an appointment as hearing examiner in another Commission proceeding against a purchaser charged with violation of Section 2 (f) of the Clayton Act, as amended,[4] involving some of the same transactions considered in this proceeding. Respondent argues that there can be no charge of receiving an illegal discrimination under Section 2 (f) of the Act unless the illegal discrimination was first given by the seller, and that the implied effect of the examiner's accepting the appointment and proceeding to take evidence in another hearing was that this case had already been adjudicated.

In proceedings of this nature each case must be decided on the basis of the individual case record. There is no indication that the hearing examiner considered the evidence in any other proceeding in reaching his decision in this case. We are accordingly rejecting respondent's contenton that as a result of the examiner's action the Administrative Procedure Act has been violated, that respondent has not been accorded a fair trial, or that its constitutional rights have been violated.

Respondent excepts to the hearing examiner's refusal to receive in evidence certain exhibits offered by respondent for the purpose of showing that the sales figures set forth in Commission's Exhibits 37A to 53B did not represent goods of like grade and quality. Commission's Exhibits 37A to 53B are tabulations prepared from respondent's books and records showing the prices paid and discounts received by purchasers in various trading areas during specified periods. These tabulations do not show the different items sold to the different customers. Instead, they show the price differences on total sales to customers in the same trading areas. The question raised by this exception, as well as the exception to the hearing examiner's finding that respondent's replacement parts are of like grade and quality, is whether the price differentials involved in this proceeding resulted from different prices on goods of like grade and quality. The price differentials we are considering did not arise from a difference in the grade or quality of the products sold to competing purchasers. They arose from varying discounts off base prices. Respondent's customers do not purchase respondent's products as individual items. They purchase them as part of a line designed to supply the needs of garages and others to whom the products are resold. To illustrate, under the agreement which respondent enters into with its warehouse jobbers, the purchaser is required to "give Whitaker an irrevocable initial order

[4] 15 U. S. C. sec. 15 (a).

for a representative stock of all items (quantities to be determined by Whitaker) and in all cases to be sufficient to permit Purchaser to take care of jobbing functions on all lines covered by " the contract.[5] The purchasers also agree to permit Whitaker representatives to check their stocks of respondent's products. We believe the record establishes that the products involved were of like grade and quality and we care of jobbing functions on all lines covered by" the contract.[5] The exhibits offered by respondent.

At the last hearing in this proceeding respondent moved the hearing examiner to issue a rule requiring counsel supporting the complaint to make certain elections from the evidence which would be relied upon to constitute the case against the respondent. As grounds for the motion respondent stated, in substance, that by virtue of the undue proliferation of evidence which had been offered and received over respondent's objection, including voluminous tabulations with respect to sales by respondent to customers in many different communities during many months and years, involving hundreds of commodities included in a single figure and thousands of invoices, there had been placed upon the respondent the almost insurmountable burden of analysis and proof, requiring the breakdown of thousands of invoices and cost allocations, requiring thousands of man hours of time and extensive, exorbitant and needless work, and causing respondent to be faced with the situation wherein it was impossible for it to receive a fair and impartial hearing. The hearing examiner denied the motion, stating that he did not think it was timely filed and that he did not believe there was any merit to the motion. Respondent contends that such action constituted a denial of a fair trial and violated respondent's constitutional rights of due process.

Respondent's motion was made at a hearing held on June 25, 1953. Counsel supporting the complaint rested their case on March 5, 1952. In the interval between those dates, at hearings in Kansas City, Denver, Dallas, New Orleans, Memphis, New York and Washington, respondent introduced considerable evidence in opposition to the complaint. There is no indication in the record that respondent did not know the issues it must meet during the presentation of this evidence. The evidence introduced in support of the complaint was that which counsel supporting the complaint believed necessary to establish respondent's practice of price discrimination. It does not appear that respondent's right to establish the contrary was in any way restricted. The tabulations to which respondent refers show details with respect to sales by respondent to customers in different trading areas during

[5] Commission Exhibit 4–C.

specified periods. It does not appear that respondent, by this motion, challenges the accuracy of the figures appearing in the tabulations. Also, it does not appear that respondent has advanced any defense to this proceeding which would require it to analyze or break down each of the numerous transactions represented by the tabulations. We believe the hearing examiner was justified in denying the motion and that such denial did not constitute a denial of a fair trial or violate respondent's constitutional rights of due process.

Another action of the hearing examiner to which respondent takes exception was the issuance of a rule to show cause why a hearing should be held which respondent had requested. At a subsequent hearing, held pursuant to the rule to show cause, counsel for respondent and counsel supporting the complaint entered into a stipulation on the record which obviated the necessity for holding the hearing which respondent had requested. There is no indication on the record that counsel for respondent was not entirely satisfied with this stipulation. The hearing examiner in issuing the rule to show cause was acting within his authority to regulate the course of the hearings and respondent's rights were in no way prejudiced.

Having determined that the record discloses no prejudicial procedural errors, we turn now to a consideration of the principal and controlling issues in the case which respondent claims were erroneously resolved by the hearing examiner. The price differential involved in this proceeding arose, for the most part, from respondent's practice of paying rebates or granting discounts to its customers, the amount of the rebate or discount being determined by each customer's total annual net purchases. Respondent's customers are variously classified as (1) Whitaker Warehouse Jobbers, (2) Whitaker Group Buying Jobbers, (3) Whitaker Wholesale Distributor Jobbers, and (4) Private Brand Customers, and the hearing examiner found that all of these customers were competitively engaged in the resale of respondent's replacement parts.

Respondent's products are sold and distributed on a nationwide scale to both the automotive jobbing trade and to various large oil and tire companies. These products are sold under both the Whitaker brand name and various so-called private brand names owned by its customers. In its sales respondent has been charging substantially different net purchase prices for its products, as between its jobbers and its oil and tire company trade, as well as between its various classifications of jobbers and its oil and tire trade.

Respondent's products are sold to the jobbing trade on the basis of its current published jobber list price subject to its published volume

discount applicable to such prices. This graduated and progressively higher discount is based on the dollar amount of annual purchases made by each buyer, irrespective of the dollar amount, size or number, of the individual transactions producing such aggregate dollar purchase amount by the buyer. Additionally, jobbers purchasing from respondent through a so-called group-buying device receive a higher discount rate than would normally be applicable to their individual purchase volume, due to the crediting of the annual purchase volume of all such purchasers to each such purchaser.

The hearing examiner found that respondent's volume discount on jobber list price resulted in the payment of substantially different net purchase prices for respondent's products by the numerous jobber customers of Whitaker purchasing its products for competitive resale. These price differences range from the payment of jobber list price by some jobbers, purchasing $600 or less annually, to the payment of a net purchase price 17½% below jobber list price by jobbers purchasing $3000 or more annually. In the case of group buying jobbers, individual jobbers receive as much as 20% off the jobbers' list price.

Jobber members of these buying groups send their orders for respondent's merchandise either direct to respondent or through the group office. Respondent ships the products so ordered direct to the group members. The group organizations are billed for the merchandise shipped to the members and respondent is paid by the group organizations. Rebates and discounts on such purchases are paid to the group buying organizations, which in turn distribute the net, after deducting operating expenses, to their members on the basis of each member's purchases. The hearing examiner properly found that the jobbers who purchased respondent's products through the various buying groups were in fact purchasers from respondent.

Other purchasers of respondent's products were those classified by respondent as Whitaker Wholesale Distributor Jobbers. Respondent's sales to customers so classified were made through Whitaker Warehouse Jobbers on the basis of the current jobber price list, subject to the same rebate schedule as was applicable to sales to warehouse jobbers. Wholesale distributors were appointed by respondent. They executed respondent's standard "Wholesale Distributor Contract," in which both respondent and the wholesale distributor agreed to perform and do certain things. For example, the distributor agreed to maintain an assorted stock of Whitaker products of a specified dollar value; to select a Whitaker Warehouse Jobber and to send orders for respondent's products to such jobber. Respondent agreed, among other things, to supply the distributor with catalogs, price sheets

and advertising material. The cumulative rebates were paid by respondent direct to the wholesale distributor when approved by the warehouse jobber. The contracts provided for the signature of the distributor, of respondent's district manager, and the approving signature of the warehouse jobber and of Whitaker Cable Corporation. We think the hearing examiner correctly found that the degree of control exercised by respondent over sales to the wholesale distributor accounts was such that the sales were in all essential respects sales by respondent and that the wholesale distributors were, therefore, purchasers from respondent within the meaning of the Clayton Act, as amended.[6]

At this point, it is appropriate to consider the question raised by the appeal of counsel supporting the complaint as to whether the contractual relationship between respondent and Willard Storage Battery Company was such as to constitute the Willard customers as purchasers from respondent. The hearing examiner found that the evidence does not support this position. Under the arrangement between respondent and Willard, respondent sold its products bearing the Willard brand to Willard. Shipments were made by Whitaker direct to Willard customers, but invoices covering the shipments were sent to Willard and payments were received from Willard. Willard resold the products purchased from respondent to automotive jobbers handling the Willard line. There is no evidence that respondent in any way participated in the selection of the customers who purchased the Willard line or that respondent was a party to the transactions between Willard and its customers. There is no evidence of control by the respondent of the sales by Willard to its customers, such as that which respondent exercised over the sales to Whitaker warehouse distributors. Accordingly, we reject the contention of counsel supporting the complaint that Willard's customers were purchasers from respondent within the meaning of the Clayton Act, as amended.

With reference to respondent's so-called private brand customers, the record reveals that respondent sold its products to these purchasers at jobbers list price, less varying discounts and allowances. For example, American Oil Company and Phillips Petroleum Company have received a discount of 20% off list price, plus 2% boxing allowance. Sun Oil Company received a discount of 20% off list price, plus 3% boxing allowance prior to May 24, 1949, and after that date received a discount of 28.5% on most items and 26% on the remainder of respondent's line. The Goodyear Tire & Rubber Company received

[6] *In the Matter of Champion Spark Plug Co.*, Docket No. 3977 (1953); *In the Matter of Kraft Phenix Cheese Corp.*, 25 F. T. C. 537 (1937).

a discount of 30% off list price, plus 3% battery cable boxing allowance until February 2, 1949, and after that date received discounts of 30% to 35% off list price. Willard Storage Battery Company received a discount of 30% off list price.

The hearing examiner concluded that respondent's private brand customers and respondent's jobber customers were all engaged in the resale of respondent's products as wholesalers to dealers and other purchasers, and as such were all in competition with each other in their respective trade areas in the resale of respondent's products. The hearing examiner further concluded that respondent's pricing practices had resulted in substantially lower prices being paid by some of its customers and that such lower prices enabled the favored purchaser to resell respondent's products at substantially higher profit margins than was obtainable by its non-favored purchasers.

Respondent contends that the hearing examiner's findings with respect to the effect of its price discriminations are not in accordance with or supported by the evidence in the record. The record contains a number of tabulations, prepared by members of the Commission's staff from the books and records of the respondent, with respect to respondent's sales to customers in selected trading areas. These tabulations graphically disclose the nature and extent of the price differences between competing customers which have resulted from respondent's use of the above-described pricing practices. For example during 1949, respondent sold directly to five purchasers in the New Orleans trading area, in the amounts and at the percentages off list price indicated below:

Customer	Net Purchases after deducting freight and allowances	Percent off list price
		Percent
Automotive Wholesalers	$687.03	5.34
Delta Distributors, Inc	2,857.90	11.47
Goodyear Tire and Rubber Co	1,133.32	[1] 35.02
Greiner Auto Parts Co	4,301.03	20.00
Parts Service Co	2,292.31	10.65

[1] Based on prices in effect February 1 to May 2, 1949.

Greiner Auto Parts Company purchased respondent's products through a group buying organization. Goodyear Tire and Rubber Company was a private brand purchaser. The other three purchasers were warehouse jobbers. In the Denver trading area, respondent sold directly to three warehouse jobbers and two private brand purchasers, and indirectly to one wholesale distributor, at prices ranging from 1.48% to 35.53% off list price. Testimony of purchasers in these and

other trading areas clearly shows that purchasers of respondent's products were in competition with each other in the resale of such products.

It appears that for the most part purchasers of respondent's products for resale resold at the prices suggested by respondent with the result that in a number of the trading areas there was little, if any, price competition in the resale of such products. In this connection, it is noted that respondent in its appeal brief approves of the hearing examiner's finding that the market in which respondent's customers compete is a highly competitive one, yet disapproves of his finding that the elimination of price competition because of uniformity of resale prices does not eliminate the question of injury to competition. Respondent urges that "where there is no price competition there is no competition whatever".

In rejecting respondent's contention, we note that a similar argument was advanced in the *Corn Products* case [7] where the Supreme Court said, in part:

"But it is asserted that there is no evidence that the allowances ever were reflected in the purchasers' resale prices. This argument loses sight of the statutory command. As we have said, the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect. We think that it was permissible for the Commission to infer that these discriminatory allowances were a substantial threat to competition."

The substantiality of respondent's price differences and the probability of injury to competition is clearly demonstrated by the record. From the very nature of the businesses operated by respondent's customers, it is clear that their profits are necessarily based upon an accumulation of small margins of profits on many items. The record shows that some of respondent's jobber customers handled from 15 to 75 different lines of automotive replacement parts involving thousands of different items, some of which sell for only a few cents. Witnesses testified that they invariably took advantage of the 2% cash discount offered by respondent; that such discount reduced their cost of acquisition of respondent's products and that it was essential to the operation of their businesses to take the discount. It follows inescapably that the price differences resulting from respondent's pricing practices must materially affect the business health of respondent's customers and that purchasers who paid the higher net prices were at a competitive disadvantage with the purchasers who paid the lower net prices.

[7] *Corn Products Refining Co.* v. *F. T. C.*, 324 U. S. 726, 742 (1945).

A further indication of the importance to respondent's customers of lower purchasing prices is the fact that many of them found it expedient to enter into group buying arrangements and thereby receive larger discounts and rebates from respondent and other automotive replacement parts manufacturers. We think the hearing examiner correctly found that:

"Any saving or advantage in price obtained by one competitor as against another increases his margin of profit, permits additional services to be extended to customers, the use of additional salesmen, the carrying of larger and more varied stocks, and the establishment of branch houses for expansion of the business. While price competition was more or less nonexistent, except perhaps in isolated instances, in the areas where testimony was taken, the possibility of price competition is ever present where lower prices to certain competing customers exists. In fact, one witness in New York testified that he deviated from the suggested resale prices on certain large orders. It must therefore be concluded that respondent's defense in this particular is without merit and that respondent's discrimination in price between customers competing in the resale of its products has had, and may have, the effect of substantially lessening competition among its customers and of injuring and preventing competition among them."

The hearing examiner found that respondent's defense of meeting competition under Section 2 (b) of the Clayton Act is not supported by the evidence. Respondent excepts to this finding, claiming that the evidence "demonstrates that respondent, in selling less than 1% of products competitive with its own in the market, in good faith, did only that which it could reasonably do, and that was to use a pricing practice which reflected as near as possible that practice which would render it competitive with the other more than 99% of the sellers in the market." The principal evidence in the record relating to this defense is the testimony of respondent's president, to the effect that about fifteen to eighteen years ago respondent adopted the same volume rebate plan as that used by The Electric Auto-Lite Company. There is no showing that respondent ever actually reduced its prices to meet a competitor's prices. In fact, respondent's president testified that it has always been respondent's practice to have the highest priced line in the market. Respondent's defense of meeting competition clearly has not been established.

Respondent devotes a large part of its brief to the contention that since respondent sells less than 1% of all the products competitive with its own sold in the automotive industry, it is impossible for its pricing practices to have the effect on competition which the hearing examiner

found. This argument loses sight of the fact that competitive injury between respondent and its competitors is not at issue in this proceeding and respondent's relative position in the industry is not controlling to a determination that its pricing practices may not have had the effect ascribed to them by the hearing examiner.

There is substantial evidence in the record that respondent is a major manufacturer in that particular industry segment specializing in the making and selling of automotive replacement cables and related parts. Respondent's annual sales volume for the year 1949 approximated $2,000,000 and according to the testimony of respondent's president, 40% to 50% of this volume represents sales in the after market replacement field. As between respondent's purchasers, we believe that the record as a whole establishes that the amount of business done by the respondent is substantial.

The premises considered, it appears that the initial decision of the hearing examiner is adequate and appropriate to dispose of this proceeding. Accordingly, the appeals of respondent and counsel supporting the complaint are denied.

Commissioner Mason dissents, the rationale therefor being set forth in his dissenting opinion in Docket 5723—Moog Industries, Inc.

FINAL ORDER

Counsel supporting the complaint and respondent Whitaker Cable Corporation having respectively filed on March 19, 1954, and April 30, 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 Commission having rendered its decision denying the appeals and affirming the initial decision:

It is ordered, That respondent Whitaker Cable Corporation shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order contained in said initial decision.

Commissioner Mason dissenting, the rationale therefor being set forth in his dissenting opinion in Docket 5723—Moog Industries, Inc.[8]

[8] See p. 951.

IN THE MATTER OF

E. EDELMANN & COMPANY

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

Docket 5770. Complaint, May 1, 1950—Decision, Apr. 29, 1955

Order requiring a manufacturer of automotive replacement products in Chicago, Ill., to cease discriminating in price between different customers by selling its products of like grade and quality at higher and less favorable prices to numerous small businessmen than to their larger competitors, in violation of sec. 2 (a) of the Clayton Act as amended.

Before *Mr. Frank Hier*, hearing examiner.

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

Bair, Freeman & Molinare, of Chicago, Ill., for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

The complaint in this proceeding charges that E. Edelmann & Company, respondent, in selling automotive products manufactured by it on a nationwide scale, has discriminated in price between its customers competitively engaged in the resale of those products, and that the effect thereof may be substantially to lessen competition and tend to create a monopoly in the line of commerce in which respondent and its competitors are engaged, and in the line of commerce in which respondent's and its competitors' customers are engaged, and also to injure, destroy or prevent competition with respondent, with the favored customers, or with the customers of either of them; all in violation of Section 2 (a) of the Clayton Act (15 U. S. C. 13).

Respondent's amended answer admits that it sells its products in interstate commerce, that it has competitors, that its customers compete in the resale of such products with purchasers from its competitors, that it sells its products to different purchasers at different prices, but denies the effects alleged of such sales and affirmatively alleges that any price differences at which it sold were made in good faith to meet an equally low price of a competitor.

The issues therefore are: Have respondent's price differences had the competitive effects charged, and were such price differences made in good faith to meet the equally low price of a competitor?

The facts are found as follows:

1. Respondent is an Illinois corporation, with its principal office and place of business at 2332 Logan Boulevard, Chicago, Illinois. It manufactures, sells and distributes, admittedly in interstate commerce, three classes or lines of automotive products—brass fittings, flexible fuel lines, and tube tools, categorically called the brass line; hydraulic brake parts, referred to as the brake line; and anti-freeze testers, battery testers, battery fillers, battery service kits and timing lights, known as the glass line—admittedly in competition with the manufacturers or sellers of comparable automotive products. The purchasers of these products, whether from respondent, or from respondent's competitors, are frequently in competition with each other in the resale thereof. Such products are, within each class or line, of like grade and quality.

2. In 1948, there were 10,959 automotive parts wholesalers in the United States, having an aggregate sales volume of $2,283,686,000. In 1949 respondent's sales volume was $1,600,000, approximately 45% of which was in the brass line, 2% in the brake line, and 53% in the glass line. These products reach the garage, repair shop, retail dealer and gasoline station through 3,500 to 4,000 purchasers from respondent, of which 35 or 40 were classified by respondent as warehouse distributors purchasing 20% of respondent's sales volume; 15 or 20 were classified by respondent as private-brand accounts, purchasing 12% of respondent's sales; and six were cooperative buying groups purchasing 8% of respondent's sales. Respondent also sells to fifty customers classified by it as industrial accounts, the remainder of respondent's total number of customers being automotive parts jobbers. Respondent's industrial accounts buy its brass line for use in the manufacture of lawn mowers, garden tractors, hot water heaters and other integrated products, and their dealings with respondent are not involved in this proceeding. Respondent's private-brand accounts are chemical, oil, battery and tire companies[1] buying its glass line under their own brand names rather than under the brand name of respondent. Twenty salesmen are employed by respondent in its distribution.

3. Respondent sells nationally on the basis of a list price. Respondent suggests resale prices at all levels down to the consumer, who pays the list price, and these are, so far as the record shows, uniformly adhered to. This is illustrated by the following table showing net prices to be paid for the same part, after discount from list is applied, in the three lines, during the forepart of 1949.

[1] Pure Oil, Shell Oil, Atlas, Dupont, Delco, Auto-Lite, Goodyear, Exide, Firestone, etc.

These differing prices, resulting from deduction from list price of the various trade or functional discounts, except that of the warehouse distributor in part, granted by respondent to its different distributor outlets are not attacked in this proceeding as being discriminatory, but they do form the mathematical basis, at least, of additional discounts which are so attacked. These prices were disseminated to respondent's various distributor categories on printed price sheets, and except as hereinafter outlined, were uniform to all in each category and not deviated from. The record does not reveal the pre-1949 difference between a distributor and a jobber, but in 1949 [2] when respondent increased the discount allowed a warehouse distributor from 15% to 20%, all customers, not classified by respondent as the latter, purchased on the above distributor-price basis as a jobber, the jobber's price sheet being discontinued. Respondent's 2% discount for payment in ten days was uniform to all purchasers and is likewise not involved in this proceeding.

4. In addition to the above discounts, however, respondent allowed to any purchaser from it directly, except the warehouse distributor, a quantity discount on one order of brass fittings shipped at one time to one destination, of 5% on 7,500 assorted fittings, 10% on 15,000, 15% on 25,000 (with two exceptions unimportant here), and 15% on $1,500 of assorted flexible lines. This is attacked as discriminatory.

	Part No.	List price	Dealer price	Jobber price	Distributor price	Whse. distributor price
Brass Line [1]	B-51 ¾ x ½	$4.12	$2.47	[2] $1.36	$1.24	[3] $1.16
Brake Line [4]	M. P. 3093	1.20	0.72	[2] 0.49	0.44	0.42
Glass Line [5]	70C	12.75	8.50	[6] 6.00	[6] 5.45	[6] 5.10
				6.50	5.95	5.52

[1] CXs, 38, 34, 16.
[2] To nearest cent.
[3] CX 69—15% blanket discount until mid-1949, 20% thereafter.
[4] CXs 52, 32, 27.
[5] CXs 48, 33, 22.
[6] Variance depends on whether in broken or standard pack.

5. With the approximately 40 of its customers classified by it as warehouse distributors, respondent enters into a uniform contract whereby such customers agree to carry at all times a substantial minimal stock set out in detail as to each of respondent's products, to furnish respondent with a list of those jobbers to whom it resells such products, to cooperate with respondent and aggressively promote resale, to display the products, to permit inventory checking by respondent, to instruct and train both its own salesmen and those of its customers, in consideration whereof respondent agrees to assist

[2] The evidence is largely confined to the year 1949, which was, by tacit consent of counsel, taken as a sample or test year.

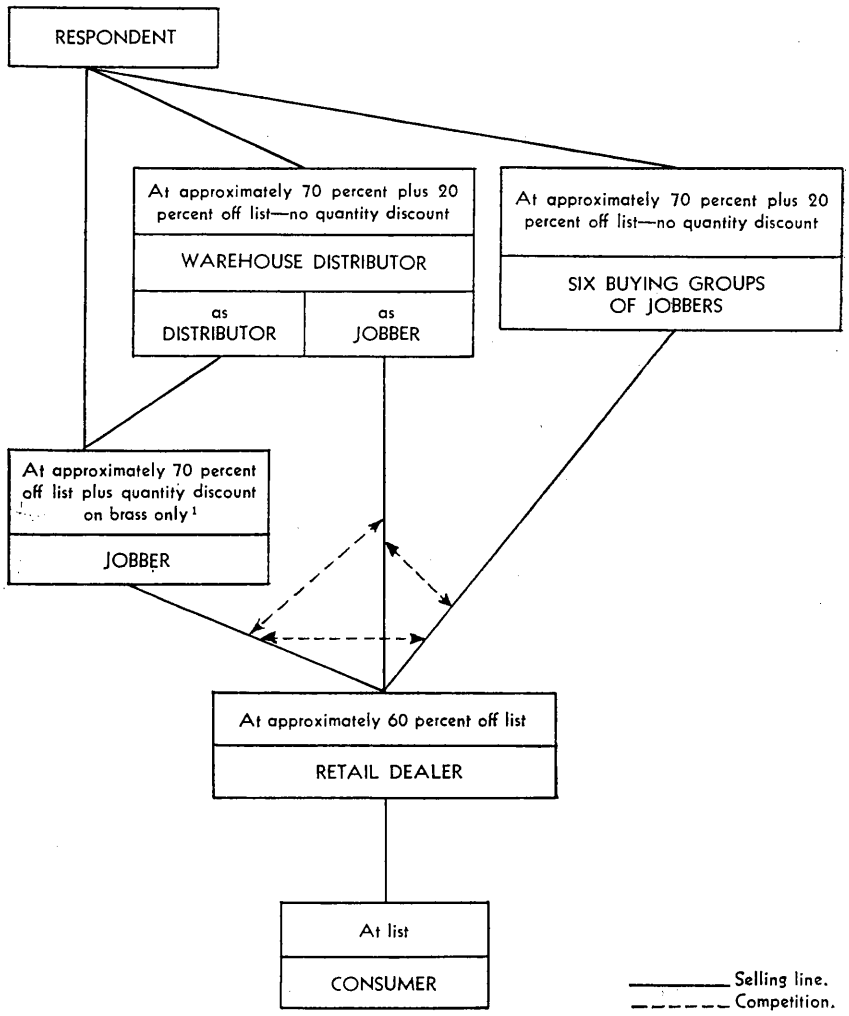
the warehouse distributor in salesmen's training, supply catalogs, price sheets and advertising matter, circularize the warehouse distributor's customers, and to grant to the warehouse distributor a 20% discount on the brass line, 15% discount on the brake line, and 15% on the glass line computed on the jobber's price; in other words, to sell at prices that are much lower than are charged jobbers. Warehouse distributors so purchasing from respondent resell not only to jobbers, but also to the customers of the latter, and in direct competition with such jobbers. There is no complaint in this proceeding of this warehousing discount on respondent's products resold to jobbers, because no competition exists—the contention being that these discounts are discriminatory and injurious when allowed on those products which the warehouse distributor resells in competition with the jobbers to the retailer because the warehouse distributor's cost of acquisition is 15%, later 20%, lower than that of the jobber, regardless of whether the jobber bought from the warehouse distributor or from respondent directly, which he may do.[3]

6. These warehouse distributors' discounts are also extended by respondent to six cooperative buying groups. The latter are aggregations of jobbers, many of whom, prior to such aggregation, bought from respondent or its nearest warehouse distributor at the jobber's price. After formation into a buying group, the individual member jobber sends his periodic orders either to respondent directly, with duplicate to the group headquarters, or to the latter for forwarding to respondent. Merchandise so ordered is shipped by respondent directly to the individual jobber member, with billing for the same directed to the group office. Monthly settlements are made between respondent and the group office for the aggregate purchases of all members, and each of the latter settles monthly with the group office for its own individual purchases so made. All of these group-buyer transactions are at respondent's jobber's prices. The warehouse rebate is made later. At least one of these buying groups maintains neither warehouse nor stock of respondent's products—the record is silent as to the other five. The warehouse distributor's discounts on the aggregate group purchases are paid by respondent to group headquarters, which in turn distributes the net, after deduction of operating expenses, to the jobber-members in proportion to their individual purchases. In reality, this group set-up is a bookkeeping device for obtaining, collecting and remitting the warehouse discount received from respondent on purchases made by jobber-members. The latter,

[3] A jobber or distributor may buy direct from respondent, but, if he does so, must pay the freight on orders of 100 lbs. or less, whereas if he buys from the warehouse distributor he generally does not have to pay freight.

in fact, purchase their requirements directly from respondent, receiving close to a 20% better price than if they had bought simply as a lone jobber, instead of as a member of the group. The functional classification as warehouse distributor is basically artificial. This discount is also attacked as discriminatory.

7. Visually presented, respondent's distributive and discount pattern, exclusive of industrial and private brand accounts, since early in 1949, is as follows:



[1] The record is not clear whether the quantity discount on the brass line only can be obtained by a jobber buying from a warehouse distributor, and, for the purposes of this proceeding, it is assumed he cannot, and that such discount can be had only on purchases by a jobber direct from respondent. In any event a jobber able to purchase brass in such quantities does compete on resale thereof with a jobber unable so to qualify.

8. The fourth and last discount, or lower net price, contended to be discriminatory was granted by respondent on sales of its glass line to private-brand accounts who purchased on a contract order for a specific quantity as a negotiated price which, in some instances, was as much as 33⅓% less than the price charged respondent's other customers for comparable products. There is some dispute as to the difference in the product sold to private-brand accounts and that sold under respondent's brand to its other customers, but so far as the Hearing Examiner can ascertain from the record, the only differences were the brand name or mark, stamped or lithographed, on the product, and the printed insert in the hydrometer, showing how much of a particular antifreeze, as opposed to a number of antifreezes, was in the radiator solution and how much was needed to prevent solidification. The floats are interchangeable, and apparently there is no basic functional difference. The finding is that these products were of substantially like grade and quality.

9. The foregoing facts found as to respondent, its business background, selling and pricing practices, discounts, both functional and allegedly discriminatory are without substantial dispute on the record. There remain the questions of whether respondent's customers, favored and unfavored pricewise on the four discounts described above, are in competition with each other in the resale of respondent's products, and whether such discounts have any of the three statutorily prescribed effects on either the original sale level, or the resale level.

10. There is substantial evidence in the record that the automotive parts jobber buying from respondent, or its warehouse distributor, competes over a local radius of from fifteen to one hundred miles with every other automotive parts jobber located within such radius, in the attempt to resell respondent's products or those of respondent's competitors; and that they also compete with respondent's warehouse distributors, including the jobbers forming buying groups, for the business of the automotive retail dealer. This evidence comes from not only witnesses produced by counsel for the complaint, but from respondent's witnesses and respondent's president, and applies to all three of respondent's lines. There is also substantial evidence that the members of the six buying groups, classified by respondent as warehouse distributors and receiving the 20% warehouse discount as such, compete with jobbers purchasing from respondent either directly or indirectly, at the higher jobber price, in the attempt to resell to dealers.

11. The competitive picture of the private-brand accounts, vis-a-vis respondent's distributors on respondent's glass line, is not developed and is consequently inconclusive. The record does not

show whether these private-brand accounts, mostly tire and oil companies, resell their individually-branded glass line to their franchised retail stations, or at what price, whether they require such stations, as a consideration of the franchise, to use only such individually branded merchandise, whether respondent's private-brand accounts offer such merchandise generally or restrict it to retail stations handling, exclusively or otherwise, their tire or oil products. None of the officials of these private-brand accounts was called as a witness. If respondent's private-brand accounts distribute respondent's glass line so branded only to their own dealers, and have no competition in doing so, as respondent's president testified, and the latter are required to buy same, either as a franchise restriction, or as a matter of supplier compulsion, then the lower price or discount described in paragraph 8 above would have no significance here, because competition would be aborted or foreclosed regardless of price—respondent's distributors could not sell the glass line branded with respondent's own mark in any event to these retail dealers.

12. The other evidence is sketchy. One jobber, a member of a buying group, testified that gasoline stations were both potential and actual customers of respondent's jobbers, of which he was one, that he did a "very likable size business" with them, that such market has not been falling off. Whether this business, though, was with independent or franchised stations does not appear. Another witness, chief executive of another buying group, stated that "controlled" stations were both a potential and actual market for respondent's glass line, but that he was not concerned with sales thereof, as it was a slow seasonal line. Yet at another point, he stated that his group had never been able to supply the "closed" or "controlled" stations of Standard Oil, Shell, Texaco, Pure Oil, and others, much of respondent's glass line, because of franchise control and apparently not because of the price factor. Apparently, in the first statement, the witness was speaking of independent stations.

13. A jobber-member of the same group testified to encountering competition from these private brand accounts, apparently on respondent's glass line, to the extent that they were, in his opinion, about to put the jobber out of business. Again it does not appear whether this stems from the lower price at which these accounts purchased, or whether it was due to franchise or other control over the stations by the private-brand accounts. Another jobber in Indiana testified he sold respondent's regular glass line to service stations of Texaco and Sun Oil, as well as to independents. Respondent's president testified that, contrary to the exception that this private-brand merchandise

would take away the jobber's business in the standard merchandise, "the idea of this kit becoming standard equipment for the major oil companies made these independent garages and service stations familiar with what we might call standard equipment * * * and it was through the advertising we got and have been getting from the major oil companies that the jobber, I feel, has been able to do a very fine business on battery service kits and our volume has constantly increased on service kits, and was pretty much a dead dodo until we started building these kits for the major oil companies." "If we had been unable to furnish these kits with medallions and have them specialized for these companies, the companies themselves would not have been interested in purchasing the kit, because these major oil companies desire everything that they sell to their stations to be a part of their color scheme and part of their merchandising plan." The Examiner construes this latter testimony to mean that there was no competition, price or otherwise, between the private brand account and respondent's jobbers for the business of the gasoline station or tire store "franchised," "closed," or "controlled" by the private-brand account, that such market was never open to respondent or its distributor.

14. On the whole, the finding is that the evidence is insufficient and too insubstantial to show competition existing between these private-brand accounts and respondent's other customers on respondent's glass line for the business therein of the retail outlets of the private-brand accounts, and that there is no evidence to show that the latter sell, or attempt to sell independent stations or retailers. So far as the discount described in paragraph 8 above is alleged to be discriminatory and in violation of Section 2 (a), the proof therefor has failed to sustain the charge.

15. The next question of whether the differing costs of acquisition of respondent's products by its customers competing in the resale thereof has an adverse competitive effect presents the first of the two most serious issues in this proceeding, which has resulted in much conflicting evidence. For the affirmative, there has been shown by charts [4] the net cost of acquisition taken from respondent's sales records, after discounts applied, of all of respondent's customers located in various trading areas in Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, North and South Carolina and Tennessee, which net costs vary from 78.1% to 98% of the jobber price, Without deduction of the uniform 2% discount for cash, the variance would be approximately from 80% to 100%. The chart shows purchasers in the same trading area buying as low as 80%, with others

[4] CXs 145–E, 146, 147.

paying full price or slightly under it. It is also evident from the testimony of jobbers that each takes regular advantage as a matter of financial necessity of the 2% cash discount for prompt payment extended uniformly to all by respondent and not under attack herein, that failure to do so would seriously impair, if not wipe out profit margin.

16. It is apparent that automotive parts jobbers operate on a very small profit margin, and most of them extend the same cash discount they receive to their purchasers; however, the latter is based on a mark-up of acquisition cost, so that if they receive a cash discount of 2% of invoice, upon resale that same percentage may amount to nearly 3% of the cost of acquisition. One jobber in business since 1918 in northern Mississippi, with six branches, testified that his cost of doing business was 23.78% of sales and his gross margin was 27.52% of sales, leaving a net margin of profit (presumably before income tax) of 3.74% of sales, and that if he were to grant a 2% cash discount to his customers and fail to take advantage of the same discount from his suppliers, his loss would be (computed) 3.9% of sales. Obviously he would not remain in business long. Another testified that his profit margin in 1949 was but 4.2% of sales; that he had to take advantage of every cash discount granted by his suppliers; that if he takes it and gives it on resale with a 33⅓% mark-up, he automatically loses 1%; that if he does not take it but does give it upon resale, he loses 5% on the same mark-up basis. Another jobber, in business for thirty years as such, stated that any jobber who can't avail himself of the cash discount is in a very serious condition.

17. Obviously, if 2% discount means the difference between profit and no profit, or accounts for half of the jobber profit, the three discounts remaining under attack in this case, ranging from 5% to 20%, spell the difference between commercial life or death. The testimony also is to the effect that a jobber's profit is made up of an accumulation of small margins of profit on many items. Even the small jobbers handle 30 to 75 lines of products, the larger ones, 100 or more lines, consisting, in the aggregate, of thousands of items. Many of respondent's products are slow-moving but essential items in every jobber's stock. Every jobber must stock them. Although the turnover is slow, and the net profit therefrom small, such profit contributes to the aggregate, which determines whether the jobber prospers, becomes static, retrogresses or fails. With net margins of profit as small as they are, the discounts described in paragraphs 4, 5 and 6, *supra*, even though on only one of many lines handled, contribute directly and powerfully to the recipient jobber's ability to compete.

18. Since respondent's products are slow-moving, purchases by jobbers thereof are small in comparison to their total purchases of all products, and it is contended by respondent that they are so insignificant in relation to the jobber's total business that no adverse effect on his competition can be inferred. This contention has been disposed of by the Supreme Court in the *Morton Salt* case,[5] which held "there are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect a merchant from competitive injury attributable to discriminatory prices on any and all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery store consists of many comparatively small articles, there is no possible way, effectively, to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store." There is nothing in this record suggesting that any of respondent's products are more insignificant to the automotive jobber than is salt to a grocer.[6]

19. The above constitutes substantially all of the evidence adduced to show the alleged injury to competition—no commercial corpse, bloody or otherwise, was produced by counsel for the complaint, apparently in reliance on the *Morton Salt* case, cited *supra*, which holds "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 those 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."

In any event, respondent's counsel filed no motion to dismiss for failure to establish a *prima facie* case at the close of the affirmative evidence. The discounts in this proceeding are equally or more substantial than those attacked in the *Morton Salt* case, and the evidence as to the commercial importance of small price percentages goes much further than that case apparently requires. The finding, therefore, is that the evidence received above supports a reasonable inference of the competitive injury alleged.

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[5] 334 U. S. 37.

[6] In *Standard Brands, Inc.* (30 F. T. C. 1117), 1/4¢ in the broker's cost of a 1-pound loaf of bread was held substantial because the profit margin of even the largest producer was but 3/10¢ per pound loaf of bread; and in the glucose cases (324 U. S. 726 and 746), 1/8¢ per pound in glucose was held substantial to the purchaser making candy therefrom. Furthermore, these products were not bought for resale as such.

20. The opposing evidence adduced by respondent consists mainly of the testimony of three of its jobbers and one of its warehouse distributors. The latter testified at considerable length of the many distributive and promotional services he performed to the benefit of respondent as well as himself, in addition to those required by the warehouse distributor contract—missionary work through his salesmen; loaning money to garage operators and servicemen to set up as jobbers; salesmen's meetings for jobbers and their salesmen; legal advice; bookkeeping and auditing services; paying transportation on jobber orders; and credit risk. To him, this fully justified the extra 20% discount which he received on all purchases from respondent. Approximately 45% of these purchases are resold to jobbers in his distributor function; 55% are jobbed by him to retailers. There is nothing in the record showing whether this extra discount exactly or approximately paid for all the services he detailed. He did state that without it, he could not continue as a warehouse distributor, but must revert to a jobbing basis. There is no holding that, if that extra discount did no more than so compensate him, it was justified, even though that has been suggested [7] where a price-favored purchaser performs a dual function. In any event, such question is probably academic here, because the extra discount on products which he resells as a warehouse distributor is not here attacked—it is that discount on products which he resells to dealers in competition with the jobbers to whom he sells as a warehouse distributor that is claimed to be illegal.

21. On this point, respondent's president testified that respondent did not know what products were resold by the warehouse distributor in the two different channels, and respondent's counsel contends that respondent cannot ascertain this. However, two of respondent's principal competitors, both larger than respondent, allow a warehousing discount only on those purchases which are resold in that capacity to jobbers, and reports of such sales must be made to the supplier by the warehouse distributor.[8] Thus, it apparently can be done, and, to avoid discrimination, should be done.[9]

22. The warehouse distributor witness further testified that of his $8,500.00 purchases from respondent in 1949, 55% was resold by him to dealers at a sales expense of 9% of the invoice, and 45% to jobbers at a sales expense of 3¼% of invoice, and that he was preparing a

[7] Functional Discounts under the Robinson-Patman Act: The Standard Oil Litigation; Gold & McGrath, Harvard Law Review, Vol. 67 No. 2 Dec. 1953.

[8] RXs 5, 6, 7; Tr. 1550–2, 1579–83.

[9] "Determining price by use" doctrine: see *Sherwin-Williams Co.*, 36 F. T. C. 25; *Standard Oil Co. v. F. T. C.*, 43 F. T. C. 56, 340 U. S. 23; see also "Tyranny of Labels," Shniderman, 60 Harvard Law Review 571 at 600–3.

breakdown of his business operations in his two functions, and would supply same to respondent within thirty days. If supplied, it was not entered in evidence. This witness also testified his net operating profit in 1949 was 1.22% before taxes, 0.74% after taxes, of sales, but that he did not know whether his percentage of profit was higher in his warehousing function or on his jobbing function; that he performed no warehousing function when reselling to dealers. He also testified that he has told his jobber customers of his extra discount over theirs from respondent, but had had no complaints from them. His testimony was given under the impression that a successful termination of this proceeding in favor of proponent counsel would deprive him of 45% of his business, would take away his warehouse-distributor status with respondent, deprive him of his merchandising discount, limit his traveling, revert him to jobber status and compel him to establish branch houses and compete with more jobbers.

23. The three jobbers of respondent who testified, collectively corroborated the warehouse distributor's testimony briefed above, stressing that they can and do freely buy from the warehouse distributor or from respondent directly at the same price, but that purchasing from the former has the advantage of prepaid freight on less than 100 pounds, free phone calls, speed of delivery, and relief from having capital tied up in an inventory of slow-moving items. They all resold to retail dealers such as service stations, garages, car and implement dealers, and competed for such business with each other, with the warehouse distributor, and with jobbers reselling similar products of competitors of respondent. They all knew the warehouse distributor bought at a lower price than they did, but did not know how much lower, and all stated that they did not care; that the warehouse distributor's competition with them had not injured them in any way; that competition at their level was keen, and had been for years; that they knew of no lessening therein, nor any corraling of business by one or a few of their competitors. All of them have grown in size over a decade or more. One of them purchased two-thirds of his requirements of respondent's products from respondent and one-third from the warehouse distributor; another splits his purchases about evenly; the third did not know. All agreed that when the warehouse distributor resold to a dealer in competition with them, none of the warehouseman's services, enumerated above, inured to their benefit.

24. All three of these witnesses, however, were and had been buying at lower than jobber prices other lines of automotive products, whether classed as warehouse distributors or under some other name,

and all were then testifying under the impression that the complaint in this proceeding endangered, not only those preferential set-ups, but also their ability to buy at jobber prices from respondent or its warehouse distributor. One of them, in fact, testified that 50% of his total purchases were on such preferential set-up, and that 80% of his sales were as a jobber. This direct interest in the outcome of this proceeding compels the giving of less weight to their testimony than if it were wholly objective. In addition, all stated that cost of product acquisition was the most important factor in their profit margin,[10] and one insisted he was entitled to the same price as respondent's warehouse distributor from whom he bought, although he did not know exactly what that net price was. And another stated he would be much better off profitwise if he were able to buy at the same price as the warehouse distributor. All of them, in testifying that the competition of the warehouse distributor did not injure them, explained that that was because the former did not cut respondent's suggested resale prices.[11] The record as a whole shows that the latter were universally adhered to, voluntarily, at all levels of distribution.

25. This brings up the contention of respondent's counsel that where preferential discounts are not used by the recipient to cut prices on resale, there can be no competitive injury—a contention which has been expressly rejected by the Supreme Court in *Corn Products Refining Co.* vs. *F. T. C.*, 324 U. S. 726 at 742:

"It was stipulated and the Commission found, that the allowances in question were 'sufficient,' in and when reflected in whole or substantial part in resale prices, to attract business to the favored purchasers away from their competitors, 'or to force competitors to resell * * * at a substantially reduced profit, or to refrain from reselling.' But, it is asserted here, that there is no evidence that the allowances ever were reflected in the purchasers' resale prices. This argument loses sight of the statutory command * * *. We think it was permissible for the Commission to infer that these discriminatory allowances were a substantial threat to competition."

Furthermore, price is but one competitive weapon—there are other

[10] While a number of respondent's customers testified that respondent's unique method of packaging brass fittings in transparent cellophane bags, a given number to each bag, made display, handling, inventory, checking and sales much easier and was an important influence on buying from respondent rather than from its competitors, the evidence is practically unanimous that cost of product acquisition is still the most important factor in profit margin.

[11] This *"idee fixe"* that competition is fair, has not been and cannot be injured if discounts are not used to cut resale prices, characterizes all of respondent's defense and the evidence in support thereof.

forms of competition, such as additional service to customers, greater and more varied stocking, branch houses, additional salesmen, the institution or expansion of which depends directly on operating profit margin, a major factor in which, on this record, is cost of merchandise purchased.

26. In connection also with the "Incipiency doctrine" [12] in evaluating the conflicting testimony as to competitive effect on the secondary and lower levels, there must be considered a possible change in economic cycle, from the inflationary to the deflationary, from the "seller's market" to the "Buyer's market." Seller's pricing practices are a matter of less import in the seller's market, but where the buyer's profit margin is so perilously thin and so directly affected as the unanimous evidence in this record shows, any change in the national economic picture to where the dollar hardens, orders shrink, inventories become a fear instead of a boast, the preferential discounts present here necessarily must loom larger and more important to the non-recipients.

27. While it may be true that the larger a jobber becomes in sales volume, the more his overhead increases and the lower his percentage profit per dollar of sales becomes, and that some jobbers voluntarily cease expanding after reaching what they consider a breaking point in their particular operation, the statutory command and its legislative intent are obviously equality of opportunity, at the seller-buyer level—what the buyer does with that opportunity thereafter is no concern of present law, and therefore is immaterial.

28. Lastly, the testimony of three of more than 3,000 jobbers, that they have grown and prospered in spite of a competitive price disadvantage, does not, to the Hearing Examiner, outweigh a basic economic factor present throughout the entire jobbing line (3,000 or more here), namely, the extremely narrow profit margin and its immediate sensitivity to cost of product acquisition. The latter is an objective fact, the former subjective. The latter may well have been influenced by the fact that these three jobber witnesses were receiving preferential price treatment on other lines of automotive products. To illustrate by analogy: if an objective test for malnutrition reveals that malnutrition exists in a large segment of population, such as all the inhabitants of a town, country, or other area, the assertion of good health and general euphoria by several such inhabitants cannot overcome the objective determination.

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[12] Kelley: Functional Discounts Under the Robinson-Patman Act, 40 Calif. Law Review 526, at 533.

29. Another line of evidence introduced by respondent, based on United States census figures, shows that the number of wholesalers of automotive parts, accessories, tires and equipment increased from 6,982 in 1939 to 12,423 in 1948, and that their aggregate sales similarly increased from 611 million in 1939 to 2,641 million in 1948. This, it is contended, shows that competition and business in the wholesale line has increased instead of substantially lessening. But the cause thereof is not shown. It is just as reasonable to infer that this overall growth was due to increase in automotive registrations, to the war, when replacement parts were frequently not up to demand, or to the inflationary forces at work during the years in question, as to infer, as contended, that it was due to respondent's pricing system and those of its competitors. Furthermore, this is an overall picture, including the myriad products not sold by respondent, and stasis or retrogression in brass fittings, hydraulic brake parts, and battery testers, might easily be over-compensated by pronounced expansion in ignition points, valves, brake linings or tires and tubes.

30. Also in the record is a table for 1948, compiled from United States census figures, as follows:

	Number of establishments	Sales entire year $1,000	Number of establishments percent of total	Business percent of total
Automotive parts—accessories total	10,959	2,283,686		
5 Million and over	11	146,612	0.102	6.41
2 to 5 million	68	210,841	.62	9.23
1 to 2 million	190	255,087	1.733	11.17
One-half to 1 million	573	386,998	5.22	16.92
300,000 to 500,000	941	355,709	8.59	15.58
200,000 to 300,000	1,134	275,749	10.34	12.08
100,000 to 200,000	2,778	392,547	25.35	17.19
50,000 to 100,000	2,598	187,171	23.65	8.28
Under 50,000	2,666	70,972	24.35	3.1

This shows that nearly half of the wholesalers in 1948 were small-sized jobbers (those doing an annual volume of $100,000 or less), from which it is contended that commercial life and profit among the unfavored price-wise must be healthy, or there would not be so many of them. But there is no such necessary causal relationship. There are degrees of injury, substantial or otherwise, which, while hurting, may not kill, and there is nothing in the record to show how these 48% of small jobbers were faring in 1948—whether they were healthy or moribund commercially, whether there were other more than compensating factors in their operation, which overcame price discriminations against them by this respondent or by other suppliers.

Furthermore, respondent sells only 3 of the many lines of automotive products involved. It will also be noted that the 48% of wholesalers did only 11.38% of the sales volume.

31. On the issue of competitive effect, the *Minneapolis-Honeywell Regulator Company* case, 191 F. 2d 786, is strongly relied on by counsel for respondent as dispositive of that issue in the negative. There is, however, a basic factual difference between this proceeding and that. Here we have a product bought for resale as is; there the product purchased became a part of an assembled final product, and the Court found no causal relationship between the cost of the one and the price of the other, saying,

"It may be true that if the manufacturers were generally selling controls as such, a differential of two or three dollars in the price they paid for them would have a substantial effect on the price obtained. Under such circumstances a finding that a competitive advantage in purchase price paid would necessarily give rise to a competitive advantage in sale price would perhaps be justified."

There is also, running through the opinion, a philosophy that unless a price advantage is used to lower the resale price and attract business thereby away from non-favored competitors, no competitive injury can result—a theory which seems, to this Hearing Examiner, directly contrary to the opinions in the *Morton Salt* case and the *Corn Products Refining Co.* case, *supra.*

32. The conclusion and finding is that respondent's preferential warehousing and quantity discounts, ranging from 5% to 20% as described in paragraphs 4, 5 and 6, are discriminatory in that it is "reasonably probable" as well as "reasonably possible" that they substantially lessen competition at the secondary level, and injure, destroy or prevent competition at that level. No other conclusion is possible, unless the *Morton Salt* case is to be ignored. The degree of control exercised by the respondent over its jobbers, by calling on them through salesmen, selling to them directly, by missionary work with them, etc., as appears above, was such as to constitute them purchasers even when they bought through a warehouse distributor.[13]

33. As for "tendency to create a monopoly," the doctrinaire approach regards this as an inevitable *sequitur* of any substantial lessening of competition. However, in the setting of this case, the Hearing Examiner construes this phrase to mean that the probable result of the discriminatory pricing practice found will be such a concentration of economic power in the price-favored as will enable them to affect

[13] *Champion Spark Plug Co.*, D. 3977; *Elizabeth Arden* v. *F. T. C.*, 156 F. 2d 123, 135; *Kraft Phenix Cheese Corp.*, 25 F. T. C. 537; *Luxor Ltd.*, 31 F. T. C. 658.

substantially the market in which they sell, if not to dominate and dictate the commercial acts of the unfavored. The record here fails to establish this. The challenged pricing practices have been followed for a substantial number of years, but there is no substantial evidence of such concentration in the price-favored at the secondary level.

34. As to competitive injury at the primary level—that is, respondent and its competitors—the record is somewhat less than fragmentary. It does appear that in one instance, when respondent artificially classified a newly formed buying group as a warehouse distributor and extended its 20% warehouse discount, one or two jobber members, formerly buying from other sources than respondent as unaffiliated jobbers, began thereafter to buy through the group from respondent. But there is evidence that others did not, and that other group members have switched from respondent to other sources of supply. Whether the preferential discount had any causal connection is not shown. On the contrary, the record shows that respondent's two principal competitors have similar price-preference set-ups, and that any switching of suppliers has been general among the three. Also, the record shows that respondent ranks below these two and one other competitor in size, and that its rate of growth has not been as high as the remainder of the industry. Respondent's true share of the market is not shown. Respondent claims this to be only .07% on the basis of national sales volume of all automotive products being $2,283,686,000, and respondent's sales volume being only $1,600,000. But respondent does not compete except on the three lines which it sells, and there are no figures in the record to show national sales volume on these products. At least one of respondent's competitors did not start in business until 1946, but has grown steadily since then. The finding is, therefore, that there is no substantial evidence of a tendency toward monopoly in any line, and no substantial evidence of a substantial lessening of competition or of injury, destruction or prevention of competition between respondent and its competitors.

35. Respondent, while denying the competitive effects charged to result from its admitted price differentials and those just above found to exist, asserts by answer that, if so found, they were made in good faith to meet the equally low prices of competitors within the meaning of Section 2 (b) of the Clayton Act, and are therefore justified.[14] In support thereof, it has named thirty-two of its competitors, and introduced the 1949 price lists of twelve thereof. Of these, the testi-

[14] This defense is confined largely to respondent's brass line. It contends that its glass line is so unique that competition plays no part in determining price or discount.

mony is unequivocal that respondent regards the Weatherhead Company and the Imperial Brass Mfg. Company as its principal and only really important competitors, because they both sell nation-wide, and sell full lines, as does respondent. Respondent's other competitors are fringe fighters, so to speak, operating in a few localities, offering for sale only the fast-moving and high-profit items in brass, and while they do offer stiff competition in certain limited areas and on certain items, and some of them have taken business away from respondent, the latter has generally refused to meet their quotations. None of this group have a warehouse discount such as respondent's; most of them sell on a net price basis, and of those who do give quantity discounts, the latter are not set out in detail, or, with one or two exceptions, are not comparable in either percentage or quantity with those of respondent.[15] A comparison of respondent's jobber price (disregarding any of the discounts under attack in this proceeding) with the net price of seven of these competitors for the same brass fitting shows the latter to be generally lower than respondent's. But, as stated, this does not reveal a true comparison because it ignores respondent's special discounts.

36. Much of respondent's testimony has to do with the important missionary and distributive service which respondent's warehouse distributors perform in reselling to jobbers, probably offered as a justification for their 20% warehouse discount, but this evidence is immaterial here, because that discount is not under attack herein when given on products resold to jobbers. It is unquestioned on this record that none of these services are performed by the warehouse distributor when it resells to dealers in competition with its jobber customers.

37. A substantial portion of the remaining testimony, largely from three of respondent's salesmen, indicates that respondent is in keen and even bitter competition with both Weatherhead and Imperial nationally; that in 1949 Weatherhead's net prices, after all discounts, were generally higher than respondent's for the same items; that Imperial's were about the same, on some items being higher, on others being lower. It is obvious, of course, that no seller can exactly meet the differing prices of two or more competitors, and respondent did not attempt to do so. Its attempt herein was apparently to fix its prices on a level where it could retain most of its business, and would be enabled to obtain more.

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[15] An equally low price of a competitor means for the same quantity (*F. T. C. v. Standard Brands*, 189 Fed. 510).

38. Counsel for the complaint contend that this affirmative defense does not comply with the statute (Section 2 (b)) for a number of reasons:

1. That under the *Staley* decision [16] the price "made in good faith to meet an equally low price of a competitor" means meeting a special price of an individual competitor in a given locality and not a generalized effort to "remain competitive," exactly meeting nothing;

2. That under the *Standard Oil* decision [17] respondent has failed to show that the competitive prices it claimed to have met were, in addition to being equally low, lawful as well;

3. That respondent's officials, as reasonably prudent business men, knew or should have known that competitors' discounts or resultant prices were discriminatory and unlawful.

39. Before discussion and disposition of these contentions, some background must be related. When respondent rested its defense, counsel in support of the complaint moved to strike out all evidence tending to support the affirmative defense, on several grounds, one of which was respondent's failure to introduce any evidence showing that competitors' prices, claimed to have been met, were lawful and non-discriminatory prices, a failure which respondent's counsel admitted. On this ground, the Hearing Examiner granted the motion, which ruling was appealed interlocutorily by respondent, and about a year later reversed by the Commission, but without cited reasons. At the same time, the Commission granted a subsequently-filed motion to reopen the case for the purpose of taking testimony intended to show that respondent neither knew, nor should have known, that the prices of its competitors which it met were unlawful, and that the respondent acted as would a reasonable and prudent business man. This evidence was taken. These Commission rulings do not state that the "lawfulness" essential of the *Standard Oil* case is required or is not required to be shown. Nor do they state that if respondent did not know, or, as a reasonably prudent business man, should not have known them to be unlawful, such constituted a defense. The Hearing Examiner construes them to mean that lawfulness of competitors' prices is not, *per se*, an indispensable prerequisite to establishing a defense under Section 2 (b); that it will be sufficient, whether lawful or unlawful, if respondent did not know their legal status, or should not have known it. The Hearing Examiner cannot assume that the

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[16] 324 U. S. 746 at 752. "But Section 2 (b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers * * * The Act thus places emphasis on individual competitive situations, rather than on a general system of competition."

[17] 340 U. S. 231.

Commission would do a futile thing—order evidence taken on its new and different standard of knowledge, actual or imputed, if such evidence did not, with other requirements, constitute a defense.

40. Taking up the contentions of counsel in support of the complaint in reverse order, the Hearing Examiner finds against the third. Proponent counsel argue that respondent's officials, as reasonably prudent men, knew, or should have known, that Imperial's volume discount was unlawful and discriminatory, because they knew that respondent's was; that respondent admittedly had no cost justification therefor; that they knew Imperial's cost for material, labor and sales, although not its overhead, and that these were approximately the same as respondent's; that Imperial is located in the same city as respondent and has roughly the same type of distribution; that they knew of no cost justification by Imperial for the latter's cumulative volume discount; and that such a volume discount cannot be justified in any event. To say that Respondent, in 1949, knew its own discounts to be unlawful, when complaint herein was not issued until a year later, and respondent is still contending its discounts to be lawful, and then to build on this basic fallacy the argument that it must therefore have known that a competitor with partially parallel costs must be charging similarly unlawful prices, not cost-justified because respondent's were not, is to pile inference upon inference. This contention is rejected.

41. The second contention, that respondent must show the substantive legality of every competitive price it claims to have met, highlights the administrative confusion and enforcement futility which such a rigid test would cause. Manifestly very few, if any, respondents could finance the undertaking of showing that every competitive price schedule was lawful in all respects. Contrariwise, the Commission could hardly prove that each such price was unlawful. No matter where the burden lay, its assumption would involve trying many cases instead of one; records would be gargantuan, and clarity wellnigh impossible. Perhaps it was this dilemma which induced the Commission to modify such a substantive and rigid test, to the one of what the respondent knew, or should have known, as a reasonably prudent man, of the legality of its competitors' price structure. Respondent's principal officials all testified that they had no reason to suspect illegality in their competitors' pricing practices; that quantity, cumulative volume, and warehousing discounts had long obtained, and, in fact, were traditional with the industry; and that they knew of no legal challenges thereto, either private or governmental, until the instant proceeding was brought against respond-

ent. There is nothing in the record to indicate otherwise—nothing substantial to indicate that they knew, or should have known—their competitors' prices were illegal. The second contention is accordingly rejected.

42. The first contention, that respondent has not met the Staley decision test, is sustained. Respondent admittedly did not exactly meet the different prices of its two principal competitors, nor those of any other competitor. Obviously it could not. This the Staley case holds respondent must do. Respondent's warehousing discount, under attack here, is the 20% on those products bought and resold, not as a warehouseman, but as a jobber to a dealer, in competition with the jobbers who purchase from the warehouseman. Both of respondent's principal competitors, Weatherhead and Imperial, allow a comparable discount only on products bought and resold as a warehouseman. Hence there was no discount of competitors for respondent to meet. Furthermore, a comparison of net prices of respondent and Imperial on the same 332 brass fittings discloses respondent's prices to be lower on 217, higher on 7, and identical on 109.[18] A similar net price comparison on 285 comparable items between respondent and Weatherhead discloses that respondent's price was lower on 260, higher on 6, and identical on 19 items.[19] There is here no "meeting of the equally low price" of its competitor. The statute does not permit undercutting, prevalent here; it permits only a meeting, incidental here. The same is generally true of respondent's quantity discounts. Weatherhead grants no quantity discount. Imperial grants a cumulative volume discount, whereas respondent's is not cumulative, but only on a single order. Imperial's volume discount goes from 3% to 14%; respondent's, from 5% to 15%. Furthermore, of 175 of respondent's customers located in 80 cities and 12 states, according to their annual purchase volume, none could have qualified for Imperial's volume discount of 10% or more, and only 14 could have obtained Imperial's 5% discount.

43. Respondent's pricing system is a continuing one, related, not to existing competition, but to future competition; not geared to individual competitive offers or localized price-cutting; but is a nation-wide system designed to come close enough to the pricing systems of its two principal competitors to allow it to retain most of its customers, and perhaps gain a few more. This is condemned as defensively ineffective by the Staley case, where there was at least an exact meeting, not present here. The finding is, therefore, that respondent has not, in

[18] See Proposed Findings of counsel in support of the complaint, Appendix A.
[19] Appendix B of Proposed Findings by counsel in support of the complaint.

good faith, met the equally low, whether lawful or not, price of its competitors.

44. Respondent contends that the *Staley* case decision, applied here, will eventuate in making Section 2 (b) a dead letter to any respondent such as this one, which entered albeit feebly at first, into an industry, all of whose then powerful members sold on the same or similar pricing system, i. e., quantity, volume and distributive (warehouse) discounts, and which respondent contends, even today, it cannot do otherwise without commercial death or moribundity, and which cannot exactly meet all of the equally low prices of various competitors. Respondent contends, therefore, for a re-assessment or re-interpretation of Section 2 (b) in the light of its economic position, with a view of either limiting the Staley decision, differentiating it from the instant case, or creating an exception to its application here. If such is to come, it must come from above. The Hearing Examiner has not received any judicial accolade of expertise, either personal or categorical, which gives him this freedom. Unable to differentiate the basic facts in that case from those in this proceeding, he is bound to follow the holding in that case.

45. The above opinion and findings are based on a consideration of the entire record in the case, the testimony and exhibits filed with the Commission, the pleadings, briefs, proposed findings and conclusions submitted by all counsel.

46. It is concluded that respondent has violated the provisions of Section 2 (a) of the Clayton Act as amended (15 U. S. C. 13).

ORDER

It is ordered, That respondent E. Edelmann & Company, a corporation,[20] 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 direct or indirect purchaser at net prices higher than the net prices charged any other purchaser, direct or indirect, competing in fact in the resale and distribution of said products.

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[20] 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 the Commission.

OPINION OF THE COMMISSION

By SECREST, Commissioner:

The initial decision filed by the hearing examiner held that respondent had discriminated in price among purchasers of its automotive parts and equipment in violation of Section 2 (a) of the Clayton Act, as amended. The order contained in the initial decision directs the respondent to cease and desist from discriminating in price in connection with the sale of its products in commerce for replacement purposes by selling to any direct or indirect purchaser at net prices higher than the net prices charged any other purchasers, direct or indirect, competing in fact in the resale and distribution of such merchandise. Counsel for the respondent and counsel supporting the complaint have filed separate appeals from that decision. In its appeal, the respondent contends that the rulings that respondent's pricing practices have been in violation of law are erroneous in their entirety. The appeal of counsel supporting the complaint is limited in scope and urges that the decision below should have ruled that certain evidence presented by the respondent in the course of its defense was legally insufficient for reasons additional to those stated in the initial decision.

Located in Chicago, the respondent manufactures and nationally distributes three classes of automotive products and equipment which have been referred to throughout the course of the proceedings below as its brass, glass, and brake lines. Its merchandise consists of certain automotive replacement parts testing equipment and tools, and, except for such products as are sold to oil companies and other private brand and industrial accounts, its products reach the garages, repair shops, gasoline stations, and other retail dealers through 3500 to 4000 purchasers buying for resale into those channels. Respondent's purchasers are automotive parts jobbers or wholesalers and, in addition to respondent's equipment, they handle a large number of other articles likewise required for the maintenance and operation of automobiles.

Since sometime prior to the middle of 1949, jobbers acquiring respondent's equipment for resale purchased on the basis of a distributor's net price. The price differentials which were found in the initial decision to constitute unlawful discriminations were those under which a discount of 20% from the distributor's net price was allowed on purchases of respondent's brass line and 15% on purchases of respondent's glass and brake lines, these being accorded to approximately 40 jobber customers who were buying under the terms of a warehouse distributor's contract. The foregoing wholesale distributor's discounts from the jobber's price were likewise ex-

tended by respondent to six cooperative buying groups on their purchases. The other price differentiations held discriminatory and unlawful in the initial decision were those incident to a quantity discount schedule providing for discounts to jobbers of 5%, 10% and 15%, offered in the price lists on single orders for brass fittings totaling $7,500, $15,000 and $25,000; and those incident to a discount of 15% on single orders totaling $15,000 on assorted flexible lines shipped to one destination at one time.

With the approximately 40 customers classified by respondent as warehouse distributors and receiving its warehouse distributor discounts, the respondent enters into a uniform contract whereby they agree to carry at all times a substantial minimal stock as prescribed in the contract. The warehouse distributors further agree, among other things, to aggressively promote the sale of the manufacturer's merchandise, to distribute respondent's catalogues to jobbers, and to use their best efforts to train jobbers' salesmen. Jobbers have their choice of purchasing from respondent directly or may purchase from a warehouse distributor and, in either case, pay the respondent's distributor's net price unless eligible for receipt of quantity or volume discounts. Unchallenged, in these connections, is the holding below that the relations and contacts maintained by respondent with jobbers purchasing its merchandise through warehouse distributors have been such as to constitute such jobbers as "purchasers" within the meaning of the Act.

Purchasers buying under the warehouse distributor's contract sell respondent's merchandise not only to jobbers, but also to garages, filling stations and other outlets at respondent's suggested dealer's price in direct competition with other jobbers marketing the Edelmann merchandise into these channels. No challenge was directed in the proceeding below to the warehouse distributors' discount on products resold to jobbers. Challenged, however, as discriminatory were respondent's sales of merchandise at lower prices to warehousers when such merchandise was sold in competition with jobbers who did not receive the greater discounts.

That the respondent has sold its merchandise in commerce at lower prices reflecting the previously described warehouse distributor's discounts and certain of the quantity discounts to purchasers who were competing in the resale of respondent's products with other purchasers paying higher prices for respondent's merchandise is undisputed. The initial decision found that there was reasonable probability that respondent's pricing practices substantially lessened competition at the secondary level; that is, among purchasers compet-

ing in the resale of respondent's line of merchandise, and that the effect of respondent's discriminations may be to injure, destroy or prevent competition between purchasers receiving the benefits of the discriminations and those to whom they were not accorded. This holding is excepted to by the respondent as are various related conclusions of fact and law cited as reasons for its adoption.

All purchasers of respondent's merchandise, whether direct or indirect, have been offered a cash discount of 2%—10 days, and the record shows that jobbers invariably avail themselves of this cash discount. During the course of the proceedings below, certain of the witnesses testified that their margins of net profit were small and that failure on their part to take advantage of this cash discount would seriously impair or wipe out their profit margins. Additionally, witnesses testified generally that the cost of product acquisition was the most important factor in determining their profit margin. On this and other bases the hearing examiner correctly found that respondent's discounts ranging from 5% to 20% contribute directly and powerfully to recipient jobbers' ability to compete in the resale of respondent's merchandise.[21]

In urging that we conclude instead that the differences in profit derived by competing purchasers are small or infinitesimal and can only have negligible competitive effects, respondent states that the net amounts returned to members of cooperative buying groups after the expenses of the central buying offices are deducted are inconsequential and therefore that the matter is legally disposable under the maxim *de minimis non curat lex*. Documentary evidence contained in the record relating to one buying group indicates, however, that in 1949 it returned to members approximately 85% of the rebates received by it from manufacturers on member purchasers. In that year the volume discounts or other rebates accorded by the respondent to the 18 members of the group in the aggregate exceeded $7,500.

On this point too, the respondent cites the testimony, among others, of a St. Louis jobber receiving its warehouse distributor discounts. This warehouse jobber reported that his net profit, after taxes, was 0.74% on sales and an analysis appears in the brief in support of contentions that this customer's favored position profitwise with com-

[21] Testimony in the record on this point reveals that respondent's discounts were deemed essential by favored purchasers to their continued operation. One favored purchaser testified, in effect, that if his preferential discounts were discontinued it would necessitate a change in his prices, compel him to cut his forces in half, prevent him from adequately covering his territory and would result in his business being "45 percent smaller than it is at the present time". Unfavored purchasers testified that with additional discounts they could stock more items and generally compete more effectively with their favored counterparts.

peting jobbers might represent only $3.00 annually. These matters notwithstanding, his gross margin on that portion of Edelmann products resold by him to dealers competitively with other jobbers would exceed by approximately $1,000 the gross profit which could be derived by jobbers making similar aggregate sales from stocks acquired at respondent's regular distributor's net prices. That costs of product acquisition is an important factor in determining profit margins is obvious. These and other facts contained in the record [22] preclude our adopting the view that only infinitesimal profit differences have resulted from respondent's price discrimination.

The additional circumstance that many of the articles included in the respondent's lines are slow moving and that volume of business on its products may be small in comparison to jobbers' volume on other types of automotive equipment does not mean that the lower prices afford only negligible competitive advantages and incentives for recipients. To secure his share of the business, a jobber of respondent's line must, as do his rivals, canvass the garages and other outlets for products in this category. That substantial sales expense attends the keen competition which exists in this and other respects is evidenced by the small net profit margins which prevail. Nor is the probability of competitive injury refuted by the circumstance that the record does not show that the lower profit margins resulting from respondent's higher prices to some of its customers may have, in instances, resulted in financial failure. There is less likelihood of the "commercial corpse" of bygone days in an era and in a market of virtual price uniformity at the retail level.[23] Even assuming a commercial corpus delicti, it would be sheer conjecture as to who caused the demise where, as here, dealers handle many lines of products and sometimes thousands of individual items. That Congress intended to protect a merchant from competitive injury attributable to discriminatory prices on any and all goods purchased by him irrespective of whether

[22] Additional corroboration for views that substantial differences in gross profit and, presumably, net profit margins have attended the respondent's discriminations among competing purchasers is contained in an exhibit representing a sales analysis for the year 1949 relating to merchandise bought directly from the respondent by purchasers in specified markets in nine Southern States. In Charlotte, North Carolina, for example, where the respondent was selling to ten customers, only two received its preferential discounts. One of the these received $138.40 on purchases of $1,453, and the other received $279.93 on purchases aggregating $1,515.31. Among the local purchasers to whom discounts were denied, one purchased $1,474.21 worth of respondent's products, another $758.60 and a third, $577.21. Of seven customers located in New Orleans, the respective purchases of two of the four customers who received no discounts were $555.79 and $639.91; but one of their competitors was accorded discounts of $153.41 on purchases of $830.46 and another $165.28 on transactions totalling $1,108.97.

[23] There is little evidence of retail price competition in the record due to respondent's jobbers' adherence to its suggested resale prices.

the particular merchandise involved constitutes a major or minor portion of his stock has already been decided.[24]

This principle is nowise affected by the fact that respondent is not one of our country's largest producers of automotive parts or that the recipients of its discounts do not appear to be concerns of great size and resources engaged in distributing the products on a national basis. Additionally, respondent asserts that conclusions that only negligible competitive effects can stem from its pricing practices are corroborated by the fact that its volume of business accounts for only 0.07% of the total volume of business in the automotive replacement parts and equipment field. Evidence bearing on its relative position in the industry is material to a consideration of the effects of respondent's preferential discounts upon competing manufacturers and manifestly was considered in connection with the holding below that no showing was made of substantial lessening of competition between respondent and its competitors. Its relevance on that issue does not mean, however, that it is important as among its purchasers in evaluating respondent's pricing practices.

While there are two, perhaps three, other manufacturers of automotive brass fittings which exceed respondent in volume of business, the record clearly discloses that respondent's lines are well established in the automotive field. Furthermore, its volume of business is substantial. In 1949, the company's aggregate volume was $1,600,000 and its products were handled, moreover, by almost 40% of the established automotive jobbers in this country. In these circumstances, respondent's relative position among manufacturers in the automotive replacement field is not controlling in appraising the probable competitive effects of its pricing practices upon its purchasers.

Respondent's products are customarily resold by purchasers at its suggested resale prices. On the authority of the Supreme Court's decision in *Corn Products Refining Company* v. *Federal Trade Commission*,[25] the hearing examiner properly rejected respondent's contention that, where preferential discounts are not used by recipients to cut prices on resale, competitive injury cannot be present. Stating

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[24] *Federal Trade Commission* v. *Morton Salt Company*, 334 U. S. 37.

[25] 324 U. S. 726. The holding of the Court pertinent in this respect (742) reads: "But it is asserted that these discriminations did not violate paragraph 2 (a), since there was not the requisite effect on competition.

"It was stipulated, and the Commission found, that the allowances in question were 'sufficient,' if and when reflected in whole or in substantial part in resale prices, to attract business to the favored purchasers away from their competitors, 'or to force [their] competitors to resell * * * at a substantially reduced profit, or to refrain from reselling.' But it is asserted that there is no evidence that the allowances ever were reflected in the purchasers' resale prices * * *. We think that it was permissible for the Commission to infer that these discriminatory allowances were a substantial threat to competition."

that price competition is but one competitive weapon, the initial decision points to other forms of competition which are commercially prevalent, including additional services to customers, greater and more varied stocks, more branch houses, and additional salesmen. Obviously, the institution or expansion of these services and facilities depends directly on operating profit margin as determined in major part by cost of acquisition of merchandise. As observed in the initial decision also, the preferential discounts would be even greater threats to the competitive positions of non-recipients in the event of marked adverse changes in the economic cycle. In our view, the examiner's findings in these regards have adequate support in the record and are otherwise in accord with the greater weight of the evidence.

Another contention advanced by respondent is that the hearing examiner erred in failing to find that the discounts given its wholesalers and others selling in competition with jobbers were justified for the reason that the extra discounts compensated them for promotional services performed. It is true that purchasers receiving larger discounts in instances have rendered bookkeeping service and other promotional services for jobbers and others and even on occasion loaned money to garage operators and service men to set them up as jobbers. These measures inured to the benefit of the affected customers and indirectly to respondent. It is clear, however, that the services performed by recipients of the discounts in the course of sales of their own merchandise to dealers did not justify the discounts. The hearing examiner, accordingly, did not err in failing to adopt the respondent's suggested finding.

Nor did he err in declining to find expressly that substantial savings are afforded to the respondent when selling to unincorporated buying groups, even though certain testimony indicates that these groups afford their members merchandising aid in selling respondent's products. Had the respondent undertaken to present competent evidence, including cost data, directed to showing that the discounts to the favored customers were justified by savings in the cost of sale, delivery or manufacture resulting from the different methods or quantities in which its products were to those purchasers delivered or sold, the matters to which the suggested finding relates would have been relevant and material. There was no such undertaking by the respondent, however, and the rejection of this finding was proper.

We turn now to consideration of respondent's contentions that the hearing examiner erred in failing to find that respondent's price dif-

ferentials were made in good faith to meet the equally low price of a competitor.[26]

Although there are various concerns selling limited lines of parts which at times are highly competitive with the respondent in certain areas, the Weatherhead Company and Imperial Brass Manufacturing Company are respondent's only major competitors selling brass on a national basis. Their competition with the respondent is keen and respondent apparently gave consideration to their prices when formulating its own. On the brass line, the evidence shows that respondent's net prices, after discounts, were generally lower than those of these two companies although there were items on which the reverse prevailed and also a considerable number of instances of virtual price identity, particularly as between the respondent and Imperial.

Respondent objects to the finding in the initial decision that these two national competitors allow discounts to warehousemen only on products bought and resold by their purchasers as warehousemen, hence, that no discount could exist for respondent to meet since its discounts found discriminatory were those given to warehousemen as jobbers selling in competition with other jobbers. We believe that the hearing examiner's findings in this and the related findings with reference to the price disparity existing between respondent's products and those of its competitors were essentially correct and that the matters cited by the respondent in the foregoing and related connections do not materially affect the soundness of the hearing examiner's analysis of the pricing situation which existed.

In its pricing practices respondent obviously did not exactly meet the prices of its two principal competitors nor, insofar as this record shows, of any other competitor, and it is evident that respondent's over-all pattern of pricing embraced departures from the systems of all its major competitors. Furthermore, as found in the initial decision, respondent's pricing system is a continuing one related not to existing competition but to future competition. It is not geared to individual competitive offers or localized price cutting, but instead represents a nationwide system designed to come close enough to its two principal competitors' pricing systems to allow it to retain most of its customers and gain perhaps a few more. The exemption provided under Section 2 (b) places emphasis, however, on individual competitive situations rather than upon a general system of competi-

[26] 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 * * *."

tion. *F. T. C.* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746. The respondent also contends, in effect, that under the Act and applicable decisions of the courts, a nationwide system of formulating prices to meet competition generally should be regarded as outside the purview of Section 2 (b) only if the prices of the competitor or competitors theretofore being met were shown to be a part of an illegal pricing system. No sound legal precedent supports respondent's position in that regard, and we, as did the hearing examiner, reject this view. The instant proceeding, moreover, does not present a situation in which the price of a competitor or competitors was being met inasmuch as the respondent's prices were generally lower than those of its major competitors.

Respondent also contends that preferential discounts constitute unlawful price differentiations only if shown to be tainted by a purpose of unreasonably restraining trade or attempting to destroy competition, and that its defense shows its pricing practices were not so tainted inasmuch as they were based on a desire to meet competitors' prices on a nationwide basis. If any of the adverse competitive effects which are proscribed are present, however, a seller may violate the Act without guilty knowledge or intent and an intent to injure or destroy competition is not a necessary element under its provisions. In the circumstances here, we share the hearing examiner's views that respondent has not sustained the burden imposed under Section 2 (b) of the Act of showing that its lower prices were made "to meet an equally low price of a competitor."

A graph appearing in the initial decision states that the respondent's discount pattern on some merchandise contemplates sales by jobbers and others to retail dealers at approximately 60% "off" list. This was manifestly inadvertent and, as asserted by the respondent in objecting thereto, dealers pay approximately 60% of list for the brass and flexible tube lines and buy the glass line at 33⅓% off consumer list. Respondent's exceptions in this regard should be deemed granted. Our consideration of the other specific exceptions interposed by the respondent to various findings as to the facts and conclusions contained in the initial decision convinces us that the determinations objected to are free from prejudicial error; and similarly without merit are the respondent's contentions that the hearing examiner erred in failing to adopt certain of its suggested findings and conclusions to which additional specific exceptions relate.

We turn now to respondent's contentions of error in connection with three of the hearing examiner's rulings excluding certain evidence offered by the respondent. Under the first of such rulings, the hearing

examiner refused to permit respondent to introduce testimony which was intended to show that if respondent were unable (1) to give discounts to wholesale distributors and buying groups additional to those granted to its jobbers, and (2) to give special discounts to jobbers, it would experience a substantial loss of business unless respondent's competitors were precluded from affording lower prices to purchasers in those connections. We think this testimony was properly excluded by the hearing examiner as irrelevant and immaterial to the issues of this proceeding. There is no valid reason, as argued by respondent under the appeal, for making the hearing examiner's order inoperative until all of respondent's competitors are put under similar restraints. To advance the argument is to answer it—obviously this Commission could not function under such restrictive and unwielding procedures. Orders would be forever pending, and unlawful industry practices rarely, if ever, corrected. Furthermore, implicit in respondent's position on this score, is the erroneous assumption that the respondent could be validly forbidden under the order from, among other things, granting discounts in connection with the sale of its merchandise actually redistributed by its wholesalers to jobbers. The order does not go this far.

The second challenged exclusionary ruling has as its basis the hearing examiner's refusal to receive evidence relating to surveys of the automotive replacement wholesaling business conducted by certain national associations. Among these proffered matters was evidence tending to show that the average percentages of cost of doing business represented by cost of merchandise for the firms reporting was 67.159% for wholesalers doing an annual business of less than $250,000, 68.41% for those in volume brackets between that and a half-million dollars annually, and 70.95% for wholesalers with annual volume exceeding $500,000. The surveys also purported to show that net profits, after taxes, for the reporting members of the foregoing groups, were 8.6%, 5.79% and 3.06% respectively, and respondent urges that these and other matters included in the surveys show that the respondent's pricing practices have neither resulted in competitive injury nor tended to create a monopoly in purchasers receiving the benefits of respondent's discrimination.

In his memorandum which ruled on these matters, the hearing examiner set forth reasons and basis for his conclusions that such evidence was hearsay and was not shown to be reliable, probative and substantial. He held that the statutory requirement for cross examination could not possibly be met without the production of the original returns, unrestricted as to the names and addresses from which the

surveys were made up and the people who made them up, as witnesses, so that a "full and true disclosure of the facts," methods used, validity of results obtained, representative character, etc. could be had to determine the "reliability, probative value and substantiality" required by statute. The circumstance that Section 7 (c) of the Administrative Procedure Act provides that any oral or documentary evidence may be received and that administrative agencies shall, as a matter of policy, provide for the exclusion of irrelevant and unduly repetitious evidence does not mean that it is mandatory that all documentary and oral evidence other than that in the irrelevant and unduly repetitious categories be received. Moreover, the materiality of these industry studies as a basis for evaluating the effects of the respondent's individual pricing practices between and among its competing customers is not shown. Everything considered, the matters urged by the respondent in support of this aspect of its appeal do not support conclusions that the ruling below was unduly restrictive or prejudicial or represented an improper exercise of the discretion which the Commission vests in its hearing examiners. Respondent's exception is accordingly denied.

Under respondent's third offer of proof were respondent's analyses of certain census data which assertedly showed, among other things, that a greater portion of available purchaser dollars was obtained by "small" automotive equipment wholesalers than was obtained by "small" wholesalers throughout other industries. We have reviewed these matters and must reject respondent's contentions that their exclusion was prejudicial or erroneous. As held by the hearing examiner, these proffered matters were not material to the issues of this case.

Respondent excepts also to the form of the order to cease and desist contained in the initial decision, contending in this connection that such order contravenes the Commission's directions to its hearing examiners calling for specificity in drafting of prohibitions, and that it exceeds the scope of the statute. The order necessarily deals with matters in the general sphere of competitive pricing matters and its provisions are reasonably related to the unlawful general course of conduct found to have been engaged in by the respondent. The order's scope, accordingly, cannot be regarded as exceeding the bounds of the statute and we are of the view also that its provisions are sufficiently specific. These exceptions by the respondent to the order, therefore, are not being granted.

Rather than too broad in application, we think instead that the order is unduly restrictive in two respects. Under the terms of its preamble, the order's succeeding proscriptions are directed to discriminations

between competing purchasers made in connection with the sale in commerce of the respondent's automotive products "for replacement purposes." In the initial decision, however, additionally found to constitute unlawful discriminations, were certain price differences resulting from the respondent's discounts among and between competing wholesalers on purchases of its testing equipment and the effect of the quoted phrase may be to exclude inadvertently the latter category of discriminations from the application of the order. Its modification by striking the phrase "for replacement purposes" is, therefore, warranted. The Commission's orders to cease and desist naming corporations as parties customarily are directed also to their respective "officers, representatives, agents and employees." The hearing examiner expressed the opinion that the latter's inclusion would be legally invalid here. His conclusion in that regard was erroneous, however,[27] and the phrase was improperly excluded.[28] Modification of the order in this respect is likewise warranted.

We turn now to the appeal of counsel supporting the complaint. As previously noted, the hearing examiner held that the respondent's pricing practices essentially represented a continuing discriminatory pricing system under which its lower prices were not equally low but generally lower than major competitors' prices. Citing the *Staley* case and holding, in effect, that the status of such competitors' prices as lawful or unlawful was immaterial, he ruled that the respondent's lower prices did not represent ones made to meet an equally low price or prices of a competitor or competitors within the meaning of the statute. The appeal of counsel supporting the complaint contends that the hearing examiner erred (1) in declining to hold the defense additionally insufficient because no affirmative showing was made in the course of presenting the defense that the competitive prices claimed by the respondent to have been met were, in fact, lawful prices, and (2) in ruling that the record does not support conclusions that the respondent knew or should have known that the lower prices of its rival were illegal. Counsel supporting the complaint interprets the examiner's position on these matters to be that the respondent has successfully carried the burden contemplated under Section 2 (b) of offering necessary proof relative to the lawfulness of the competitive prices upon which respondent's pricing system was patterned. Inasmuch as the defense was held insufficient on the other ground referred to above, decision on the appeal of counsel supporting the complaint

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[27] *Anchor Serum Co.* v. *F. T. C.*, 217 F. 2d 867 (C. A. 7, 1954).

[28] In the matter of *Hato Company, Inc., et al.* Docket No. 5807 (Decided Oct. 6, 1952).

is not necessary to a determination of the merits of the instant proceeding.

We accordingly are denying the appeal of counsel supporting the complaint, and are granting the respondent's appeal in the respect hereinbefore noted, but such appeal is otherwise denied. With the order to cease and desist modified in the manner previously discussed, the initial decision is affirmed.

Chairman Howrey filed a separate concurring opinion.[29]

FINAL ORDER

Counsel supporting the complaint and respondent E. Edelmann & Company, having respectively filed on May 28, 1954, and June 1, 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 Commission having rendered its decision denying the appeal of counsel supporting the complaint and granting in part and denying in part the appeal of respondent and affirming the initial decision as modified:

It is ordered, That the order contained in the initial decision be, and it hereby is, modified (1) by adding the words "and its officers, representatives, agents and employees" immediately following the words "E. Edelmann & Company, a corporation," and (2) by striking from such order the words "for replacement purposes".

It is further ordered, That the respondent E. Edelmann & Company 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 contained in the initial decision as modified:

A separate concurring opinion will be filed by Chairman Howrey.

[29] See p. 951 of the Moog case.