IN THE MATTER OF

# P. J. BURK PACKING CO., INC., ET AL.

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

*Docket 7202. Complaint, July 22, 1958—Decision, Feb. 12, 1959*

Consent order requiring two associated canners of salmon and other seafood products in Bellingham, Wash., to cease violating the brokerage provisions of the Clayton Act (Sec. 2(c)) by reducing their selling prices to certain direct buyers in the approximate amount of the brokerage fees which would have been due to brokers had they negotiated the sales.

## COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly described, have been and are now violating the provisions of subsection (c) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent P. J. Burk Packing Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington.

Respondent Burk Canning Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington.

Respondents P. J. Burk Packing Co., Inc., and Burk Canning Co., Inc., hereinafter sometimes referred to as corporate respondents, share common officers and both have their offices and principal places of business located at Port of Bellingham Municipal Dock, in the City of Bellingham, State of Washington. Corporate respondent Burk Canning Co., Inc., is a wholly owned subsidiary of corporate respondent P. J. Burk Packing Co., Inc., and leases its plant facilities from its said parent corporation. The business address of said corporate respondents is Post Office Box 660, Bellingham, Wash.

Respondent John G. Mitchell, hereinafter sometimes referred to as individual respondent, is president of both of said corporate respondents and directs and controls their affairs and policies, including their sales and distribution policies. The business ad-

dress of individual respondent is the same as that of corporate respondents.

The said corporate and individual respondents are engaged in the business of packing, distributing and selling canned salmon and other seafood products. Their volume of business is substantial.

PAR. 2. Respondents, and each of them, now sell and distribute, and for many years last past have sold and distributed, their canned salmon and other seafood products in commerce to customers located in the several states of the United States. They sell and distribute their products through primary brokers, generally located in Seattle, Washington, and also, upon occasion, through field brokers located in the various marketing areas, to the buyers for resale located throughout the various States of the United States. Said respondents also sell directly to some buyers for resale from time to time, without utilizing the services of any broker.

When selling through primary brokers said respondents pay these brokers for their services a commission or brokerage fee, generally in the amount of 5% of the net selling price of the merchandise sold. When selling through field brokers without utilizing the service of a primary broker, respondents pay a commission or brokerage fee in amounts which vary from time to time in relation to the net selling price of the merchandise sold.

PAR. 3. In the course and conduct of their business over the past several years, but more particularly from July 1, 1954, up to the present, respondents, and each of them, have sold and distributed, and now sell and distribute, their canned salmon and other seafood products in commerce, as "commerce" is defined in the aforesaid Clayton Act as amended to buyers for resale located in the several States of the United States other than the State of Washington in which respondents are located. Respondents, and each of them, transport or cause such canned salmon and other seafood products, when sold, to be transported from their place of business in the State of Washington to such buyers for resale located in various other States of the United States. There has been at all times mentioned herein a continuous course of trade in commerce in said canned salmon and other seafood products across state lines between said respondents and the respective buyers for resale of such canned salmon and other seafood products.

PAR. 4. In the course and conduct of their business, as aforesaid, respondents, and each of them, have made substantial sales of canned salmon and other seafood products to certain direct buyers for resale without utilizing the services of either primary brokers or field brokers, and in many such instances have reduced their selling prices to such direct buyers in the approximate amount of the brokerage fees or commissions which would otherwise have been paid to such brokers had they negotiated such sales for respondents.

PAR. 5. In making payments of commission, brokerage fees, or discounts or allowances in lieu thereof as alleged and described above, respondents, and each of them, in the course and conduct of their business in commerce, as hereinabove described, have paid, granted, or allowed, and are now paying, granting, or allowing something of value as a commission, brokerage or other compensation, or an allowance or discount in lieu thereof, in connection with the sale and distribution of their canned salmon and other seafood products to buyers who were and are purchasing for their own account for resale, or to agents or intermediaries who were and are, in fact, acting for or in behalf of, or who were and are subject to the direct or indirect control of such buyers.

PAR. 6. The acts and practices of respondents, and each of them, as above alleged and described, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13).

*Mr. Cecil G. Miles* for the Commission.

*Mr. Herald A. O'Neill*, of Seattle, Wash., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

This proceeding involves alleged violations of §2(c) of the Clayton Act, as amended (U.S.C. Title 15, §13), it being charged in the complaint, in substance, that the respondents have paid, granted, or allowed and are now paying, granting, or allowing something of value as a commission, brokerage, or other compensation or allowance or discount in lieu thereof in connection with the sale and distribution of their canned salmon and other seafood products to buyers purchasing for their own account for resale or to agents or intermediaries acting for or in behalf of or subject to the direct or indirect control of such buyers.

On December 12, 1958, there was submitted to the undersigned

hearing examiner of the Commission for his consideration and approval an "Agreement Containing Consent Order to Cease and Desist," which had been entered into by and between respondents and the attorneys for both parties, under date of December 1, 1958, subject to the approval of the Bureau of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with §3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondent P. J. Burk Packing Co., Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at Port of Bellingham Municipal Dock, Post Office Box 660, in the city of Bellingham, State of Washington.

Respondent Burk Canning Co., Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at Port of Bellingham Municipal Dock, Post Office Box 660, in the city of Bellingham, State of Washington.

Respondent John G. Mitchell is an individual and is president of corporate respondents P. J. Burk Packing Co., Inc., and Burk Canning Co., Inc., with his office and principal place of business located at Port of Bellingham Municipal Dock, Post Office Box 660, in the city of Bellingham, State of Washington.

2. Pursuant to the provisions of §2(c) of the Clayton Act, as amended (U.S.C. Title 15, §13), the Federal Trade Commission on July 22, 1958, issued its complaint in this proceeding against respondents, and a true copy was thereafter duly served on respondents.

3. Respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

4. This agreement disposes of all of this proceeding as to all parties.

5. Respondents waive:

(a) Any further procedural steps before the hearing examiner and the Commission;

(b) The making of findings of fact or conclusions of law; and

(c) All of the rights they may have to challenge or contest

the validity of the order to cease and desist entered in accordance with this agreement.

6. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

7. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

8. This agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

9. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondents. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order to Cease and Desist," the latter is hereby approved, accepted and order filed, the same not to become a part of the record herein, however, unless and until it becomes part of the decision of the Commission. The hearing examiner finds from the complaint and the said "Agreement Containing Consent Order to Cease and Desist" that the Commission has jurisdiction of the subject matter of this proceeding and of each of the respondents herein; that the complaint states a legal cause for complaint under the provisions of §2(c) of the Clayton Act, as amended (U.S.C., Title 15, §13), against each of the respondents both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the just disposition of all of the issues in this proceeding as to all of the parties hereto; and that said order therefore should be, and hereby is, entered as follows:

ORDER

*It is ordered,* That respondents P. J. Burk Packing Co., Inc., a corporation, and its officers, Burk Canning Co., Inc., a corporation, and its officers; and John G. Mitchell, individually and as an officer of respondent corporations, and respondents' officers, agents, representatives, or employees, directly or through any corporate or other device, in connection with the sale of seafood products

in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Paying, granting, or allowing, directly or indirectly, to any buyer, or to anyone acting for or in behalf of, or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any sale of seafood products to such buyer for his own account.

## DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 12th day of February 1959, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

# CARL H. ANDERSON TRADING AS E. H. HAMLIN ASSOCIATES

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

*Docket 7204. Complaint, July 23, 1958—Decision, Feb. 12, 1959*

Consent order requiring a primary broker of seafood products in Seattle, Wash., to cease violating the brokerage section of the Clayton Act (Sec. 2(c)) by making grants or allowances in lieu of brokerage to certain buyers or their agents consisting of price concessions or rebates, a part or all of which were not charged back to the packer-principals but were taken from his brokerage or that of his field brokers.

## COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has been and is now violating the provisions of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Carl H. Anderson is an individual trading as E. H. Hamlin Associates, with his office and principal place of business located at 218 Mutual Life Building, Seattle, Wash. Respondent is sole proprietor of the business and formulates, directs, and controls the acts and practices, including the sales policies, of E. H. Hamlin Associates.

PAR. 2. Respondent is now, and for the past several years has been engaged in the business of selling and distributing seafood products such as canned salmon, crab, halibut, clams, and tuna, all of which are hereinafter referred to as seafood products. Respondent distributes as a primary broker, negotiating sales for the account of a number of packer-principals located in various areas within and beyond the continental United States, including the Puget Sound and Columbia River areas, and the Territory of Alaska.

PAR. 3. Respondent sells and distributes said seafood products generally through field brokers located in various marketing areas to buyers located throughout the United States. Respondent has

directly or indirectly caused such seafood products, when sold, to be transported from the canning plants or warehouses of their respective packer-principals to buyers thereof located in various states of the United States other than the State or territory of origin of said seafood products. Thus respondent has been for the past several years and is now engaged in a continuous course of trade in commerce, as "commerce" is defined in the aforesaid Clayton Act.

PAR. 4. Respondent is usually compensated for his services in negotiating the sale and distribution of such seafood products by deducting a brokerage or commission from the proceeds in his account of sale to his packer-principals. The brokerage or commission deducted by respondent is customarily five percent of the net selling price of the merchandise sold. The field brokers employed are usually compensated for their services by receiving from respondent, as a primary broker, a brokerage or commission in the amount of 2½ percent of the net selling price of the merchandise.

PAR. 5. Respondent, in the course and conduct of his business in commerce as a primary broker for various packer-principals, has made grants or allowances in substantial amounts in lieu of brokerage to certain buyers of said seafood products, or agents of said buyers, by affording differentials or concessions in price, or by making rebates or other payments, a part or all of which were not charged back to the various packer-principals but were, on the contrary, taken from all or a portion of the brokerage or commission earnings of respondent and of his field brokers.

Among and including, but not necessarily limited to, the methods or means employed by respondent in so doing are the following:

(a) Selling to certain buyers at net prices which were less than those accounted for to his packer-principals;

(b) Granting to certain buyers or the buyers' agents deductions from price by way of allowances, rebates, or other payments, a part or all of which were not charged back to his packer-principals.

(c) Making payments or allowances as or in lieu of brokerage to at least one agent of certain buyers, which payments came from respondent's brokerage earnings and were not charged back to his packer-principals.

PAR. 6. The acts and practices of respondent as hereinabove alleged and described constitute violations of the provisions of

subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Sec. 13).

*Mr. Cecil G. Miles* for the Commission.
*Mr. B. F. Reno, Jr.*, of Seattle, Wash., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

This proceeding, involves alleged violations of §2(c) of the Clayton Act, as amended (U.S.C., Title 15, §13), it being charged in the complaint, in substance, that the respondent named therein, in the course and conduct of his business in commerce as a primary broker selling and distributing seafood products such as canned salmon, crab, halibut, clams, and tuna, for various packer-principals, has made grants or allowances in substantial amounts in lieu of brokerage to certain buyers of said seafood products, or to agents of said buyers, by affording differentials or concessions in price, or by making rebates or other payments, a part or all of which were not charged back to the packer-principals, but were taken from all or a portion of the brokerage or commission earnings of respondent and his field brokers.

On December 12, 1958, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval an "Agreement Containing Consent Order to Cease and Desist," which had been entered into by and between respondent and the attorneys for both parties, under date of December 2, 1958, subject to the approval of the Bureau of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with §3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondent Carl H. Anderson is an individual trading as E. H. Hamlin Associates and is doing business under and by virtue of the laws of the State of Washington, with his office and principal place of business located at 218 Mutual Life Building, in the city of Seattle, State of Washington.

2. Pursuant to the provisions of §2(c) of the Clayton Act, as amended (U.S.C., Title 15, §13), the Federal Trade Commission, on July 23, 1958, issued its complaint in this proceeding against respondent, and a true copy was thereafter duly served on respondent.

3. Respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

4. This agreement disposes of all of this proceeding as to all parties.

5. Respondent waives:

a. Any further procedural steps before the hearing examiner and the Commission;

b. The making of findings of fact or conclusions of law; and

c. All of the rights he may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

6. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

7. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

8. This agreement is for settlement purposes only and does not constitute an admission by respondent that he has violated the law as alleged in the complaint.

9. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondent. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order to Cease and Desist," the latter is hereby approved, accepted and ordered filed, the same not to become a part of the record herein, however, unless and until it becomes part of the decision of the Commission. The hearing examiner finds from the complaint and the said "Agreement Containing Consent Order to Cease and Desist" that the Commission has jurisdiction of the subject matter of this proceeding and of the respondent herein; that the complaint states a legal cause for complaint under the provisions of §2(c) of the Clayton Act, as amended (U.S.C., Title 15, §13), against the respondent both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate

for the just disposition of all of the issues in this proceeding as to all of the parties hereto; and that said order therefore should be, and hereby is, entered as follows:

ORDER

*It is ordered,* That Carl H. Anderson, individually and trading as E. H. Hamlin Associates, or under any other name, and his agents, representatives, or employees, directly or through any corporate, partnership or other device, in connection with the sale and distribution of seafood products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Paying, granting, or passing on, either directly or indirectly, to any buyer or to anyone acting for or in behalf of or subject to the direct or indirect control of such buyer, brokerage earned or received by respondent on sales made for his packer-principals, by allowing to buyers lower prices which reflect all or any part of such brokerage, or by granting them allowances or rebates which are in lieu of such brokerage, or by any other method or means.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 12th day of February 1959, become the decision of the Commission; and, accordingly:

*It is ordered,* That respondent Carl H. Anderson, an individual trading as E. H. Hamlin Associates, shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which he has complied with the order to cease and desist.

IN THE MATTER OF

P. E. HARRIS COMPANY, INC.

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

*Docket 7208. Complaint, July 23, 1958—Decision, Feb. 12, 1959*

Consent order requiring a canner and primary broker of seafood products in Seattle, Wash., to cease violating the brokerage section of the Clayton Act (Sec. 2(c)) by paying or allowing brokerage to certain buyers for their own account and making grants in lieu of brokerage by price concessions or rebates, a part or all of which were not charged back to the packer-principals but were taken from its brokerage or that of its field brokers.

## COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has been and is now violating the provisions of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent P. E. Harris Company, Inc., hereinafter sometimes referred to as respondent Harris or as corporate respondent, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its principal office and place of business located at 1220 Dexter Horton Building, Seattle, Wash. Respondent is a substantial factor in the sale and distribution of seafood products, particularly canned salmon.

PAR. 2. Respondent is now and for the past several years has been engaged in the business of canning, packing, selling and distributing seafood, including canned salmon, hereinafter referred to as seafood products. A substantial part of the seafood products sold and distributed by respondent are canned and packed in its own plants. However respondent also distributes seafood products as a primary broker, negotiating sales for the account of a number of packer-principals located in various areas within and beyond the continental United States, including the Puget Sound and Columbia River areas, and the Territory of Alaska.

PAR. 3. Respondent generally sells and distributes both its own and its principals' seafood products through field brokers located in various marketing areas, to buyers located throughout the United States. Respondent has directly or indirectly shipped or transported or caused such seafood products, when sold, to be shipped or transported from its canning plants or warehouses, or from the canning plants or warehouses of its packer-principals to buyers thereof located in various States of the United States other than the State or territory of origin of said seafood products. Thus respondent has been for the past several years and is now engaged in a continuous course of trade in commerce, as "commerce" is defined in the aforesaid Clayton Act.

PAR. 4. When acting as a primary broker in negotiating sales for its packer-principals, respondent is usually compensated for its services at the rate of 5 percent of the net selling price of the merchandise as established by said packer-principals by deducting the brokerage from the proceeds in its account of sale to its packer-principals. The field brokers employed to negotiate sales for respondent are usually compensated at the rate of 2½ percent of the net selling price of the merchandise sold. However some field brokers received 3½ percent for said services.

PAR. 5. In the course and conduct of its business in commerce for the past several years both as a packer and as a primary broker, respondent has paid, granted or allowed a brokerage or commission in substantial amounts to certain buyers for their own account, and has made grants or allowances in substantial amounts in lieu of brokerage by affording price concessions or rebates or allowances, a part or all of which were not charged back to its various packer-principals but were, on the contrary, taken from all or a portion of the brokerage or commission earnings of respondent and of its field brokers.

Among and including, but not necessarily limited to, the methods or means employed by respondent in so doing are the following:

(a) Selling to certain buyers, purchasing for their own account on which purchases respondent paid, granted or allowed the buyer the customary field brokerage.

(b) Selling to certain buyers at net prices which were less than those accounted for to its packer-principals, a part or all of the difference in prices being taken from respondent's brokerage or commission.

(c) Granting to certain buyers deductions from price by way of allowances or rebates, a part or all of which were not charged back to its packer-principals but were taken from respondent's brokerage.

PAR. 6. The acts and practices of respondent as herein alleged and described constitute violations of the provisions of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Sec. 13).

*Mr. Cecil G. Miles* for the Commission.

*Mr. James Wm. Johnston,* of Seattle, Wash., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

This proceeding involves alleged violations of §2(c) of the Clayton Act, as amended (U.S.C., Title 15, §13), it being charged in the complaint, in substance, that the respondent named therein, in the course and conduct of its business of canning and packing seafood, including canned salmon, and selling and distributing in commerce its own seafood products and those of a number of packer-principals for whom it acts as a primary broker, has paid, granted or allowed a brokerage or commission in substantial amounts to certain buyers for their own account, and has made grants or allowances in lieu of brokerage by affording price concessions or rebates or allowances, a part or all of which were not charged back to its various packer-principals, but were taken from all or a portion of the brokerage or commission earnings of respondent and of its field brokers.

On December 12, 1958, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval an "Agreement Containing Consent Order to Cease and Desist," which had been entered into by and between respondent and the attorneys for both parties, under date of November 28, 1958, subject to the approval of the Bureau of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with §3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondent P. E. Harris Company, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of

business located at 1220 Dexter Horton Building in the city of Seattle, State of Washington.

2. Pursuant to the provisions of §2(c) of the Clayton Act, as amended (U.S.C., Title 15, §13), the Federal Trade Commission on July 23, 1958, issued its complaint in this proceeding against respondent, and a true copy was thereafter duly served on respondent.

3. Respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

4. This agreement disposes of all of this proceeding as to all parties.

5. Respondent waives:

(a) Any further procedural steps before the hearing examiner and the Commission;

(b) The making of findings of fact or conclusions of law; and

(c) All of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

6. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

7. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

8. This agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

9. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondent. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified, or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order to Cease and Desist," the latter is hereby approved, accepted and ordered filed, the same not to become a part of the record herein, however, unless and until it becomes part of the decision of the Commission. The hearing examiner finds from the complaint and the said "Agreement Containing Consent Order to Cease and Desist" that the

Commission has jurisdiction of the subject matter of this proceeding and of the respondent herein; that the complaint states a legal cause for complaint under the provisions of §2(c) of the Clayton Act, as amended (U.S.C., Title 15, §13), against the respondent both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the just disposition of all of the issues in this proceeding as to all of the parties hereto; and that said order therefore should be, and hereby is, entered as follows:

ORDER

*It is ordered,* That P. E. Harris Company, Inc., a corporation, and its officers, agents, representatives, or employees, directly or through any corporate or other device, in connection with the sale of seafood products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

1. Paying, granting, or allowing, directly or indirectly, to any buyer, or to anyone acting for or in behalf of, or who is subject to the direct or indirect control of such buyers, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with the sale of seafood products to such buyer for his own account;

2. Paying, granting, or passing on, either directly or indirectly, to any buyer or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, brokerage earned or received by respondent on sales made for its packer-principals, by allowing to buyers lower prices which reflect all or any part of such brokerage, or by granting them allowances or rebates which are in lieu of brokerage, or by any other method or means.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

The Commission having considered the hearing examiner's initial decision herein, filed December 24, 1958, accepting an agreement containing a consent order theretofore executed by the respondent and counsel in support of the complaint, service of which was complete on January 12, 1959; and

It appearing that through inadvertence the word "on" was omitted from the first line of the paragraph numbered "2" in the order contained in the initial decision, resulting in a variance

between said order and the order agreed upon by the parties; and

The Commission being of the opinion that this clerical error should be corrected:

*It is ordered,* That the initial decision of the hearing examiner be, and it hereby is, modified by inserting the word "on" after the word "passing" in the first line of paragraph 2 of the order contained in said initial decision.

*It is further ordered,* That the initial decision, as so modified, shall, on the 12th day of February 1959, became the decision of the Commission.

*It is further ordered,* That the respondent, P. E. Harris Company, Inc., a corporation, shall, within sixty (60) days after service upon it of this decision, 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 aforesaid initial decision as modified.

IN THE MATTER OF

# HUDSON HOUSE, INC., ET AL.

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

*Docket 7215. Complaint, Aug. 1, 1958—Decision, Feb. 12, 1959*

Consent order requiring a large packer and wholesaler of foods and its subsidiary manufacturer of bakery and fountain supplies in Portland, Oreg., to cease discriminating in price in violation of the Clayton Act by such practices as charging certain favored buyers from 2% to 18% less for maraschino cherries than their competitors and also giving the former a 2% discount for cash while the latter received only 1%, thus violating Section 2(a); and by granting 2½% to 3% discounts in lieu of brokerage to certain direct buyers purchasing for their own accounts, in violation of Section 2(c).

## COMPLAINT

The Federal Trade Commission having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have been, and are now, violating the provisions of subsections (a) and (c) of Section 2 of the Clayton Act (U.S.C., Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint stating its charges with respect thereto as follows:

### Count I

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

PARAGRAPH 1. Respondent Hudson House, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon, with its principal office and place of business located at 401 SE. Water Avenue, Portland, Oreg. It is engaged in the purchase and sale at wholesale of produce, groceries, fruits and bakery products, the packing of fruits and vegetables, the processing of frozen foods and the operation of a chain of retail grocery stores. Hudson House, Inc. was for many years the largest briner of cherries in the United States and still is a substantial factor in the processing and sale of brine cherries. Respondent Hudson House, Inc. has annual net sales of approximately $31,500,000 and is directed and controlled by

respondents, Robert A. Hudson, Sr. and Francis T. Rowell who are responsible for its acts and practices.

Respondent Gray & Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon with its principal office and place of business located at 401 SE. Water Avenue, Portland, Oreg., and being a wholly owned subsidiary of respondent Hudson House, Inc., it is directed and controlled by respondents, Robert A. Hudson, Sr. and Francis T. Rowell who are responsible for its acts and practices.

Respondent Robert A. Hudson, Sr. is an individual with an office located at 401 SE. Water Avenue, Portland, Oreg., and is president of respondent Hudson House, Inc., owning 100% of its stock.

Respondent Francis T. Rowell is an individual with an office located at 401 SE. Water Avenue, Portland, Oreg., and is first vice president of respondent Hudson House, Inc. and vice president of respondent Gray & Company.

PAR. 2. Respondent Gray & Company is now, and has been since 1945, engaged in the manufacture and sale of bakery and fountain supplies including the processing and sale of maraschino cherries, glace cherries, broken cherries, jams, jellies, olives, toppings, mincemeat, fruit mix and other such products. Respondent Gray & Company produces maraschino cherries from brine cherries which it purchases from its parent, respondent Hudson House, Inc.

Respondent Gray & Company sells maraschino cherries and other products on a nationwide basis. Except for the Portland, Oreg. area where it sells through company salesmen, respondent Gray & Company sells its products through brokers to which it pays 5% commissions for sales of maraschino cherries and 3% commissions for sales of other cherries.

PAR. 3. In the course and conduct of its business, respondent Gray & Company has engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondent Gray & Company ships its products, or causes them to be shipped, from its place of business in the State of Oregon to purchasers located in States other than the State of Oregon.

PAR. 4. In the course and conduct of its said business in commerce, respondent Gray & Company is now and has been in competition with other corporations, partnerships, individuals, and firms engaged in manufacturing, processing, selling and dis-

tributing maraschino cherries, and other cherries, bakery and fountain supplies.

Many of respondent Gray & Company's purchasers are likewise, directly or indirectly, competitively engaged with each other and with the customers of Gray & Company's competitors in the resale of said commodities within the trading area in which respondent Gray & Company's said competitors, offer for sale and sell such commodities as those purchased from said respondent.

PAR. 5. Since January 1954, while engaged as aforesaid in commerce among the several States of the United States, respondent Gray & Company has been, and is now, in the course of such commerce discriminating in price between purchasers of commodities of like grade and quality, which commodities are sold for use, consumption and resale within the several States of the United States, in that respondent has been, and is now, selling such commodities to some purchasers at higher prices than the prices at which such commodities of like grade and quality are sold by said respondent to other purchasers. Said favored purchasers are now competing and have competed since January 1954, directly or indirectly, with respondent Gray & Company's nonfavored purchasers.

Respondent Gray & Company has sold, and now sells, its commodities through its brokers or its sales agents to some of its buyers at net prices from approximately 2% to 18% higher than it has sold and now sells commodities of like grade and quality to some of its favored buyers, many of whom are engaged in active, direct or indirect, competition with respondent Gray & Company's nonfavored buyers.

For example, specific illustrations of representative discriminations in commerce and prices of certain commodities of like grade and quality sold by respondent Gray & Company during the year 1956 to its competing favored and nonfavored buyers are as follows:

During February 1956 respondent Gray & Company sold maraschino cherries to its two favored purchasers in San Francisco, Calif., Tiedemann & McMorran and A. Giurlani & Bros., and to the following competing nonfavored purchasers who paid net prices which exceeded the net prices paid by Tiedemann & McMorran for commodities of like grade and quality by the following percentages: R. Vannucci & Company, 7.4%; Julliard Fancy Foods Co., 6.7% and 10.8%; Peroni & Erminio, 9.5%; and Riva

Distributing, 4.8%. The favored purchaser Tiedemann & McMorran also received a discriminatory discount of 2% for cash while some of the nonfavored purchasers received 1% for cash.

During January and March of 1956 respondent Gray & Company sold maraschino cherries to its favored purchaser in Sacramento, Calif., Tiedemann & McMorran, and to the following competing nonfavored purchasers who paid net prices which exceeded the net prices paid by Tiedemann & McMorran for commodities of like grade and quality by the following percentages: Lancaster Wholesale Grocery, 7.4% and 6.7%; Valley Wholesale Grocery, 9.5% and 6.1%.

During January of 1956 respondent Gray & Company sold maraschino cherries to its favored purchaser in Los Angeles, Calif., A. M. Lewis, Inc., and to the following competing nonfavored purchasers who paid net prices which exceeded the net prices paid by A. M. Lewis, Inc., for commodities of like grade and quality by the following percentages: Certified Grocers, 8.3%, 17.9% and 8.8%; Mayfair Markets, 10.6%.

During January, February, March and December of 1956 respondent Gray & Company sold maraschino cherries to its favored purchaser in Los Angeles, Calif., S. E. Rykoff & Company, and to the following competing nonfavored purchasers who paid net prices which exceeded the net prices paid by S. E. Rykoff & Company for commodities of like grade and quality by the following percentages: Eckhard's Better Lemon Juice, 5%; Tasty Products Company, 10%; Western Restaurant Supply Co., 10%; Hollywood Bar Supply Co., 5%; Leake & Abbey Bar & Restaurant Supply, 5%.

During January 1956 respondent Gray & Company sold maraschino cherries for delivery in Spokane, Wash., to its favored purchaser Regent Canfood Company (a wholly owned buying subsidiary of Safeway Stores, Inc.), and to the following competing nonfavored purchasers who paid net prices which exceeded the net prices paid by Regent Canfood Company for commodities of like grade and quality by the following percentages: U. R. M. Stores, 2.2% and 1.9%; Sigman Food Stores, 7.4% and 4.3%.

During January and February, 1956 Regent Canfood Company was also so favored in the purchase of maraschino cherries over its competitors in Butte, Montana, to the following extent: Gamble-Robinson Company, 1.7%, 2% and 5.3%; Davidson Grocery Company, 1.7% and 2%.

The favored purchaser Regent Canfood Company also received a discriminatory discount of 2% for cash while the nonfavored purchasers received 1% for cash.

During July 1956 respondent Gray & Company sold maraschino cherries to its favored purchaser in Salt Lake City, Utah, Utah Wholesale Grocery, and to a competing nonfavored purchaser, Pacific Fruit & Produce Company, which paid net prices which exceeded the net prices paid by Utah Wholesale Grocery Company for commodities of like grade and quality by 5%.

PAR. 6. The effect of such discriminations in price made by respondent Gray & Company, as set forth in paragraph 5 hereof, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent Gray & Company and its purchasers are respectively engaged; or to injure, destroy, or prevent competition with respondent Gray & Company or with purchasers of respondent Gray & Company who receive the benefit of such discriminations.

PAR. 7. The acts and practices of the respondent Gray & Company, as alleged above, violate subsection (a) of Section 2 of the Clayton Act as amended.

Count II

Charging violation of subsection (c) of Section 2 of the Clayton Act, as amended, the Commission alleges:

PAR. 8. Paragraphs 1 and 4, inclusive, of Count I hereof are hereby repeated and made part of this Count as fully and with the same force and effect as though here again set forth in full.

PAR. 9. In the course and conduct of its business as above described, respondent Gray & Company has paid or granted, directly and indirectly, to some of its customers commissions, brokerage, or other compensation, or allowances, or discounts in lieu thereof, in connection with purchases of products by such customers from respondent Gray & Company in their own names and for their own accounts for resale.

For example, specific illustrations of such allowances made in lieu of brokerage are as follows:

During the year 1956 respondent Gray & Company granted discriminatory allowances as described above in connection with purchases of respondent Gray & Company's products made for their own accounts to S. E. Rykoff & Company of Los Angeles, Calif.; Tiedemann & McMorran of San Francisco, Calif.; Regent Canfood Company of San Francisco, Calif., (a wholly owned buy-

ing subsidiary of Safeway Stores, Inc.), for delivery to Safeway Stores in Spokane, Wash., Butte, Mont., and Portland, Oreg., part of which allowances were made in lieu of one-half of the 5% brokerage fee customarily paid by respondent Gray & Company to its brokers on such purchases.

During the years 1956 and 1957 respondent Gray & Company granted allowances of from 3% to 5% in connection with purchases of respondent Gray & Company's products made for their own accounts to Fraering Brokerage Company of New Orleans, La., Mountain States Wholesale Company of Boise, Idaho, and Miles Distributing Company of Reno, Nev., which allowances were made in lieu of 3% and 5% brokerage fees customarily paid by respondent Gray & Company to its brokers on such purchases.

PAR. 10. The acts and practices of the respondent Gray & Company, as alleged above, violated subsection (c) of Section 2 of the Clayton Act as amended.

*Mr. Fredric T. Suss* for the Commission.

*Mr. Robert H. Huntington* of *Hart, Spencer, McCulloch, Rockwood and Davies,* of Portland, Ore., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

This proceeding involves alleged violations of subsections (a) and (c) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Sec. 13), it being charged in the complaint, in substance, that Gray & Company, a wholly owned subsidiary of respondent Hudson House, Inc., named therein, in the course of its business of selling bakery and fountain supplies, including maraschino cherries, glace cherries, broken cherries, jams, jellies, olives, toppings, mincemeat, fruit mix and other such products, in commerce, has discriminated in price between purchasers by granting lower prices and by giving higher cash discounts to favored customers, and has made payments, grants, allowances or discounts in lieu of brokerage.

On December 19, 1958, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval an "Agreement Containing Consent Order to Cease and Desist," which had been entered into by and between respondents and the attorneys for both parties, under date of December 10, 1958, subject to the approval of the Bureau of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with §3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondent Hudson House, Inc., is a corporation organized and existing under the laws of the State of Oregon with its principal office and place of business located at 401 Southeast Water Avenue, Portland, Oreg. It is directed and controlled by respondents Robert A. Hudson, Sr., and Francis T. Rowell, who are responsible for its acts and practices.

Respondent Gray & Company is a corporation organized and existing under the laws of the State of Oregon, with its principal office and place of business located at 401 Southeast Water Avenue, Portland, Oreg., and is a wholly owned subsidiary of respondent Hudson House, Inc. Respondent Robert A. Hudson, Sr., is an individual with an office located at 401 Southeast Water Avenue, Portland, Oreg., and is president of respondent, Hudson House, Inc., owning one hundred percent of its stock. The respondent Francis T. Rowell is an individual with an office located at 401 Southeast Water Avenue, Portland, Oreg., and is first vice president of respondent, Hudson House, Inc., and vice president of respondent Gray & Company.

2. Pursuant to the provisions of the Clayton Act, as amended, the Federal Trade Commission on August 1, 1958, issued its complaint in this proceeding against respondents and a true copy was thereafter duly served on respondents.

3. Respondents admit all jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts have been duly made in accordance with such allegations.

4. This agreement disposes of all of this proceeding as to all parties.

5. Respondents waive:

(a) Any further procedural steps before the hearing examiner and the Commission;

(b) The making of findings of fact and conclusions of law; and

(c) All of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

6. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

7. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

8. This agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

9. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondents. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order to Cease and Desist," the latter is hereby approved, accepted and ordered filed, the same not to become a part of the record herein, however, unless and until it becomes part of the decision of the Commission. The hearing examiner finds from the complaint and the said "Agreement Containing Consent Order to Cease and Desist" that the Commission has jurisdiction of the subject matter of this proceeding and of each of the respondents herein; that the complaint states a legal cause for complaint under the provisions of §2(a) and (c) of the Clayton Act, as amended (U.S.C., Title 15, §13), against each of the respondents both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the just disposition of all of the issues in this proceeding as to all of the parties hereto; and that said order therefore should be, and hereby is entered as follows:

ORDER

*It is ordered,* That respondents Hudson House, Inc., a corporation, and Gray & Company, a corporation, their officers, respondent Robert A. Hudson, Sr., individually and as president of Hudson House, Inc., and Francis T. Rowell, individually and as first vice president of Hudson House, Inc., and vice president of Gray & Company, their representatives, agents and employees, directly or through any corporate or other device in connection with the

sale of maraschino cherries, other brine cherry products, olives, jams, jellies, mincemeat, or other bakery or fountain supplies in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

(1) Discriminating directly or indirectly in price by selling any of said products of like grade and quality to any purchaser at a price which is lower than the price charged any other purchaser who in fact competes with the favored purchaser in the resale and distribution of respondents' said products;

(2) Paying, granting, or allowing, directly or indirectly, to any buyer, or to any one acting for or in behalf of, or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any sale of their said products to such buyer for his own account.

## DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

The Commission having considered the hearing examiner's decision, filed December 30, 1958, accepting an agreement containing a consent order to cease and desist, theretofore executed by the respondents and counsel in support of the complaint; and

The respondents, by letter received January 22, 1959, having noted that the hearing examiner's statement in the first paragraph of the initial decision purporting to set forth the alleged violations of law involved in this proceeding includes certain allegations not contained in the complaint, and it appearing that said paragraph does contain an erroneous summation of the allegations of the complaint and should be corrected:

*It is ordered,* That the initial decision be, and it hereby is, amended by substituting for the first paragraph thereof the following:

This proceeding involves alleged violations of subsections (a) and (c) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Sec. 13), it being charged in the complaint, in substance, that Gray & Company, a wholly owned subsidiary of respondent Hudson House, Inc., named therein, in the course of its business of selling bakery and fountain supplies, including maraschino cherries, glace cherries, broken cherries, jams, jellies, olives, toppings, mincemeat, fruit mix and other such products, in commerce, has discriminated in price between purchasers by

granting lower prices and by giving higher cash discounts to favored customers, and has made payments, grants, allowances or discounts in lieu of brokerage.

*It is further ordered,* That the initial decision as so amended shall, on the 12th day of February 1959, become the decision of the Commission.

*It is further ordered,* That the respondents, Hudson House, Inc., and Gray & Company, corporations, Robert A. Hudson, Sr., individually and as president of Hudson House, Inc., and Francis T. Rowell, individually and as first vice president of Hudson House, Inc., and vice president of Gray & Company, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order contained in the aforesaid initial decision as amended.

Complaint

IN THE MATTER OF

EMARD PACKING CO., INC., ET AL.

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

*Docket 7249. Complaint, Sept. 11, 1958—Decision, Feb. 12, 1959*

Consent order requiring packers of seafood products and their exclusive primary brokers in Seattle, Wash., to cease violating Sec. 2(c) of the Clayton Act by making payments, allowances, etc., in lieu of brokerage, or granting lower prices which reflected brokerage to certain favored customers.

## COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have been and are now violating the provisions of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Emard Packing Co., Inc., hereinafter sometimes referred to as corporate packer respondent, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its principal office and place of business located at 911 Lowman Building, Seattle, Wash.

Respondent Henry J. Emard, hereinafter sometimes referred to as individual packer respondent, is an individual and is president and treasurer of the corporate packer respondent. He owns a majority of the outstanding capital stock of the corporate packer respondent and directs and controls its business practices and policies, including its sales and distribution policies. His principal office and place of business is the same as that of corporate packer respondent.

The said packer respondents, both corporate and individual, have been for the past several years and are now engaged in the business of packing, selling and distributing canned salmon and other seafood products, hereinafter referred to as seafood products, to various buyers throughout the United States. Respondents' annual volume of business during the past several years has been substantial.

PAR. 2. Respondent Johnson Lincoln, hereinafter sometimes referred to as corporate broker respondent, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington with its principal office and place of business presently located at 911 Lowman Building, Seattle, Wash.

Respondent Forrest H. Johnson hereinafter sometimes referred to as individual broker respondent, is an individual and is president of said corporate broker respondent. Said individual respondent sometimes also trades as Forrest H. Johnson Co. He owns a majority of the outstanding capital stock of the said corporate broker respondent and directs its business practices and policies, including its sales and distribution policies as well as those of the Forrest H. Johnson Co.

Said broker respondents, both corporate and individual, have been for the past several years and are now engaged in the brokerage business representing a number of packer-principals, one of which is now the corporate packer respondent named herein, in connection with the sale of seafood products, to various buyers located throughout the United States. Respondents' annual volume of business during the past several years has been substantial.

PAR. 3. In the course and conduct of their business both packer and broker respondents, corporate and individual, for the past several years have sold and distributed and are now selling and distributing seafood products in commerce, as "commerce" is defined in the aforesaid Clayton Act, to buyers located in the several states of the United States, other than the State in which respondents are located. Said respondents transport or cause such seafood products when sold to be transported from their place of business, or from warehouses or terminals in the State of Washington to buyers, or to the buyers' customers, located in various other states of the United States. There has been at all times mentioned herein a continuous course of trade in commerce in said seafood products across State lines between respondents and the respective buyers of said products.

PAR. 4. The packer respondents, both corporate and individual, for the past several years and up until the time they entered into a joint venture with broker respondents, in the latter part of 1956, as described herein, sold their seafood products through primary brokers generally located in Seattle, Wash., and through field brokers in the various marketing areas to buyers located

throughout the United States. From time to time during this period, the said packer respondents also sold direct to certain buyers without utilizing the services of either their primary or field broker. In other instances, they made sales to buyers where only one broker was utilized.

When selling through primary brokers the packer respondents paid said broker a commission or brokerage fee usually in the amount of 5% of the net selling price of the merchandise sold. When a field broker is utilized either by the packer or the primary broker, said field broker is usually compensated for his services at the rate of 2½% of the net selling price of the merchandise.

PAR. 5. In the course and conduct of their business, respondents in or about August 1956, entered into an agreement or a joint venture arrangement, whereby the broker respondents named herein would have the exclusive right to represent the packer respondents as primary brokers in negotiating sales for them at the usual primary brokerage rate. Certain direct sales in which the packer respondents did not utilize a broker were excluded from said agreement. Under this arrangement the broker respondents utilized certain of the packer respondents' facilities and clerical personnel for such activities as invoicing, billing, etc., with the net brokerage earnings being shared equally between the packer respondents and the broker respondents. Beginning on or about January 1, 1957, the agreement or joint venture was extended whereby the broker respondents would have the exclusive right to represent the packer respondents as their primary brokers in negotiating the sale of the packer respondents' entire pack at the usual primary brokerage rate, under the name and style of Emard Packing Company—Sales Division. Under this agreement the broker respondents were also acting as primary brokers for other packers in the sale and distribution of seafood products. The sharing of facilities and brokerage earnings between the broker and the packer respondents remained the same.

PAR. 6. In the course and conduct of their business as aforesaid, respondents, both corporate and individual have in many instances made payments, grants, allowances or discounts by various means and in substantial amounts in lieu of brokerage, or have granted lower prices which reflect the payment of brokerage to certain favored buyers of seafood products.

Among and including, but not necessarily limited to, the methods or means employed by respondents in so doing, are the following:

a. Granting or allowing to certain buyers direct and indirect reductions in price in various amounts in transactions where either a primary or field broker, or both, were not utilized.

b. Granting or allowing to certain buyers direct and indirect reductions in price in various amounts in transactions where the primary or field brokers, or both, took a reduction in their brokerage on the particular transactions.

c. Selling to certain buyers at net prices which were lower than those accounted for to the packer-principal.

PAR. 7. In making payments of commissions, brokerage fees, or granting discounts or allowances in lieu thereof, or by granting lower prices which reflect brokerage, to certain buyers as hereinabove alleged and described the respondents, and each of them, have violated and are now violating the provisions of subsection (c) of Section 2 of the Clayton Act, as amended. (U.S.C., Title 15, Sec. 13).)

*Mr. Cecil G. Miles* for the Commission.

*Mr. B. F. Reno, Jr.*, of Seattle, Wash., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

This proceeding involves alleged violations of §2(c) of the Clayton Act, as amended (U.S.C., Title 15, §13), it being charged in the complaint, in substance, that the respondents named therein, in the course of their business of packing, selling and distributing canned salmon and other seafood products in commerce, operating under a joint venture arrangement entered into in or about August 1956, and extended on or about January 1, 1957, whereby respondents Johnson Lincoln and Forrest H. Johnson were to have the exclusive right to act as primary brokers in negotiating the sale of the entire pack of respondents Emard Packing Co., Inc., and Henry J. Emard as packer-principals, and in certain direct sales, excluded from said arrangement, as well as in some sales for other packer-principals, have made payments, grants, allowances or discounts by various means and in substantial amounts in lieu of brokerage, or have granted lower prices which reflect the payment of brokerage to certain favored buyers of seafood products.

On December 12, 1958, there was submitted to the undersigned

hearing examiner of the Commission for his consideration and approval an "Agreement Containing Consent Order to Cease and Desist," which had been entered into by and between respondents and the attorneys for both parties, under date of December 2, 1958, subject to the approval of the Bureau of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with §3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondent Emard Packing Co., Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 911 Lowman Building, in the city of Seattle, State of Washington.

Respondent Henry J. Emard is an individual and is an officer of respondent Emard Packing Co., Inc., with his office and principal place of business located at 911 Lowman Building, in the city of Seattle, State of Washington.

Respondent Johnson Lincoln is a corporation existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 911 Lowman Building, in the city of Seattle, State of Washington.

Respondent Forrest H. Johnson is an individual and is an officer of respondent Johnson Lincoln, and also trading as Forrest H. Johnson Co., with his office and principal place of business located at 911 Lowman Building, in the city of Seattle, State of Washington.

2. Pursuant to the provisions of §2(c) of the Clayton Act, as amended (U.S.C., Title 15, §13), the Federal Trade Commission, on September 11, 1958, issued its complaint in this proceeding against respondents, and a true copy was thereafter duly served on respondents.

3. Respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

4. This agreement disposes of all of this proceeding as to all parties.

5. Respondents waive:

(a) Any further procedural steps before the hearing examiner and the Commission;

(b) The making of findings of fact or conclusions of law; and

(c) All of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

6. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

7. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

8. This agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

9. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondents. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order to Cease and Desist," the latter is hereby approved, accepted and ordered filed, the same not to become a part of the record herein, however, unless and until it becomes part of the decision of the Commission. The hearing examiner finds from the complaint and the said "Agreement Containing Consent Order to Cease and Desist" that the Commission has jurisdiction of the subject matter of this proceeding and of each of the respondents herein; that the complaint states a legal cause for complaint under the provisions of §2(c) of the Clayton Act, as amended (U.S.C., Title 15, §13), against each of the respondents both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the just disposition of all of the issues in this proceeding as to all of the parties hereto; and that said order therefore should be, and hereby is, entered as follows:

ORDER

*It is ordered,* That Emard Packing Co., Inc., a corporation, and its officers, and Henry J. Emard, individually and as an officer of said corporation; and Johnson Lincoln, a corporation, and its officers, and Forrest H. Johnson, individually and as an officer of said corporation, and also doing business as Forrest H. Johnson Co., and respondents' agents, representatives, or employees, directly or through any corporate, partnership or other device, in connection with the sale of seafood products in commerce as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

1. Paying, granting, or allowing, directly or indirectly, to any buyer, or to anyone acting for or in behalf of, or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any sale of seafood products to such buyer for his own account.

2. Paying, granting, or passing, directly or indirectly, to any buyer, or to anyone acting for or in behalf of, or who is subject to the direct or indirect control of such buyer, brokerage earned or received by respondents on sales made for their packer-principals, by allowing to buyers lower prices which reflect all or any part of such brokerage, or by granting them allowances or rebates which are in lieu of such brokerage, or by any other method or means.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 12th day of February 1959, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

# HELEN E. HINDE ET AL. TRADING AS PUGET SOUND BROKERAGE CO.

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

*Docket 7151. Complaint, May 20, 1958—Decision, Feb. 17, 1959*

Order requiring primary brokers of seafood products in Seattle, Wash., to cease violating the brokerage section of the Clayton Act (Sec. 2(c)), by granting to certain buyers of canned salmon, deductions from price by way of allowances or rebates, a part or all of which was not charged back to their packer-principals, in such transactions as invoicing buyers, including buying agents of food chains, at a lower price per case than they accounted for to the packer-principals and absorbing the difference out of their brokerage; granting a 10¢ a case promotional allowance to the purchaser in the form of a freight rebate; and taking 3% brokerage instead of 5% on sales involving price concessions to certain buyers.

*Mr. Cecil G. Miles* for the Commission.

*Evans, McLaren, Lane, Powell & Beeks*, by *Mr. W. Byron Lane* and *Mr. Martin P. Detels, Jr.*, of Seattle, Wash., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

## The Complaint

On May 20, 1958, the Commission issued its complaint against Helen E. Hinde and Elizabeth B. Swenson, individually and as copartners trading as Puget Sound Brokerage Co., charging them with acts and practices violating §2(c) of the Clayton Act as amended (U.S.C., Title 15, §13). The complaint alleges that the respondents are now, and for the past several years have been, engaged in a course of trade in commerce, as "commerce" is defined in the Clayton Act, as amended. The complaint avers that in that course of trade respondents act as primary brokers for various packers of seafood products, including canned salmon, which respondents sell and distribute for their packer-principals by negotiating sales through field brokers located in various marketing areas to buyers located throughout the United States. The complaint further alleges that respondents are usually compensated for such services by deducting a brokerage or commission of 5% of the net selling price of the commodity sold. It is further alleged that respondents compensate their field brokers

by paying them a brokerage or commission of 2½% of the net selling price of the merchandise. It is charged that respondents have granted allowances, differentials, rebates and concessions in price, in substantial amounts, to certain buyers of said seafood products, a part or all of which was not charged back to the various packer-principals, but was taken from the brokerage or commission earnings of respondents and their field brokers. Specifically, the complaint alleges that respondents' methods of effectuating such concessions included:

(a) Selling to certain buyers at net prices which were less than those accounted for to their packer-principals;

(b) Granting to certain buyers deductions from price by way of allowances or rebates, a part or all of which were not charged back to their packer-principals;

(c) Taking reduced brokerage on sales which involved price concessions to certain buyers.

The complaint alleges, finally, that such acts and practices of the respondents constitute the alleged violations of §2(c) of the Clayton Act as amended.

## The Answer

On August 6, 1958, respondents submitted their answer to the above-described complaint, admitting their identity and business organization and that they are engaged, as alleged, in the business of acting as primary brokers for seafood packers. They deny, however, the possession of sufficient knowledge to answer the allegations regarding the granting of allowances, differentials, concessions in price or rebates in lieu of brokerage by the methods alleged, or that such acts and practices are in violation of law.

## The Proceedings

Following the joining of the issues by the complaint and answer thereto, a hearing was held in Seattle, Wash., on August 28, 1958, at which counsel supporting the complaint presented evidence and rested his case. The respondents then declined to present any evidence. Thereafter, both counsel submitted to the hearing examiner proposed findings as to the facts and proposed conclusions. The entire record herein, including such proposals, has been duly considered. Each of such proposals which has been accepted has been, in substance, incorporated into this initial decision. All proposals not so incorporated are hereby rejected.

## Identity and Business of Respondents

Respondents' identity, business organization and general operation, as hereinabove described, have been admitted and are found to be as alleged.

## Acts and Practices Questioned

The evidence shows that on August 17, 1952, respondents sold 10 cases of 48 tall one-pound cans each of Chum salmon to Winsboro Wholesale, Winsboro, La., at $19.00 per case. In accounting for this sale to their packer-principal, the Annette Island Canning Company, Metlakatta, Alaska, respondents represented this salmon as having been sold to the buyer at $20.00 per case. Respondent Hinde testified that the difference between the invoice price to the purchaser and the price as accounted for to respondents' packer-principal was absorbed by respondents out of their brokerage; accordingly, $1.00 per case of respondents' brokerage earnings on this transaction was passed on by them to the purchaser in the form of a lower price.

On September 14 and 18, 1953, respondents invoiced Bridgeport Canfish Co., the buying agent of Safeway, for 315 cartons of pink salmon at $17.75 per case, but in accounting for this sale to the packer-principal, Annette Island Canning Co., respondents indicated that the price charged the purchaser was $18.00 per case. Testimony shows that this 25¢-per-case difference was absorbed by respondents out of their 5% brokerage. Thus, in this instance, respondents passed on to their buyer a portion of their earned brokerage on this transaction in the form of a 25¢-per-case price concession.

Similarly, respondents on December 3, 1956, invoiced to American Stores, Philadelphia, Pa., 200 cartons of 48 1-pound cans of Chum salmon at $20.50 per case, but accounted to their packer-principal, the Annette Island Canning Company, that this sale was made at $21.00 per case, the difference of 50¢ per case being absorbed by respondents out of their brokerage.

In another instance, respondents on January 23, 1957, invoiced the American Stores Co., Philadelphia, Pa., for 500 cartons of 48 tall 1-pound cans of pink salmon at $22.50 per carton, accounting for this sale to the packer-principal, the Annette Island Canning Company, as if made at the price of $23.00 per carton, the 50¢ difference again being absorbed by respondents out of their brokerage.

Again, on February 18, 1957, respondents invoiced the same customer, among other things, for 500 cartons of 48 tall 1-pound cans of pink salmon at $22.50 per case, and accounted for the sale to the same packer-principal at $23.00 per case, absorbing out of their brokerage, and passing on to the customer as a price concession, the difference of 50¢ per case.

In view of the above-described evidence, we must find that respondents have, in fact, engaged in "selling to certain buyers at net prices which were less than those accounted for to their packer-principals," as alleged in the complaint herein.

The record contains an invoice dated September 30, 1952, covering a sale by respondents of 1,250 cases of 48 tall 1-pound cans of pink salmon to the C. F. Smith Company, Detroit, Mich. This invoice shows freight prepaid by respondents in the amount of $1,168.17, whereas the freight actually paid by respondents to the Union Pacific Railroad for this shipment was $1,293.17, or $125 more, which represents 10¢ a case promotional allowance granted to the purchaser in the form of a freight rebate.

This further evidence compels the factual conclusion that the respondents have, as alleged, granted "to certain buyers deductions from price by way of allowances or rebates, a part or all of which were not charged back to their packer-principals."

On March 16, 1953, respondents invoiced Chum salmon to a customer in Louisiana through Brown Brokerage Co., respondents' field broker, at $16.00 per case, on which transaction respondents received 5% brokerage from their packer-principal, Annette Island Canning Co. On the same date, respondents invoiced Chum salmon to The Nakat Packing Corp., a buying subsidiary of the Great Atlantic & Pacific Tea Co., at $15.25 per case, 75¢ less per case than the price charged the Louisiana customer. On this transaction, the respondents received a billing and handling charge of 20¢ per case from Nakat, in lieu of their usual 5% brokerage.

As shown by documentary evidence in the record, respondents had with the Nakat Packing Corp. a sales contract dated September 14, 1953, which specified that a 50¢-per-case differential in favor of Nakat was to be maintained on all items listed therein; and on all sales to Nakat, respondents received from their packer-principal, the Klawack Oceanside Packing Co., only 3% brokerage instead of their usual 5%. Instances thereof are substantiated in the record by invoices dated November 18, 1953, and February 16, 1954, respectively. Simultaneously, respondents

were selling the same product to other customers through their field brokers at 50¢ a case over their price to Nakat, and were receiving from their packer-principals brokerage of 5%. In fact, the same packer-principal who paid respondents 3% brokerage on sales to Nakat paid to them, during the same period of time, 5% brokerage on similar sales to other customers. Under the terms of the above-mentioned contract with Nakat, the packer agreed "that the present ratio of 50¢ a case" (allowance to Nakat) "shall be maintained against a general market decline on all items listed * * *." Respondent Hinde, on the record, explained that the packer reduced both the price to Nakat and the brokerage to respondents as they probably considered that it was not too difficult to make the sale.

These acts of the respondents reveal that, as alleged, they have engaged in "taking reduced brokerage on sales which involve price concessions to certain buyers."

## Applicable Precedents

The courts have consistently held that it is a violation of §2(c) of the Clayton Act to pay or to pass on brokerage to a buyer in any guise whatsoever.

In *The Great Atlantic & Pacific Tea Company* case, 106 F. 2d 667, 674 (C.A. 3, 1939), cert. denied 308 U.S. 625 (1940), the Court said:

> At each stage of its enactment, paragraph (c) was declared to be an absolute prohibition of the payment of brokerage to buyers or buyers' representatives or agents. Such is the plain intent of Congress and thus we construe the statute. Any other result would frustrate the intent of Congress.

Also in *Oliver Bros., Inc., et al.*, v. *Federal Trade Commission,* 102 F. 2d 763, 770 (C.A. 4, 1939), the Court said:

> No one would contend that without violating this section, a broker representing the seller could give his commissions to the buyer; for in such case the action of the broker would be the action of the principal, the seller, and would amount to the allowance of commissions by the seller to the other party to the transaction in direct violation of the statutory provisions.

Further, in *Quality Bakers of America* v. *Federal Trade Commission,* 114 F. 2d 393 (C.A. 1, 1940), the Court said:

> It is plain enough that the paragraph [2(c)] taken as a whole, is framed to prohibit the payment of brokerage in any guise by one party to the other or the other's agent * * *.

## Conclusions

We must conclude, in the light of the authorities cited, and the facts as hereinabove found, that respondents, as alleged in the complaint, granted, directly and indirectly, price concessions, rebates and allowances in lieu of brokerage to certain buyers of seafood products, in violation of §2(c) of the Clayton Act as amended by the Robinson-Patman Act. Accordingly,

*It is ordered,* That respondents Helen E. Hinde and Elizabeth B. Swenson, individually and as copartners trading as Puget Sound Brokerage Co., and their agents, representatives and employees, directly or through any corporate, partnership, or other device, or trading under any other name, in connection with the sale of seafood products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Paying, granting, or passing on, either directly or indirectly, to any buyer, or to anyone acting for or in behalf of, or who is subject to the direct or indirect control of such buyer, brokerage earned or received by respondents on sales made for their packer-principals, by allowing to buyers lower prices which reflect all or any part of such brokerage, or by granting them allowances or rebates in lieu of such brokerage, or by any other methods or means.

## DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

The Commission having considered the hearing examiner's initial decision, filed December 9, 1958, in disposition of this matter; and

It appearing that except for one sentence, which is inaccurate, said initial decision is appropriate in all respects to dispose of the proceeding:

*It is ordered,* That the initial decision be, and it hereby is, modified by striking therefrom the last sentence of the first paragraph on page 3, reading as follows:

"This transaction shows that the respondents divided the 5% brokerage which they were legally entitled to collect from their packer-principal in half, and granted a price concession representing 2½% thereof to their customer, retaining only 2½% brokerage as compensation for their services."

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

*It is further ordered*, That the respondents, Helen E. Hinde and Elizabeth B. Swenson, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in the aforesaid initial decision.

IN THE MATTER OF

# GREENWOOD FURS, INC., ET AL.

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

*Docket 7189. Complaint, July 17, 1958—Decision, Feb. 17, 1959*

Consent order requiring a furrier in New York City to cease violating the Fur Products Labeling Act by setting out fictitious prices in invoicing and by failing to maintain adequate records as a basis for such pricing claims.

*Mr. Charles W. O'Connell* for the Commission.

*Dewey, Ballantine, Bushby, Palmer & Wood,* by *Mr. E. Deane Turner,* of New York, N.Y., for respondents.

## INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents with falsely and deceptively invoicing and advertising certain of their fur products, and with failing to maintain full and adequate records disclosing the facts upon which were based pricing and savings claims and representations as to said products, in violation of the Fur Products Labeling Act and the rules and regulations promulgated thereunder, and of the Federal Trade Commission Act.

After the issuance of the complaint, respondents, their counsel, and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the acting director and an assistant director of the Commission's Bureau of Litigation, and thereafter transmitted to the hearing examiner for consideration.

The agreement states that respondent Greenwood Furs, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 350 Seventh Avenue, New York, N.Y.; and that respondent Maury Green is president and treasurer of said corporation, his office and place of business being the same as that of the corporate respondent.

The agreement provides, among other things, that respondents admit all the jurisdictional facts alleged in the complaint, and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that the record on which the initial decision and the de-

cision of the Commission shall be based shall consist solely of the complaint and this agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the complaint may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

Respondents waive any further procedural steps before the hearing examiner and the Commission, the making of findings of fact or conclusions of law, and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

The order agreed upon fully disposes of all the issues raised in the complaint, and adequately prohibits the acts and practices charged therein as being in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and of the Federal Trade Commission Act. Accordingly, the hearing examiner finds this proceeding to be in the public interest, and accepts the agreement containing consent order to cease and desist as part of the record upon which this decision is based. Therefore,

*It is ordered,* That respondents Greenwood Furs, Inc., a corporation, and its officers, and Maury Green, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or the manufacture for introduction, into commerce, or the sale, advertising, offering for sale, transportation or distribution, in commerce, of fur products, or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution of fur products which have been made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Falsely or deceptively invoicing fur products by representing, directly or by implication, that the regular or usual price of any fur product is any amount which is in excess of the price

at which respondents have usually and customarily sold such product in the recent regular course of their business;

B. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement or notice which is intended to aid, promote or assist, directly or indirectly, in the sale or offering for sale of fur products, which represents, directly or by implication, that the regular or usual price of any fur product is any amount which is in excess of the price at which respondents have usually and customarily sold such product in the recent regular course of their business;

C. Making claims or representations in advertisements that prices are reduced from regular or usual prices, unless respondents maintain full and adequate records disclosing the facts upon which such claims or representations are based.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

The Commission having considered the hearing examiner's initial decision, filed December 30, 1958, and having concluded that it is appropriate in all respects to dispose of this proceeding:

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

*It is further ordered,* That the respondent, Greenwood Furs, Inc., a corporation, and Maury Green, individually and as an officer of said corporation, shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in the aforesaid initial decision.

# IN THE MATTER OF

# THOMPSON PRODUCTS, INC.

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

*Docket 5872. Complaint, Apr. 17, 1951—Decision, Feb. 19, 1959*

Order requiring a manufacturer in Cleveland, Ohio, to cease violating Sec. 2(a) of the Clayton Act by selling its automotive products and supplies at higher and less favorable prices to numerous small businessmen than to various larger purchasers competing with them and with purchasers from its competitors.

*Mr. Eldon P. Schrup* and *Mr. Robert E. Vaughan* for the Commission.

*Jones, Day, Cockley & Reavis,* of Cleveland, Ohio, by *Mr. Curtis C. Williams, Jr.,* and *Mr. Thomas O. Nevison,* for respondent.

## INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is before the undersigned hearing examiner for final consideration upon the complaint, answer thereto, testimony and other evidence, proposed findings of fact and conclusions, and brief in support thereof filed by counsel for respondent, proposed findings of fact and conclusions filed by counsel supporting the complaint, and reply brief filed by counsel for respondent. The hearing examiner has given consideration to the proposed findings of fact and conclusions submitted by both parties and briefs in support thereof, and all findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded, are herewith rejected, and the hearing examiner having considered the record herein and being now fully advised in the premises makes the following findings as to the facts, conclusions drawn therefrom and order:

### I. In General

1. Respondent Thompson Products, Inc., is a corporation organized under the laws of the State of Ohio. It is now, and during the times mentioned herein has been, engaged in the manufacture and in the sale and distribution in interstate commerce of diversified products for use or resale in three principal markets within the United States. During the year 1955 such sales were as follows:

| | |
|---|---|
| To manufacturers of automotive, marine and industrial products | $ 84,603,000 |
| To jobbers and others principally for automotive replacement use | 29,425,000 |
| To manufacturers and users of aircraft and aircraft engines | 172,201,000 |
| Total | $286,229,000 |

2. This proceeding involves automotive parts manufactured and sold by respondent for replacement purposes under both the "Thompson" and "Toledo" lines. These parts consist of certain automotive engine and chassis parts including valves and tie rods, tie rod sockets or ends and other front-end steering and suspension parts. In addition, respondent distributes automotive engine and chassis parts, including friction type bearings, which it purchases from other manufacturers. In the sale and distribution of its automotive parts, respondent is in active and substantial competition with other corporations and firms selling and distributing comparable automotive products and supplies in interstate commerce.

3. Respondent Thompson Products, Inc., began the manufacture of automotive parts, consisting of engine valves, in 1904, exclusively for the use of original equipment manufacturers. In 1924, the respondent, in addition to sales to original equipment manufacturers, began the distribution and sale of a line of engine and chassis replacement parts to independent distributors located throughout the United States. In 1935, respondent acquired the Toledo Steel Products Company, another company engaged in the manufacture and distribution of a line of valves to independent distributors. As of December 31, 1951, the marketing activities of Toledo Steel Products Company were transferred to the Replacement Division of the respondent. That Division now carries on respondent's activities with respect to the marketing, distribution and sale of the "Thompson" and "Toledo" lines of automotive replacement parts to independent distributors.

## II. Price Differences Arising Under the Purchase Bonus Provision of the Thompson Distributor Franchise Agreements

4. The respondent enters into franchise agreements with certain independent wholesalers who are designated as Thompson distributors. With the consent of the respondent, the distributor may designate as a Thompson jobber a jobber who executes a

Thompson Jobbers Franchise, which franchise has been accepted in writing by the respondent. Both the Thompson distributor and the Thompson jobber resell respondent's automotive replacement parts at wholesale. The Thompson jobber accounts are not sold directly by the respondent. Each such account deals primarily with the Thompson distributor with whom it has the Thompson Jobbers Franchise Agreement. The Thompson jobber account is billed by the distributor, who in turn is billed by the respondent. A redistribution allowance is paid by respondent to each distributor in an amount equal to 10 percent of the distributor's cost of parts resold by it to Thompson jobber accounts. No purchase bonus or rebate is paid by respondent to Thompson jobber accounts on the annual volume of business done by them. Sales by Thompson distributors to Thompson jobber accounts are normally at distributor's list prices.

5. In the course and conduct of its business, respondent has sold and sells its automotive replacement parts of like grade and quality, including valves, front-end parts and bearings, at varying prices (a) among Thompson distributors and (b) between Thompson distributors and Thompson jobbers. These varying prices have resulted from the varying rebates granted to Thompson distributors under the purchase bonus provision of the Thompson distributor franchise agreements. In general, Thompson distributors and Thompson jobbers compete in the resale of such products.

6. For many years the franchise agreement between respondent and its distributors has provided for a purchase bonus to be paid by respondent to its distributor based upon the distributor's annual volume of purchases of parts subject to the plan. The purchase bonus provision in respondent's 1951 distributor's franchise was applicable to the distributor's purchases of all parts in the franchised line and provided for the following nonretroactive schedule of rebate payments:

NON-RETROACTIVE

| *Annual Purchases* | *Purchase Bonus %* |
|---|---|
| Up to $10,000 | None |
| $10,001 to $25,000 | 1½ |
| $25,001 to $40,000 | 3 |
| $40,001 to $60,000 | 4½ |
| $60,001 to $80,000 | 6 |
| $80,001 to $100,000 | 7½ |
| Over $100,000 | 8 |

7. The discount was nonretroactive in that the percentage of discount set out in the schedule with respect to a particular bracket of purchases was applicable only to the purchases falling within the specified range and not to the purchases within lesser volume ranges, these latter purchases carrying only the lesser discounts set out in the lower brackets of the schedule.

8. In 1953, respondent modified the purchase bonus provision of its distributor franchise by changing the percentages of discount and the quantities required for the various discount brackets. A separate purchase bonus schedule was provided with respect to bearings, connecting rods and shims. The other products in the line remained subject to the principal bonus schedule. The discount schedules set out in respondent's 1953 full line distributor's franchises were identical for distributors handling either the "Thompson Products" or "Toledo Steel Products" brand of the company's replacement parts, and were as follows:

CONNECTING RODS, ENGINE BEARINGS AND SHIMS
NONRETROACTIVE

| *Annual Purchases* | *Purchase Bonus %* |
|---|---|
| $0 –$750 | 0 |
| $750 –$2,000 | 3½ |
| $2,000–$5,000 | 5 |
| $5,000–$10,000 | 7½ |
| Over $10,000 | 10 |

ALL OTHER PRODUCTS NONRETROACTIVE

| *Annual Purchases* | *Purchase Bonus %* |
|---|---|
| $0 –$5,000 | 0 |
| $5,000 –$7,000 | 2 |
| $7,000 –$12,000 | 3 |
| $12,000–$18,000 | 4 |
| $18,000–$24,000 | 5 |
| $24,000–$30,000 | 6 |
| $30,000–$36,000 | 7 |
| $36,000–$48,000 | 8 |
| $48,000–$60,000 | 9 |
| Over $60,000 | 10 |

9. The respondent offered in evidence a cost study made by a firm of certified public accountants for the purpose of showing that the different prices paid by respondent's distributors as a result of the nonretroactive purchase bonus plan were cost justified in that they made due allowance for differences in cost of manufacture, sale and delivery resulting from the differing meth-

ods or quantities in which such commodities were sold and delivered to such distributors. The assistant chief accountant for the Federal Trade Commission was called as witness and testified that he had checked the cost study offered by the respondent and that in his opinion the fact that the cost study did not show complete arithmetical justification in some instances does not necessarily mean that there was a failure of cost justification and that in some instances the failure of cost justification is not significant in terms of percentages of sales or of rebate differentials. In the absence of evidence to the contrary, the hearing examiner must accept the cost justification offered as correct, and conclude that the differing prices at which respondent sold its distributors resulting from the nonretroactive purchase bonus plan have been cost justified.

### III. Price Differences Arising from Sale of Common Parts to Original Equipment Manufacturers and to Thompson Distributors

10. In 1955 the respondent sold automotive parts consisting of certain valves and front-end parts to 26 automotive vehicle manufacturers for use in the original production of the vehicle and for repair or so-called replacement use. The prices at which respondent sold such automotive parts to vehicle manufacturers were lower than the prices at which respondent sold automotive parts of like grade and quality to its distributors. Replacement part sales have constituted a substantial part of the business of the automotive vehicle manufacturers. During 1955, the replacement parts sales of General Motors (Buick, Oldsmobile, Pontiac) were $139,000,000; Chrysler sold $100,000,000 and Ford sold $200,000,000. Included in these sales were substantial dollar amounts of various replacement parts manufactured by the respondent but sold under the trade name of General Motors, Chrysler and Ford.

11. Automotive vehicle manufacturers who purchase replacement parts from Thompson, including General Motors, Chrysler and Ford, are competitively engaged with Thompson distributors and jobbers in the sale of said replacement parts to their respective franchised new-car dealers. It is the general practice of the vehicle manufacturers to allow wholesale compensation to their car dealers for replacement parts sold at wholesale to other dealers, garages, etc. In making such sales, the car dealer is in

competition with Thompson distributors and jobbers. During 1955, Buick paid out $4,500,000; Oldsmobile, $3,500,000; and Pontiac, $3,000,000 in wholesale compensation to their franchised new-car dealers.

12. The automotive vehicle manufacturer buying parts from outside manufacturing sources for production use, uniformly also selects these particular sources for the purchase of these same parts for replacement use. Such vehicle manufacturers in buying these so-called "common parts" for replacement use also attempt to purchase at a price sufficiently low to enable their resale to the franchised new-car dealer at a dealer net price, which after payment of all intervening packaging, warehousing, distributing, sales promotion and advertising expenses, will place the car dealer in what they term a "competitive" position. This means that a buying price is being obtained from the independent parts manufacturers such as respondent that is so low it will allow not only for all the foregoing concurrent sale and promotional expenditures and enable the automotive vehicle manufacturer to set a new-car dealer price on the part which the Thompson wholesaler cannot profitably meet or compete with as against the franchised new-car dealer, but also that such buying price is so low that it still further provides for the payment of a wholesale compensation by the automotive vehicle manufacturer to the car dealer, for competing with the Thompson wholesaler for the latter's replacement parts wholesale business.

13. The favorable price advantages granted to the vehicle manufacturers by respondent gave a substantial competitive advantage to these favored vehicle manufacturers and their franchised new-car dealer customers. This price advantage thus gained from Thompson not only in large part contributed to the foreclosure by the vehicle manufacturer of the franchised new-car dealer as a replacement parts customer of the Thompson distributor and jobber, but further set up the franchised new-car dealer as a powerful wholesaler competitor on these parts in the place of a former actual or potential customer. Originally, parts could be obtained at a cheaper price from the jobber, but subsequent to the use of the wholesale plan, the car dealer now sells at the same or lower price. The wholesale sales of the car dealer are not inconsequential or sporadic. Among the car dealers called as witnesses in this case were—

A. Buick dealers who gave the following comparison of their wholesale versus retail parts sales during 1955:

(a) Wholesale sales of $76,825, representing 92.3 percent of sales;

(b) Wholesale sales of $142,440, representing 82.1 percent of sales; and

(c) Wholesale sales of $29,901, representing 33.7 percent of sales.

B. Four Oldsmobile dealer witnesses who testified to figures as follows:

(a) Wholesale sales of $90,081, representing 89.0 percent of sales;

(b) Wholesale sales of $39,470, representing 42.3 percent of sales;

(c) Wholesale sales of $21,592, representing 37.8 percent of sales; and

(d) Wholesale sales of $105,493 the percentage of which to the total is not available because the record fails to disclose total retail sales of this dealer.

C. With regard to the five Pontiac dealer witnesses, the figures were:

(a) Wholesale sales of $54,489, representing 31.8 percent of sales;

(b) Wholesale sales of $30,734, representing 26.1 percent of sales;

(c) Wholesale sales of $47,301, representing 25.7 percent of sales;

(d) Wholesale sales of $17,534, representing 22.0 percent of sales; and

(e) Wholesale sales of $11,918, representing 17.3 percent of sales.

D. With regard to the six Ford dealer witnesses, the figures were:

(a) Wholesale sales of $500,336, representing 81.8 percent of sales;

(b) Wholesale sales of $218,749, representing 64.9 percent of sales;

(c) Wholesale sales of $242,570, representing 56.2 percent of sales;

(d) Wholesale sales of $195,596, representing 54.2 percent of sales;

(e) Wholesale sales of $196,225, representing 53.7 percent of sales; and

(f) Wholesale sales of $117,902, representing 40.3 percent of sales.

14. Thompson distributors in the sample trade areas of Washington, D.C., Baltimore, Md., Norfolk, Va., and Richmond, Va., when called as witnesses in this proceeding, uniformly testified regarding the competitive disadvantages they encountered both in attempting to sell Thompson replacement parts to new-car dealers as well as when competing with such car dealers acting as wholesalers of these parts.

15. Respondent provides its distributors and jobbers with suggested resale prices in their attempts to sell Thompson replacement parts to new-car dealers as well as to others in the retail repair trade. The Thompson suggested new-car dealer price is a lower price than the wholesale price suggested for others in the retail repair trade. These witnesses testified to the effect that they could not profitably sell to the new-car dealer on the basis of the Thompson suggested new-car dealer price and could profitably do so only on the basis of the Thompson suggested wholesale price, at which latter and higher price the new-car dealer would not buy. The new-car dealer in turn, when acting as a wholesaler, was also selling in many instances to other potential and actual customers of the Thompson distributor on a price basis the same as the suggested Thompson new-car dealer price. This competition could only be met by the Thompson distributor at a profit loss, and when done, the sale was made only to keep the customer because of accompanying sales of more profitable items. In many instances, however, the Thompson distributor was unable to meet or refused to meet this nonprofit situation.

16. The competitive effect of the disparity in prices paid by the original equipment manufacturer and prices paid by Thompson distributors can be readily recognized when compared with the distributors net margin of profit and 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 replacement parts. Several of the distributors and jobbers of respondent testified that the overall net profit of their companies after taxes ran from 1 to 4 percent. By the

very nature of the businesses operated by the various distributors of respondent, their profit was necessarily based upon an accumulation of small margins of profit on many items. Practically all of respondent's distributors extend the same cash discount they receive to their customers, however, on a markup of acquisition cost, the discount actually given by such distributor to its purchaser on resale will be greater than the 2 percent cash discount.

17. In connection with the differing prices as between original equipment manufacturers and Thompson distributors on automotive parts for replacement, the respondents offered a defense of cost justification.

18. In order to determine if the price differences exceed any allowable cost differences, a standard of comparison was established wherein the goods can be stated to be of like grade and quality within the statutory meaning, and in comparable amounts in quantities purchased. The procedure for the establishment of this standard of comparison was developed and agreed upon by the accounting staff of the Commission and the accountants for respondent.

19. A list of "common parts" sold both to the original equipment manufacturer and to respondent's distributors was agreed upon by the accountants. All replacement parts were eliminated from further consideration by the accounting studies as not being so-called "common parts" of like grade and quality, for cost and sales price comparison, where there was a manufacturing cost difference to respondent in excess of 10 percent as between any such parts, even though such parts might have a possible common replacement use. Where the manufacturing cost difference was 10 percent or less, adjustments were made in the accounting studies to reflect the necessary cost differences in order that the comparable actual gross price differences in the sale of such like grade and quality replacement parts by respondent could be established.

20. In order to determine the comparable quantity in amount of purchases of such like grade and quality replacement parts, the actual quantity amounts of such parts which were sold by respondent to its distributors was compared with like amounts, only, of the greater quantity of such parts which were sold by respondent to original equipment manufacturers. Finally to establish the existing net price differences, the negotiated price to each different manufacturer which was subject to no further

discount, was compared against the net price of respondent to its distributors for the respective common parts, which distributor price was obtained after crediting the necessary payment by respondent of the 8 percent Federal excise tax, the granting of the normal 2 percent cash discount for prompt payment, and the allowance of the so-called average volume rebate of 3.37 percent on total sales as determined in the accounting studies.

21. The following tabulation based upon Commission Exhibit Nos. 33 A–B and 42 shows the result of the foregoing procedures (including failures of cost justification hereinafter explained) to be as follows:

| O.E.M. [1] customers not cost justified | No. of common replacement parts | Sales Value | | Price diff. favoring O.E.M. [1] | Percent of price diff. favoring O.E.M. [1] |
|---|---|---|---|---|---|
| | | Distributor | Original equip. manufacturer | | |
| Allis-Chalmers | 19 | $ 22,461 | $ 11,322 | $ 11,139 | 49.59 |
| American Motors | 7 | 23,410 | 13,088 | 10,322 | 44.09 |
| Briggs & Stratton | 13 | 960 | 375 | 585 | 60.94 |
| J. I. Case | 3 | 5,966 | 3,346 | 2,620 | 43.92 |
| Caterpillar | 1 | 1,803 | 918 | 885 | 49.08 |
| Chrysler | 44 | 310,127 | 170,379 | 139,748 | 45.06 |
| Continental | 33 | 138,727 | 77,387 | 61,340 | 44.22 |
| Ford | 32 | 297,191 | 170,074 | 127,117 | 42.77 |
| General Motors | 40 | 284,497 | 167,232 | 117,265 | 41.22 |
| Kaiser-Willys | 7 | 62,493 | 38,028 | 24,465 | 39.15 |
| Massey-Harris | 1 | 70 | 36 | 34 | 48.57 |
| Rockwell | 15 | 18,065 | 10,417 | 7,648 | 42.34 |
| Studebaker | 2 | 6,126 | 3,667 | 2,459 | 40.14 |
| Waukesha | 10 | 16,083 | 9,633 | 6,450 | 40.10 |
| Total | 227 | 1,187,979 | 675,902 | 512,077 | 43.10 |

| O.E.M. [1] customers cost justified | No. of common replacement parts | Sales Value | | Price diff. favoring O.E.M. [1] | Percent of price diff. favoring O.E.M. [1] |
|---|---|---|---|---|---|
| | | Distributor | Original equip. manufacturer | | |
| Diamond T | 4 | 54,201 | 46,276 | 7,925 | 14.62 |
| Divco | 2 | 564 | 700 | [2] 136 | [2] 24.11 |
| International Harvester | 58 | 284,523 | 195,258 | 89,265 | 31.37 |
| Le Roi | 3 | 470 | 301 | 169 | 35.96 |
| Mack | 2 | 540 | 559 | [2] 19 | [2] 3.52 |
| Oliver | 1 | 644 | 555 | 89 | 13.82 |
| Twin Coach | 2 | 5,170 | 3,735 | 1,435 | 27.76 |
| White Motors | 13 | 31,919 | 27,646 | 4,273 | 13.39 |
| Total | 85 | 378,031 | 275,030 | 103,001 | 27.25 |
| Overall total | 312 | 1,566,010 | 950,932 | 615,078 | |
| Not cost justified | 227 | 1,187,979 | 675,902 | 512,077 | |
| Cost justified | 85 | 378,031 | 275,030 | 103,001 | |

[1] Original equipment manufacturer.
[2] Denotes deduction.

22. In order to ascertain the extent of any cost justification for the foregoing pricing by the respondent, it was necessary to ascertain the operating cost differential applicable to sales by respondent to its distributors. The Thompson Service Division handled all warehousing, packaging, sales and deliveries to respondent's distributors. In order to obtain an operating cost differential the gross and net sales were determined for the year 1955. Next, the total allowances and expenses were determined, finally arriving at an operating cost differential of 38.15 percent. Respondent's accountants following the same procedure made substantially the same computation, arriving at an operating cost differential of 38.87 percent. This difference, .72 percent, was due to allocation of engineering expense previously excluded by the hearing examiner. This expense consisted of engineering research and development projects primarily concerning non-automotive products or with experimental and research work on products not currently sold by respondent. This .72 percent difference does not reflect any actual sales cost attributable to 1955 sales costs alone. The computations to arrive at the operating cost differential are set out as follows:

*Thompson Service Division—1955*

| | Amount | Percent of net sales |
|---|---|---|
| Gross Sales | $12,325,060 | |
| Less: | | |
| 2% cash discount | 246,501 | |
| 8% Federal excise tax | 894,708 | |
| Purchase bonus rebate | 415,946 | |
| Net sales | 10,767,905 | 100.00 |
| Sales allowances and deductions: | | |
| Franchise discount | 286,758 | 2.66 |
| Transportation allowed | 124,819 | 1.16 |
| Special allowances | 110,588 | 1.03 |
| Transportation to warehouses | 173,300 | 1.61 |
| Total allowances and deductions | 695,465 | 6.46 |
| Expenses: | | |
| Warehouse | 2,140,269 | 19.88 |
| Selling | 715,510 | 6.64 |
| Catalog and advertising | 231,187 | 2.15 |
| General and administrative | 337,035 | 3.13 |
| Total expenses | 3,424,001 | 31.80 |
| Total allowances and expenses | 4,119,466 | 38.26 |
| Add: | | |
| Factory billing and sales expense applicable to Thompson Service Division | | .05 |
| Total expenses applicable to distributors | | 38.31 |
| Less: | | |
| Selling expenses applicable to sales to original equipment manufacturers | | .16 |
| Operating cost differential | | 38.15 |

23. For the purpose of determining the extent of cost justification of the lower prices for replacement parts allowed original equipment manufacturers, the operating cost differential of 38.15 percent was applied to the percent of price difference with the following results:

| Original Equipment Manufacturer | Percent of price difference | Operating cost differential | Extent of cost justification | |
|---|---|---|---|---|
| | | | Over | Under |
| | | 38.15 *Percent* | *Percent* | *Percent* |
| Allis-Chalmers | 49.59 | | | 11.44 |
| American Motors | 44.09 | | | 5.94 |
| Briggs & Stratton | 60.94 | | | 22.79 |
| J. I. Case | 43.92 | | | 5.77 |
| Caterpillar | 49.08 | | | 10.93 |
| Chrysler | 45.06 | | | 6.91 |
| Continental Motors | 44.22 | | | 6.07 |
| Ford Motor Co. | 42.77 | | | 4.62 |
| General Motors: | | | | |
| Buick Division | 52.97 | | | 14.82 |
| Chevrolet Division | [1] 3.90 | | 42.05 | |
| G.M.C. Truck & Coach Div. | 30.17 | | 7.98 | |
| Oldsmobile Division | 31.51 | | 6.64 | |
| Pontiac Division | 39.10 | | | 0.95 |
| | 41.22 | | | 3.07 |
| Kaiser-Willys | 39.15 | | | 1.00 |
| Massey-Harris | 48.57 | | | 10.42 |
| Rockwell | 42.34 | | | 4.19 |
| Studebaker | 40.14 | | | 1.99 |
| Waukesha | 40.10 | | | 1.95 |
| Diamond T. | 14.62 | | 23.53 | |
| Divco | [1] 24.11 | | 62.26 | |
| International Harvester | 31.37 | | 6.78 | |
| Le Roi | 35.96 | | 2.19 | |
| Mack Mfg. Co. | [1] 3.52 | | 41.67 | |
| Oliver | 13.82 | | 24.33 | |
| Twin Coach | 27.76 | | 10.39 | |
| White Motors | 13.39 | | 24.76 | |

[1] Denotes red figure.

24. The accounting studies of the Commission and the accounting studies of respondent while agreeing on the mathematical correctness of each, do conflict, however, with regard to certain cost allocations proposed by respondent which, if found acceptable, would negate in full or further lessen respondent's failures of cost justification in this proceeding. These allocations by respondent involve:

(a) A claimed allowance of the right to "average" the costs of serving all the manufacturers herein concerned, notwithstanding the significant competitive realities involved in the marketing of these replacement parts.

(b) A claimed allowance of a so-called "return on investment" as a cost to be included in respondent's sales to the jobbing trade, notwithstanding it is to be computed on a comparable profit

basis with that occurring in unrelated matters such as respondent's aircraft, industrial products, export, and various other sales.

25. The averaging of the costs of serving all the manufacturers is not an element of cost analysis acceptable under Section 2(a) of the Clayton Act. It has been contended by respondent that the right to so average is authorized by the proceeding before the Commission in the matter of *Sylvania Electric Products, Inc.*, Docket No. 5728. The price discrimination involved in that proceeding was the sale of tubes by Sylvania to its distributors at prices higher than it charged Philco which was in competition with said distributors in the sale and distribution of replacement tubes. In making a cost justification, Sylvania compared the aggregate price difference on the entire complement of tubes with the aggregate cost difference. Only one area of competition was involved, namely, competition between Sylvania distributors and Philco.

26. In the present case, during the year 1955, the respondent sold automotive parts to 26 original equipment manufacturers for both original equipment and for resale as replacement parts. Instead of one, there were approximately 26 areas of competition. Respondent's distributors, for example, must compete with the Thompson manufactured General Motors part against General Motors and the General Motors franchised new-car dealer, not against the Ford or Chrysler organizations with regard to these particular replacement parts. Similarly, on Thompson manufactured Ford and Chrysler parts, respondent's distributors would be in competition with the Ford or Chrysler organizations and their franchised new-car dealers and not against other original equipment manufacturers with regard to these particular replacement parts.

27. The Robinson-Patman Act was designed to prohibit price discrimination between favored and nonfavored buyers, having an adverse effect on competition. The tabulation hereinbefore set out shows that Chrysler had a price advantage of 45.06 percent over the Thompson distributor; Ford, 42.77 percent; and General Motors, 41.22 percent. These lower prices can be justified only to the extent of the 38.15 percent or the operating cost differential. Permitting the averaging of the costs of all 26 customers and using the 11 customers whose prices were overjustified would result in permitting the respondent to continue to sell certain vehicle manufacturers, including Chrysler, Ford and

General Motors, at discriminating prices to the detriment and injury of respondent's distributors. In effect such procedure would permit the use of higher prices charged nonfavored customers to cost justify the lower prices granted the favored customers with the net result in certain instances of nullifying the provisions of Section 2(a) of the Clayton Act and defeat the purpose for which it was intended.

28. The attempt by the respondent to use "return on investment" as an element of cost is so far removed from the sphere of actual cost differences that it cannot be accepted as applicable to a cost justification defense. In order to arrive at this "return on investment," the respondent has determined that the rate of return or profit, before Federal income taxes, for the company's total business operations was 20.8 percent for 1955. This rate of return included income from all activities of the company operations which would embrace aircraft, marine, and industrial products, as well as automotive products, in addition to the Replacement Division's sales of automotive replacement parts.

29. The respondent claims that in 1955 it had an average investment of $8,810,912.00 in its Domestic Replacement Division facilities which are used only in the sale and distribution of its products to its distributors. It claims that since these facilities do not contribute in any way to its business with original equipment manufacturers, it is entitled to include as a cost differential between the two classes of business the return on investment in these facilities. Respondent would compute and arrive at its so-called "return on investment" in its Replacement Division as follows:

| | |
|---|---|
| Investment in Replacement Division | $ 8,810,912 |
| Return on investment in company as a whole | 20.8% |
| Return on investment in Replacement Division | $ 1,832,670 |
| Net sales of Replacement Division | $17,219,194 |
| Return on investment in Replacement Division | 10.64% |

This percentage of 10.64 was then applied to the Replacement Division net sales value of common parts in 1955 to arrive at $166,623.00 which the respondent used as a cost differential, but which, in fact, was an allocated portion of the total profits of the company from all sources, including export sales, defense contract sales and sales of parts that were not common to original equipment manufacturers or distributors.

30. The cost justification must be limited to the differential in price between sales of common automotive replacement parts sold to original equipment manufacturers and to respondent's wholesaler customers. This so-called "return on investment" claimed by respondent was calculated on the basis of the net profit before deduction of Federal income taxes from its total operations as shown above. In other words, respondent claims that the difference between its price to wholesaler customers and its price to original equipment manufacturer customers should be sufficiently large to cover not only the actual additional distribution expenses, but should also include a conjectural but nonetheless equal profit of 20.8 percent on the investment in its Replacement Division distribution facilities as well.

31. This whole concept of return on investment is contrary to the legislative intent of the Congress. The Senate Committee of the Judiciary in reporting on the Robinson-Patman Act (S. Rept. No. 1502—74th Cong., 2d Sess.) stated that the phraseology of the Act, "* * * resulting from differing methods or quantities in which such commodities are to such purchasers sold or delivered" precluded "differentials based on allocated or imputed, as distinguished from actual differences in cost." Similarly, the Committee of the Judiciary of the House of Representatives (Rept. No. 2287—74th Cong., 2d Sess.) stated that the Act "limits the use of quantity price differentials to the sphere of actual cost differences."

32. For the reasons above stated, the hearing examiner finds that there has been a failure by the respondent to cost justify the lower prices for automotive replacement parts granted to certain original equipment manufacturers, including General Motors, Chrysler and Ford.

## CONCLUSION

Respondent's discriminations in price in the interstate sale of replacement parts of like grade and quality between automotive vehicle and other manufacturer purchasers and respondent's distributor and wholesaler purchasers of said parts for competitive resale as hereinbefore found are in violation of Section 2(a) of the Clayton Act, as amended.

## ORDER

*It is ordered,* That the respondent Thompson Products, Inc., a corporation, and its officers, representatives, agents and em-

ployees, directly or through any corporate or other device, in connection with the sale for replacement purposes of automotive replacement parts 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 said replacement parts to any manufacturer of automotive vehicles or any other original equipment manufacturer at net prices which are lower than the net prices paid by any other direct or indirect purchaser who, in fact, competes with said manufacturer in the resale and distribution of such replacement parts; *provided, however,* that nothing herein shall prohibit the respondent from showing as a defense in any proceeding instituted for enforcement of this order that its differing prices make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such products are sold or delivered.

## OPINION OF THE COMMISSION

By ANDERSON, Commissioner:

In the initial decision filed after the hearings were concluded, the hearing examiner found that respondent Thompson Products, Inc., had discriminated in price between purchasers of its automotive parts in violation of Section 2(a) of the Clayton Act, as amended.[1] The respondent has appealed from that decision including its order which would require cessation of the practices held unlawful.

The respondent manufacturers and purchases from others equipment parts which are distributed to over 4,000 franchised independent distributors and jobbers for resale for replacement purposes. The distributors are automotive parts wholesalers who annually execute distributor franchise agreements for purchases of respondent's merchandise. The distributors are served through the replacement division of respondent where the parts are packed

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1 "* * * it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *"

in boxes suitable for resale. The Thompson jobbers are wholesalers signing respondent's jobber franchise agreements who thereby agree to maintain an average inventory of $1,000 on certain lines of Thompson merchandise. Parties to the jobber agreements are the respondent, the jobber, and the distributor who recommends him and from whom the jobber is to purchase his requirements of Thompson products. The distributors and jobbers engaging in the resale of respondent's products are collectively referred to hereafter as Thompson wholesalers.

In 1955 and for many years prior, the respondent was selling parts to various vehicle manufacturers for production use and also for replacement purposes. As found by the hearing examiner, the objective of the automotive manufacturer is to obtain a buying price on bulk purchases of parts low enough to bear packaging, distributive and other promotional expense and permit resale of the parts to garages and others in the repair trade by the car manufacturers' dealer or distributor affiliates. In the case of Chrysler Corporation, approximately 90% of the parts manufactured by it for replacement purposes or purchased from others, including the respondent, are sold to franchised Mopar distributors. There are approximately 135 Mopar distributorships. Some of them also operate as franchised dealers for Chrysler's cars and maintain repair garages or are owned by interests holding such car franchises. The remaining 10% of the replacement parts distributed by Chrysler Corporation are sold direct to franchised car dealers.* The Mopar distributors resell to car dealers, franchised by Chrysler Corporation and to dealers selling other makes of cars, independent garages, filling stations and fleet owners. The repair parts distributed by the various divisions of General Motors are sold to their respective franchised car dealers. On sales of parts by a franchised car dealer to a qualified wholesale customer, the dealer becomes eligible to receive a wholesale allowance or compensation from General Motors. This approximates 25% on many items. Ford Motor Company's distributional program in selling to its franchised dealers, including payments of wholesale allowances, is broadly similar to that used by General Motors. The replacement parts sold by the vehicle manufacturers are branded under their respective names. The parts sold by respondent's wholesalers carry respondent's brand names, Thompson or Toledo.

* Published as modified by Commission order of July 7, 1959.

There is no dispute in this proceeding that the prices at which the respondent sold its parts to various vehicle manufacturers, including Chrysler, General Motors and Ford, were substantially lower than those received by it for parts of like grade and quality purchased by the respondent's independent distributors and jobbers. The hearing examiner concluded that such lower prices constituted discriminations in price having the adverse competitive effects proscribed in the statute. Having additionally determined that the differing prices in instances were not fully justified by differences in costs of sale or delivery or otherwise within the contemplation of the statute's cost proviso [2], the hearing examiner found that the respondent's pricing practices accordingly were violative of law.

The respondent contends that the record does not show competitive injury, actual or potential, to Thompson distributors resulting from its lower prices to original equipment manufacturers. One of the arguments relied on in this connection is that findings of competitive injury are entirely refuted by the fact that Thompson distributors purchase parts at less than the prices paid their respective car makers by Chrysler's Mopar distributors and Ford and General Motors franchised car dealers reselling as wholesalers. This comparison primarily relates to Thompson distributors purchasing in certain volume brackets and eligible for rebates or bonuses which reduce their net prices for merchandise. In 1955, Thompson had 2,439 franchised distributors and 2,002 jobbers, and a rebate program similar to that which was in effect in 1953. In 1953, 57.87% of the distributors did not receive any rebates; and the franchised jobbers were ineligible for any rebates whatsoever.[3] Hence, approximately three-fourths

[2] See note 1, *supra*.

[3] As previously noted, the parties to the jobber franchise agreements are the jobber, the respondent, and the distributor from whom the jobber is to purchase his requirements of Thompson merchandise. The jobbers normally buy at the distributor's price and a redistribution allowance of 10% is paid by respondent on such sales. Distributors make out a monthly report form respecting their sales to such "approved customers". Although purchasing indirectly through distributors, the jobbers under respondent's merchandising program must be deemed "purchasers" from it within the meaning of the Act.

Additional issues with which the hearings were concerned pertained to the respondent's sales of its replacement parts at varying prices (a) among Thompson distributors, and (b) between Thompson distributors and Thompson franchised jobbers. Such differing prices resulted from varying rebates granted to Thompson distributors under respondent's purchase bonus programs. These noncumulative discounts ranged in 1953 from 2% up to 10% and were accorded to distributors whose annual purchases exceeded specified amounts and attained the volume brackets prescribed under the schedules. Based on the testimony received relating to an accounting study introduced by the respondent concerning cost of sales to distributors, the hearing examiner

of the Thompson wholesalers have not shared in the lower prices paid by some independent distributors.

Furthermore, tabulated comparisons appended to the brief of counsel supporting the complaint relating to the net prices paid in 1955 by Thompson wholesalers purchasing at distributor net prices and receiving no rebates and those paid by Chrysler's Mopar distributors to Chrysler indicate that Chrysler's prices were lower on 29 of the 30 common parts there tabulated. These variations ranged from small up to more substantial percentages. General Motors' net prices to wholesaling new-car dealers (redistribution net prices) were lower on 17 common parts and higher on 4 than the comparable net prices paid by such Thompson wholesalers; and as to 26 Ford common parts, its net prices to wholesaling car dealers were lower on 11, equal on 9 and higher on 6. It would be erroneous to conclude, therefore, that Thompson's wholesalers have purchased at prices generally lower than the net amounts paid for like parts by distributor and wholesaling dealer affiliates of the automobile manufacturers to their respective car producers.[4]

Respondent also argues that even if it were true that Chrysler's Mopar distributors and General Motors' and Ford's wholesaling parts' dealers resell their parts at prices below those which Thompson distributors can profitably resell them, such circumstance is irrelevant and nowise supports inferences of actual or potential injury to competition. This contention appears to assume that violation of the Act cannot occur in any competitive situation unless the favored buyer passes on the discriminations by reselling the wares to his dealers at prices lower than those charged competing dealers by the person granting the discrimination. It is not necessary, however, that a price advantage be used to lower the resale price and thereby attract customers away

[3] Continued
reached conclusions that the differing prices at which the respondent sold its merchandise between and among distributors were cost justified. His views in that regard have not been challenged by counsel supporting the complaint and no further consideration of this aspect of the proceeding appears warranted. However, the findings contained in the initial decision include none evaluating record matters specifically adressed to the legal status of the differing prices between distributors and jobbers. We have duly considered the record and deem the record insufficient for informed decision on the charges insofar as they relate to the differing prices paid by respondent's franchised jobber purchasers and certain of its distributors.

[4] It should be noted in this connection also that the principal volume of purchases by Thompson wholesalers is shown by the record to be in the category of parts for which they paid the higher comparative prices. On the Ford lines of parts, for example, Thompson wholesalers purchased 225,186 units of the higher priced parts, 15,528 of the equally priced parts, and only 3,559 of the lower priced parts.

from disfavored competitors. *E. Edelmann & Co.* v. *Federal Trade Commission.* 239 F.2d 152 (C.A. 7, 1956). That a discriminatory price enables a buyer to resell the merchandise at prices sufficiently low to force his disfavored competitors to sell the seller's wares at prices reflecting abnormally low profit levels or to refrain from selling is a relevant and material factor in determining whether such discrimination constitutes a substantial threat to competition. *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U.S. 726 (1945).

The respondent further states (1) that new-car dealers are not a potential market for Thompson wholesalers for parts usable on the cars which they are franchised to sell and hence no injury to competition between respondent's wholesalers and vehicle manufacturers in that area can result, and (2) that the record additionally shows that Thompson distributors compete on favorable terms with automobile manufacturers and their affiliated distributors and dealers in selling repair parts to other retailing segments of the repair trade.

As to the first contention, it is, of course, true that there are various commercial considerations encouraging the franchised dealer to regard his car manufacturer as a preferential source for parts. These include the fact that such parts bear the car manufacturer's name and are advertised as genuine parts and that dealer protection against obsolescence of parts may be increased. While these factors may tend to handicap the independent parts distributor in varying degrees in individual competitive situations, they nowise signify that new-car dealers were not formerly and do not now represent a potential market for the independent distributor as to parts designed for use on the dealer's make of car. It is clear that franchised car dealers both use and resell automotive parts and their franchise agreements do not stipulate that they purchase their requirements for repair parts exclusively from the car manufacturer. The various versions of the so-called "wholesale plan," including those whereby dealers may earn redistribution commissions on sales to other dealers and Chrysler's distributional program through Mopar representatives and volume discounts to dealers, implicitly recognized the potential market for the independent parts distributor represented by the franchised dealerships. In the light of the foregoing, we reject the contentions that the new-car dealer is not a poten-

tial customer for independent parts distributors selling parts of merchantable quality for franchised dealers' makes of cars.[5]

Also rejected is the respondent's previously mentioned companion argument, namely, that the respondent's distributors compete on favorable terms with distributors and franchise dealers engaged in wholesaling the parts of their respective car manufacturers. The respondent provides its distributors and jobbers with suggested resale prices. The Thompson suggested new-car dealer prices, also referred to in the course of the proceedings as "pink sheet" prices, are lower than the wholesale prices suggested for use in selling others in the repair trade. The sale of automotive replacement parts is a keenly competitive field. There can be no doubt but that the respondent's wholesalers frequently must offer their parts in competition with others whose regular resale prices are equivalent to respondent's pink sheet or lowest recommended resale prices. Respondent states that in such situations its distributors have a gross profit margin of 27.5% and that this materially exceeds the industry's nationwide average operating costs of 24.4% of sales and the 25.3% average sales costs for certain of the Thompson distributors who testified in this proceeding respecting costs in that regard. On respondent's parts for use on certain General Motors cars and the Ford and Chrysler lines, however, the pink sheet margins afforded on certain common parts to wholesalers who pay respondent's distributor net prices and receive no rebates average approximately 24.9%. As the hearing examiner in effect found, sales by respondent's wholesalers at Thompson's lowest recommended prices when duly reextending the customary 2% cash discount to purchasers constitute sales at or below cost for those lines, that is, merchandising costs plus operating costs. The profits of automotive parts wholesalers necessarily are based on an accumulation of small margins of profit. Wholesalers uniformly try to take advantage of the 2% cash discount accorded by their suppliers, their cost of merchandise is reduced thereby, and the

[5] Although one of the Thompson distributors testified to the effect that new-car dealers have never been customers for Thompson's so-called hard parts, other evidence fully supports informed determinations of competition between car makers and independent wholesalers in selling parts to franchised dealers. For example, a Thompson dealer witness testified that he formerly regarded the new-car dealer as one of his best customers; and another stated that the factory differential precluded him from selling Ford dealers. The testimony of a dealer who stated that he adhered to the respondent's higher suggested wholesale price list for the repair trade in lieu of the Thompson lower list suggested for use in selling new-car dealers additionally shows that he had some business, albeit a negligible volume, with car dealers on parts manufactured for the cars which they were franchised to handle.

material effect of that discount on profit margins is clearly evident from the record. We think the hearing examiner's findings respecting the reduced margins resulting to Thompson wholesalers had sound record basis.

Certain cost studies for the year 1955 were received into the record concerning the respondent's sales of parts of like grade and quality or so-called common parts to its wholesalers and 22 original equipment manufacturers. Thompson catalogues approximately 20,000 parts but a standard was established and agreed upon by the accountant witnesses for determining whether parts having a common replacement use were of like grade and quality. Thus, 312 parts sold in 1955 by Thompson's replacement division and purchased by the original equipment manufacturers from respondent's manufacturing divisions comprise and have been treated in the studies as the common parts or parts of like grade and quality. As to Chrysler, Ford and General Motors, the record showed an average percentage of price differences favoring Chrysler of 45.06%, Ford 42.77% and General Motors 41.22%. In the cases of Chrysler, Ford and General Motors, the nonjustified differentials, respectively, represented 6.91%, 4.62% and 3.07%.[6] Assuming but not conceding the correctness of these percentages, respondent argues that the excess or unjustified amounts of the price differences are *de minimis* and, therefore, should be disregarded. In other words, it is the respondent's position that for all practical purposes the price differences shown by the record have been fully justified. In support of this argument, the respondent refers to the Commission's decision in *United States Rubber Co.*, 46 F.T.C. 998. In that case we were considering excess price differentials over cost differences ranging from 0.0047 to 0.0480 per dollar of gross sales, and held that the differentials in the amounts of 0.0064, 0.0047 and 0.0092 per dollar of gross sales would be considered *de minimis*. We further held, however, that the other amounts by which the differences in cost failed to justify the price differences were substantial. As noted above the nonjustified differentials on common parts included in those here considered amount to 3.07%

[6] The hearing examiner found that the operating cost differential applicable to sales by respondent to the independent distributors through its replacement division and to the sales of like replacement parts to the original equipment manufacturers represented 38.15%. This was the figure applied by him to the respective percentages of price difference for each equipment manufacturer in determining the extent of cost justification for each. As discussed hereafter, the respondent excepts to the figure of 38.15% as the actual operating cost differential and claims it improperly excludes certain costs allocable to its replacement division.

in the case of General Motors, 4.62% in the case of Ford, and 6.91% in the case of Chrysler. In this industry where competition is unusually keen, where margins of profit on individual items are exceedingly small, and where even the 2% cash discount allowed by the respondent is so important to its distributor customers, these unjustified price differences obviously are not *de minimis* in character.

The business of the independent wholesalers is not limited to the resale of common parts purchased from the respondent. Respondent's wholesalers must sell competitively the balance of the parts in the Thompson lines and other lines of automotive products against their counterparts in the vehicle manufacturers' replacement lines irrespective of whether the balance is supplied the car manufacturers by the respondent or other replacement parts manufacturers. Competitive handicaps on the handling of one merchandise category have no legal sanction by reason of the fact that the disfavored competitors sell other wares. As stated by the Supreme Court in the *Morton Salt* case, *supra*:

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 or 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.

The contended insignificance of the unjustified differentials notwithstanding, purchases for competitive resale of the common parts here involved have been very substantial. With respect to 77 common parts for the Chrysler and Ford lines and certain General Motors cars, Thompson distributors in 1955 purchased 1,172,639 units for which they paid $835,756. The comparable price, had such purchases been made by the respective car manufacturers, would have been $455,029.00, a difference of $380,727. The three car makers paid $1,511,480 for the respective common parts purchased by them. Their cost to Thompson distributors would have been $2,756,105, a difference of $1,244,625.

In that year, aggregate sales of all automotive replacement parts by Chrysler and Ford were $100,000,000 and $200,000,000, respectively. Total sales by General Motors on Buick, Oldsmobile and Pontiac parts represented $139,000,000. Included in such sales were substantial dollar amounts of various replacement parts manufactured by the respondent. The granting of redistribution or wholesale allowances to car dealers on replacement parts sold at wholesale to other dealers was widespread. Buick paid out four and one-half million dollars, Oldsmobile three and one-half million dollars and Pontiac three million dollars in wholesale compensation to their franchised car dealers. Everything considered, it is evident that the discriminations accorded by respondent to the vehicle manufacturers not only have contributed to foreclosure of the franchised car dealer as a replacement parts' customer for the respondent's wholesalers, but additionally contributed to setting up the car dealer as a powerful wholesale competitor in place of a former actual or potential customer. We think there is sound record basis for the initial decision's holding that the respondent's discriminations represent substantial threats to competition. This aspect of the appeal is denied.

The respondent further excepts to the hearing examiner's action in rejecting certain elements of cost justification which it requested be recognized in the operating cost differential. The first of these concerns an accounting allocation to the replacement division of .72% for staff engineering expense. This company outlay consisted of engineering research and development projects primarily concerning nonautomotive products or related to experimental or research work on products not being sold in 1955. We have considered the arguments advanced by the respondent on this aspect but find no error in the hearing examiner's ruling declining to recognize this item as an element of cost differential.

A second exception urges error through the hearing examiner's failure to include as a differential cost a "return on investment" factor on sales to the jobbing trade on a comparable profit basis to that realized by the respondent on sales of other company products. The respondent states that, in 1955, it had an average investment of $8,810,912 in its domestic replacement division facilities used solely in selling to distributors. It further states that rate of return or profit (before federal income taxes) for total company operations was 20.8%. Respondent computes its

claimed "return on investment" for the replacement division as follows:

| | |
|---|---|
| Return on investment in replacement division (20.8% x $8,810,912) | $ 1,832,670 |
| Net sales of replacement division | 17,219,194 |
| Percentage of return on investment in replacement division to net sales | 10.64% |

The respondent would apply the percentage of 10.64 to the division's net sales value of common parts to wholesalers to arrive at $166,623 which the respondent argues should be recognized as a proper cost differential. This amount is essentially an allocated portion of the total profits of the company from all sources including export sales, defense contract sales and sales of automotive parts. The Act's pertinent proviso is limited to permitting cost differentials making only due allowances for differences in cost of manufacture, sale and delivery resulting from the different methods or quantities in which the commodities are sold or delivered to purchasers. The return rate factor or element here claimed is thus entirely outside the sphere of actual cost differences. Respondent's request for recognition of such return rate factor was properly denied by the hearing examiner.

The sales to the original equipment manufacturers of replacement parts for their respective makes of vehicles were negotiated by the manufacturing divisions of the respondent with the vehicle makers individually and prices have varied greatly. The percentage differences between the prices paid by the independent wholesalers and the different vehicle manufacturers similarly have varied. The respondent contended that the prices of all common parts sold to equipment manufacturers should be averaged to thereby afford a weighted average price differential to be cost justified. The hearing examiner in effect held that such proposed balancing of overjustification as to some equipment manufacturers against underjustification in cases of others was not a valid procedure. The respondent contends error and argues that the hearing examiner's ruling contravenes principles controlling in the Commission's decision in *Sylvania Electric Products, Inc.*, Docket 5728 (decided September 23, 1954). In that proceeding, a radio tube manufacturer was charged with discriminating in price between its disfavored distributors and a radio set manufacturer purchasing tubes for resale nationally to the replacement trade. That case dealt with comparisons of ag-

gregate price differences with aggregate cost differences on the entire complement of tubes sold and presented a competitive situation entirely dissimilar to the instant one. As we noted there, the particular tube types on which the price differences favoring the national reseller were larger, were those in least demand. Here, the price differentials relate to replacement parts having marked demand including common parts for the cars sold by General Motors, Ford and Chrysler Corporation. Furthermore, the respondent's distributors and jobbers must compete in as many areas of competition with vehicle manufacturers as there are manufacturers buying the common parts and not with a single hypothetical original equipment manufacturer. We conclude that the respondent's contentions that it has justified the differences in price between Thompson wholesalers and the original equipment manufacturers lack sound basis.

We also have considered the objections, raised by the respondent under Part III of the brief, together with the exceptions set forth in the brief's appendix. The hearing examiner's rejection of various of respondent's requested findings appears sound and free from substantial error. Error is claimed also in the brief respecting other rulings including those whereby the hearing examiner, in instances, received evidence over respondent's objections and, in others, excluded evidence offered by the respondent. The great majority of those rulings related to matters calling for exercise of the hearing examiner's sound discretion. No showing has been made by the respondent of abuses in that respect. Based on our study of these exceptions, we find no prejudice under those rulings to respondent's right to full and fair hearing.

As a result of our review here, we additionally have determined that the order to cease and desist contained in the initial decision should be modified to more clearly extend its bans to discriminations between original equipment manufacturers and disfavored indirect jobber customers who, like respondent's direct buying distributors, are purchasers within the meaning of the Act. In the light of the facts of this case, we approve in principle the hearing examiner's recognition of the availability to the respondent of the statutory cost defense in circumstances envisioned by the Act. In this connection, however, we feel that the language of the order should be revised to more clearly relate this to any future proceedings instituted for judicial enforcement.

The appeal of the respondent is denied. With the order to cease and desist modified in respects noted in the preceding paragraph, our order issuing herewith adopts the initial decision as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon the respondent's appeal from the initial decision of the hearing examiner and upon the briefs filed in support of and in opposition to the appeal; and the Commission having rendered its decision denying the appeal and having determined, for reasons stated in the accompanying opinion, that the order to cease and desist should be modified:

*It is ordered,* That the following order be, and it hereby is, substituted for the order contained in the initial decision:

*It is ordered,* That the respondent Thompson Products, 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 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 said replacement parts to any manufacturer of automotive vehicles or any other original equipment manufacturer at net prices which are lower than the net prices paid by any other direct or indirect purchaser who, in fact, competes with said manufacturer in the resale and distribution of such replacement parts; *provided, however,* that nothing herein shall prohibit the respondent from showing as a defense in any proceeding instituted for enforcement of this order that its differing prices make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such products are sold or delivered.

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

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

Decision

IN THE MATTER OF

# D & N AUTO PARTS COMPANY, INC., ET AL. AND BORDEN-AICKLEN AUTO SUPPLY CO., INC., ET AL.

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

*Dockets 5767 and 5766. Complaints, May 1, 1950—Decision, Feb. 24, 1959*

Order requiring two group buying organizations—in Memphis, Tenn., and Andalusia, Ala., respectively—and their 25 jobber members, to cease violating Sec. 2(f) of the Clayton Act by soliciting and accepting illegal price advantages from suppliers of automotive parts and supplies consisting of discounts ranging up to 20% based on the aggregate purchases of all members of each group in the preceding year.

*Mr. Eldon P. Schrup* for the Commission.

*Mr. Frank J. Tipler, Jr.*, of Andalusia, Ala., for D & N Auto Parts Company, Inc., et al.

*Taylor, Costen & Taylor*, of Memphis, Tenn., by *Mr. Hillsman Taylor*, for Borden-Aicklen Auto Supply Co., Inc., et al.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

In the above proceedings Mid-South Distributors, a corporation, and its officers, directors and members named as respondents in Docket No. 5766; and Cotton States, Incorporated, a corporation, and its officers, directors and members named as respondents in Docket No. 5767, were charged with violation of subsection (f) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. During the course of the hearings, it was agreed by all parties that these two proceedings be tried concurrently and considered as one case; that the testimony and other evidence introduced in each of these cases be considered as applying to the respondents in both cases; and that the hearing examiner issue one initial decision covering both cases.

These proceedings are now before the undersigned hearing examiner for final consideration, upon the complaints, answers thereto, testimony and other evidence, proposed findings of fact and conclusions submitted by counsel, and oral argument thereon. The hearing examiner has given consideration to the proposed findings of fact and conclusions submitted by all parties and oral argument thereon, and all findings of fact and conclusions of law proposed by the parties respectively, not hereinafter

specifically found or concluded, are herewith rejected, and the hearing examiner having considered the record herein and being now fully advised in the premises, makes the following findings as to the facts, conclusions drawn therefrom and order:

1. Respondent Mid-South Distributors is a membership corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its principal office and place of business located at 387 South Front Street, Memphis, Tenn. At the time of the issuance of the complaint in this proceeding the members of said respondent Mid-South Distributors were the following:

(1) Respondent Borden-Aicklen Auto Supply Co., Inc., a Louisiana corporation with its principal office and place of business located in 613–17 Baronne Street, New Orleans, La.

(2) Respondent Central Electric Company a Mississippi corporation with its principal office and place of business located at 404–06 Main Street, Hattiesburg, Miss.

(3) Respondent Corpus Christi Hardware Co., Inc., a Texas corporation with its principal office and place of business located at 99 South Broadway, Corpus Christi, Tex.

(4) Respondent Crawford Co., Inc., a Louisiana corporation with its principal office and place of business located at 213–15 Crockett Street, Shreveport, La.

(5) Respondent Maurice G. Whitley and Lorraine C. Whitley, copartners trading as Fulton, Conway and Co. with their principal office and place of business located at 803–07 West Main Street, Louisville, Ky.

(6) Respondent A. S. Hatcher Co., Inc., a Georgia corporation, with its principal office and place of business located at 586–94 Third Street, Macon, Ga.

(7) Respondent Keith-Simmons Co., a Tennessee corporation with its principal office and place of business located at 201–314 10th Avenue, South, Nashville, Tenn.

(8) Respondent Mills-Morris Co., Inc., a Tennessee corporation with its principal office and place of business located at 171–187 South Dudley Street, Memphis, Tenn.

(9) Respondent Motor Supply Co., Inc., a Mississippi corporation with its principal office and place of business located at 2618 Fifth Street, Meridian, Miss.

(10) Respondent Motor Supply Co., Inc., a Louisiana corporation with its principal office and place of business located at Monroe, La.

(11) Respondent Motor Supply Co., Inc., a Georgia corporation with its principal office and place of business located at 37 West Broad Street, Savannah, Ga.

(12) Respondents Sidney A. Robinson, Jr., Mrs. Elta A. Robinson and Mrs. Elta R. Posey, copartners trading as Robinson Brothers with their principal office and place of business located at 135–162 Amite Street, Jackson, Miss.

(13) Respondent Southern Auto Supply Co., Inc., a Tennessee corporation with its principal office and place of business located at 507–09 Broad Street, Chattanooga, Tenn.

(14) Tennessee Mill & Mine Supply Co., a Tennessee corporation with its principal office and place of business located at 404–12 State Street, Knoxville, Tenn.

(15) Respondent Voss-Hutton, Barbee Company, Inc., formerly known as Voss-Hutton Company, Inc., an Arkansas corporation with its principal office and place of business located at 400–04 West Spring Street, Little Rock, Ark.

(16) Respondent Wadel-Connally Hardware Company, Inc., a Texas corporation with its principal office and place of business located at 412 North Spring Street, Tyler, Tex.

(17) Respondent Williams Hardware Co., Inc., an Arkansas corporation with its office and principal place of business located at 100–06 South Fourth Street, Portsmouth, Ark.

All of the above-named respondent members have been members of said respondent Mid-South Distributors since its organization, August 16, 1936, until the present time, with the exception of respondents Corpus Christi Hardware Co., Inc.; A. S. Hatcher Co., Inc.; Motor Supply Co., of Savannah, Georgia, Tennessee Mill & Mine Co.; and Wadel-Connally Hardware Company, Inc., who were elected to membership subsequent to August 18, 1936, and who have continued as members to the present time.

2. Respondent Cotton States, Incorporated, is a membership corporation organized, existing and doing business under and by virtue of the laws of the State of Mississippi with its principal office and place of business located at Andalusia, Ala. At the time of the issuance of the complaint in this proceeding the members of said respondent, Cotton States, Incorporated, were the following:

(1) Respondent D & N Auto Parts Company, a Mississippi corporation with its office and principal place of business located at 420 Howard Street, Greenwood, Miss.

(2) Respondent Christian Auto Supply Co., Inc., a Mississippi

corporation with its principal office and place of business located at 529 Central Avenue, Laurel, Miss.

(3) Respondent Milton Supply Company a Mississippi corporation with its principal office and place of business located at 2712 Sixth Street, Meridian, Miss.

(4) Respondent Taylor Parts & Supply Co., Inc., a Florida corporation with its principal office and place of business located at Andalusia, Ala.

(5) Respondent William P. Barnes, trading as Barnes Motor Supply located at 1205 Main Street, Baton Rouge, La.

(6) Respondent Davis Motor Supply Co., Inc., an Alabama corporation with its principal office and place of business located at 260 St. Louis Street, Mobile, Ala.

(7) Respondent Hart Supply Co., Inc., a Mississippi corporation with its principal office and place of business located at 350 Broad Street, Columbia, Miss.

(8) Respondent Greiner Auto Parts Company, Inc., a Louisiana corporation with its principal office and place of business located at 2929 Magazine Street, New Orleans, La.

All of the above-named respondent members have been members of said respondent Cotton States, Incorporated, since its organization March 15, 1938, with the exception of respondent Greiner Auto Parts Company, Inc., which was subsequently elected to membership.

3. The above respondents who have been named as members of respondents Mid-South Distributors and Cotton States, Incorporated, are independent jobbers dealing principally in automotive parts, accessories and supplies. Since June 19, 1936, said respondent jobbers have been engaged in the purchase and resale of said automotive products, in interstate commerce, and have been and are now engaged in active and substantial competition with other corporations, partnerships, firms and individuals also engaged in the purchase and resale of such automotive products of like grade and quality, in interstate commerce, which have been purchased from the same or competitive sellers.

4. Respondent jobbers organized and have maintained, controlled and operated respondents Mid-South Distributors and Cotton States, Incorporated, for the purpose of inducing the granting or allowance of lower and more favorable prices by manufacturers and sellers of automotive parts, accessories and supplies. It was the regular procedure for the respondent jobbers acting through Mid-South Distributors or Cotton States, Incor-

porated, to either notify or allow competing manufacturers of various lines of automotive parts, accessories or supplies—to submit prices and appear before the members of the group interested in purchasing such lines and present their lines of merchandise and the terms and conditions of sale they were prepared to allow. Thereafter, the members of the group organization to which such lines had been presented would consider the offers and vote to accept one of the lines to the exclusion of the lines of the seller's competitors. This, however, was not a rigid requirement in that the individual members could continue to handle competitive lines which they were already selling or for which they had a preference. In actual practice, most of the members of the group organizations sold and distributed the particular manufacturer's line accepted by the group.

5. Among the lines adopted by the members of respondent Mid-South were: the ignition line manufactured and sold by Standard Motor Products, Inc.; the fuel pump line sold by Hygrade Products Division of Standard Motor Products, Inc.; and leaf spring, coil spring and chassis parts lines manufactured and sold by Moog Industries, Inc. Among the lines adopted by the members of Cotton States, Incorporated, were: leaf spring, coil spring and chassis parts sold by Moog Industries, Inc.; the fuel pump line sold by Hygrade Division, Standard Motor Products, Inc.; the ignition line sold by C. E. Niehoff & Company; and the battery cable line sold by Whitaker Cable Corporation.

6. Representatives of the above sellers were called as witnesses in this proceeding, and these witnesses testified as to the pricing practices of the respective suppliers. The pricing plan followed by these particular sellers was more or less similar to that used by other sellers not named herein. The sellers from time to time issued their distributor or jobber price lists which listed the basic prices used by the seller in the sale and distribution of its various automotive parts, accessories and suppliers. In addition to various discounts, such as cash discount, and in some instances warehousemen's discount for resale to other jobbers, the sellers allowed a retroactive volume rebate to purchasers of their products. This plan involved a sliding scale of discounts based upon the volume purchased, and 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. In the case of the respondent jobbers who were members of Mid-South Distributors and members of Cotton States, Incorporated, the retroactive volume discount allowed by the suppliers was based not on the total purchases of the individual respondent jobber, but instead was based upon the total purchases of all the members of Mid-South Distributors or Cotton States, Incorporated, as the case may be.

7. The purchase procedure followed by the respondent jobbers, as members of either Mid-South Distributors or Cotton States, Incorporated, provided for the forwarding of purchase orders by the individual respondent jobber member to the seller directly or through the group office. Monthly settlements were made between the supplier and the group office for the aggregate purchase orders of all the respondent jobber members so received, and each respondent jobber member also settled monthly with the group office for its individual purchases so made. The annual volume rebate allowed by the seller was based upon the aggregate purchases of the members of the group and was paid to the group office, which in turn distributed such volume rebate, less expenses, to its jobber members in proportion to the amount of such jobber's individual purchases. The rebates and discounts were granted and allowed by the sellers to each individual respondent jobber member of Mid-South Distributors and Cotton States, Incorporated, on the basis of the total purchases of all the members of the respective groups irrespective of whether or not the amount of such individual member's purchases met with the requirements of any particular bracket of the seller's volume rebate schedules set forth in the seller's contracts. The group buying organizations, Mid-South Distributors and Cotton States, Incorporated, were in reality bookkeeping devices for the collection of rebates, discounts and allowances received from sellers on purchases made by their jobber members. Such respondent jobbers in fact purchase their requirements of the seller's products direct from the seller and at the same time receive a more favorable price or a higher rebate based upon the combined purchases of all of the members.

8. The purpose of the respondent jobbers in organizing and maintaining respondents Mid-South Distributors and Cotton States, Incorporated, was to obtain a price lower than a jobber respondent could obtain on the amount of its purchases if made as a non-member of the group. The jobber respondents knew that

the net prices obtained through the use of the group buying device were not based upon the quantities or other factors involved in any particular sale, but rather upon the combined dollar amount of all sales to them as purchasers and bear relation to factors other than actual costs of production or delivery. The method of purchase was substantially the same as if the jobber member had been operating individually instead of as a group member. Deliveries by the seller were made direct to the respondent jobber in the same manner as deliveries would have been made had respondent jobber been a purchaser independent of any group organization. Respondent jobbers further knew that they were getting a lower price through the means of the group organization than was obtained by jobbers competing with them in the resale of the supplier's products, in the same marketing area, where such competitors were not members of a buying group.

9. Illustrative of the monetary benefits derived by the respondent jobbers as members of the group buying organizations Mid-South Distributors and Cotton States, Incorporated, as opposed to those individual purchasers buying without the benefit of such group consolidation of purchases and as opposed to what the respondent jobber would have paid had it been operating without the benefit of the group consolidation of purchases, are the following tabulations taken from Commission Exhibits in Docket Nos. 5766 and 5767 as shown on the face of such tabulations: [1]

10. The automotive parts industry is a highly competitive business involving small margins of profit. The net margin of profit of certain individual respondent jobbers was as low as 2 percent before taxes. The importance of the discriminatory prices allowed by the various suppliers is pointed up by the importance given by the respondent jobbers to the 2 percent cash discount as increasing their margin of profit and reducing the cost of acquisition of their merchandise. Through the lower cost of merchandise resulting from such discriminatory prices, the respondent jobbers obtained a competitive advantage over their competitors selling the same or comparable merchandise in the same trade area who receive discounts or rebates based upon their individual purchases.

11. The complaint in this proceeding named as respondents certain individuals who were described as officers and directors of Mid-South Distributors and Cotton States, Incorporated. Many

[1] See pages 1286–1293.

## MID-SOUTH DISTRIBUTORS

### RESPONDENT JOBBERS' "GROUP-BUYING" METHOD OF PURCHASING [1]

| Manufacturer's published discount schedule to trade | | Member-jobbers | Actual Net rebateable 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 |
|---|---|---|---|---|---|---|---|---|
| Net purchases | Retro-active rebate | | 1 | 2 | 3 | 4 | 5 | 6 |
| | *Percent* | | | *Percent* | | *Percent* | | |
| | | Auto Bearings & Parts Co. | $10,926.64 | 15 | $ 1,639.00 | 20 | $ 2,185.33 | $ 546.33 |
| | | Borden-Aicklen Auto Supply | 4,883.52 | 7 | 341.85 | 20 | 976.70 | 634.85 |
| Under $1,800 | None | Central Electric Co. | 19,813.71 | 15 | 2,972.06 | 20 | 3,962.72 | 990.66 |
| $1,800 - $2,400 | 3 | Corpus Christi Hdw. Co. | 34,902.59 | 16 | 5,584.41 | 20 | 6,980.50 | 1,396.09 |
| $2,400 - $3,600 | 5 | Crawford Co. | 2,107.24 | 3 | 63.22 | 20 | 421.45 | 358.23 |
| $3,600 - $5,000 | 7 | Fulton-Conway & Co. | 34,578.28 | 16 | 5,532.52 | 20 | 6,915.65 | 1,383.13 |
| $5,000 - $6,500 | 9 | A. S. Hatcher Co. | 2,432.54 | 5 | 121.63 | 20 | 486.54 | 364.91 |
| $6,500 - $8,000 | 11 | Keith Simmons Co. | 263.35 | None | ..... | 20 | 52.67 | 52.67 |
| $8,000 - $10,000 | 13 | Mills Morris Co. | 44,940.96 | 16 | 7,190.55 | 20 | 8,988.15 | 1,797.60 |
| $10,000 - $25,000 | 15 | Motor Supply Co. (Meridian) | 8,312.32 | 13 | 1,080.60 | 20 | 1,662.47 | 581.87 |
| $25,000 - $50,000 | 16 | Motor Supply Co. (Savannah) | 14,987.12 | 15 | 2,090.04 | 20 | 2,786.70 | 696.66 |
| $50,000 - $75,000 | 17 | Motor Supply Co. (Monroe) | 4,888.97 | 7 | 315.06 | 20 | 899.99 | 584.93 |
| $75,000 - $100,000 | 18 | Robinson Bros. | 11,386.24 | 15 | 1,707.94 | 20 | 2,277.43 | 569.49 |
| $100,000 and over | 20 | Tenn. Mine & Mill Supply | 17,050.24 | 15 | 2,557.54 | 20 | 3,410.06 | 852.52 |
| | | Southern Auto Supply Co. | 31,821.79 | 16 | 5,091.49 | 20 | 6,364.36 | 1,272.87 |
| | | Voss-Hutton Co. | 16,638.77 | 15 | 2,495.82 | 20 | 3,327.75 | 831.93 |
| | | Wadel-Connally Co. | 5,803.64 | 9 | 522.33 | 20 | 1,160.75 | 638.42 |
| | | William Hardware Co. | 17,307.94 | 15 | 2,596.19 | 20 | 3,461.61 | 865.42 |
| Totals | ..... | ..... | 281,604.25 | ..... | 41,902.25 | ..... | 56,320.83 | 14,418.58 |

[1] Compiled from Commission Exhibit No. 160, showing actual purchases from Standard Motor Products, Inc. during 1949 and comparison with Commission Exhibit Nos. 175-178, being the applicable Standard Motor Products, Inc. rebate contracts and endorsements. (Also, see Commission decision in D. 5721—Standard Motor Products, Inc.)

## MID-SOUTH DISTRIBUTORS

RESPONDENT JOBBERS' "GROUP-BUYING" METHOD OF PURCHASING [2]

| Manufacturer's published discount schedule to trade | | Member-jobbers | 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 |
|---|---|---|---|---|---|---|---|---|
| Net purchases | Non-retroactive rebate | | 1 | 2 | 3 | 4 | 5 | 6 |
| | *Percent* | | | *Percent* | | *Percent* | | |
| | | Central Electric Co. | $419.69 | None | | 10 | $41.97 | $41.97 |
| | | Corpus Christi Hdwe. | 367.84 | None | | 10 | 36.78 | 36.78 |
| | | Crawford Co., Inc. | 423.06 | None | | 10 | 42.31 | 42.31 |
| | | Fulton Conway Co. | 2,285.10 | 5; 10 | $153.51 | 10 | 228.51 | 75.00 |
| | | A. S. Hatcher Co. | 1,122.67 | None | | 10 | 112.27 | 112.27 |
| | | Mills Morris Co. | 5,681.47 | 5; 10 | 493.15 | 10 | 568.15 | 75.00 |
| | | Auto Bearing & Parts | 1,715.80 | 5; 10 | 96.58 | 10 | 171.58 | 75.00 |
| | | Motor Supply Co. (Meridian) | 176.61 | None | | 10 | 17.66 | 17.66 |
| | | Motor Supply Co. (Monroe) | 106.73 | None | | 10 | 10.67 | 10.67 |
| $1,500 | 5 | Motor Supply Co. (Savannah) | 2,876.51 | 5; 10 | 212.65 | 10 | 287.65 | 75.00 |
| All above $1,500 | 10 | Robinson Bros. | 1,264.46 | None | | 10 | 126.45 | 126.45 |
| | | Southern Auto Supply Co. | 6,868.04 | 5; 10 | 611.80 | 10 | 686.80 | 75.00 |
| | | Tenn. Mill & Mine | 1,873.53 | 5; 10 | 112.35 | 10 | 187.35 | 75.00 |
| | | Voss-Hutton Co. | 365.25 | None | | 10 | 36.53 | 36.53 |
| | | Wadel-Connally Co. | 364.90 | None | | 10 | 36.49 | 36.49 |
| | | Williams Hardware | 1,512.98 | 5; 10 | 76.30 | 10 | 151.30 | 75.00 |
| Totals | | | 27,424.64 | | 1,756.34 | | 2,742.47 | 986.13 |

[2] Compiled from Commission Exhibit No. 162, showing actual purchases from the Hygrade Products Division of Standard Motor Products, Inc. during 1949, and comparison with Commission Exhibit No. 184, being the applicable rebate contract of Hygrade Products Division of Standard Motor Products, Inc.

## MID-SOUTH DISTRIBUTORS

### RESPONDENT JOBBERS' "GROUP-BUYING" METHOD OF PURCHASING [3]

| Manufacturer's published discount schedule to trade | | Member-jobbers | 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 |
|---|---|---|---|---|---|---|---|---|
| Net purchases | Retroactive rebate | | 1 | 2 | 3 | 4 | 5 | 6 |
| | *Percent* | | | *Percent* | | *Percent* | | |
| Under $1,000 | None | Auto Bearing & Parts Co. | $334.91 | None | | 14.96 | $50.09 | $50.09 |
| $1,000 – $2,999 | 5 | Central Electric Co. | 6,824.46 | 9 | $614.20 | 14.96 | 1,020.68 | 406.48 |
| $3,000 – $4,999 | 7 | Corpus Christi Hdwe. Co. | 5,239.94 | 9 | 471.59 | 14.96 | 783.69 | 312.10 |
| $5,000 – $7,999 | 9 | Crawford Co. | 402.94 | None | | 14.96 | 60.26 | 60.26 |
| $8,000 – $10,999 | 10 | Fulton Conway & Co. | 995.83 | None | | 14.96 | 148.94 | 148.94 |
| $11,000 – $14,999 | 11 | A. S. Hatcher Co. | 1,977.91 | 5 | 98.90 | 14.96 | 295.82 | 196.92 |
| $15,000 – $19,999 | 12 | Mills-Morris Co. | 11,634.50 | 11 | 1,279.80 | 14.96 | 1,740.07 | 460.27 |
| $20,000 – $27,499 | 13 | Motor Parts & Supply Co. | 19.57 | None | | 14.96 | 2.93 | 2.93 |
| $27,500 – $34,999 | 14 | Motor Supply Co. (Meridian) | 4,516.79 | 7 | 316.18 | 14.96 | 675.54 | 359.36 |
| $35,000 and over | 15 | Motor Supply Co. (Monroe) | 2,587.10 | 5 | 129.36 | 14.96 | 386.93 | 257.57 |
| | | Motor Supply Co. (Savannah) | 7,708.83 | 9 | 693.79 | 14.96 | 1,152.94 | 459.15 |
| | | Robinson Bros. | 917.54 | None | | 14.96 | 137.23 | 137.23 |
| | | Southern Auto Supply Co. | 6,990.20 | 9 | 629.12 | 14.96 | 1,045.47 | 416.35 |
| | | Tenn. Mill & Mine Supply Co. | 1,391.38 | 5 | 69.57 | 14.96 | 208.10 | 138.53 |
| | | Voss-Hutton Co. | 4,333.89 | 7 | 303.37 | 14.96 | 648.18 | 344.81 |
| | | Wadel-Connally Co. | 6,308.79 | 9 | 567.79 | 14.96 | 943.55 | 375.76 |
| | | Williams Hdwe. Co. | 4,535.19 | 7 | 317.46 | 14.96 | 678.29 | 360.83 |
| Totals | | | 66,719.77 | | 5,491.13 | | 9,978.71 | 4,487.58 |

[3] Compiled from Commission Exhibit No. 164 A–B, showing the actual purchases of leaf springs, coil springs and chassis parts from Moog Industries, Inc. during 1950, and comparison with Commission Exhibit 128 A–D, being the applicable Moog Industries, Inc. rebate contract.

## MID-SOUTH DISTRIBUTORS

### RESPONDENT JOBBERS' "GROUP-BUYING" METHOD OF PURCHASING [4]

| Manufacturer's published discount schedule to trade | | Member-jobbers | 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 |
|---|---|---|---|---|---|---|---|---|
| Net purchases | Retroactive rebate | | 1 | 2 | 3 | 4 | 5 | 6 |
| | *Percent* | | | *Percent* | | *Percent* | | |
| | | Auto Bearings & Parts Co. | $1,369.08 | 5 | $68.45 | 19 | $260.13 | $191.68 |
| | | Central Elect. Co. | 2,408.24 | 5 | 120.41 | 19 | 457.57 | 337.16 |
| Under $1,000 | None | Corpus Christi Hdwe. Co. | 1,530.00 | 5 | 76.50 | 19 | 290.70 | 214.20 |
| $1,000 - $4,999 | 5 | Crawford Co. | 585.96 | None | | 19 | 111.33 | 111.33 |
| $5,000 - $7,499 | 7½ | Fulton Conway Co. | 2,594.97 | 5 | 129.75 | 19 | 493.05 | 363.30 |
| $7,500 - $9,999 | 9 | A. S. Hatcher Co. | 1,483.65 | 5 | 74.18 | 19 | 281.89 | 207.71 |
| $10,000 - $12,499 | 10 | Mills-Morris Co. | 3,728.45 | 5 | 186.42 | 19 | 708.41 | 521.99 |
| $12,500 - $14,999 | 12 | Motor Supply Co. | 6,656.06 | 7½ | 499.20 | 19 | 1,264.65 | 765.45 |
| $15,000 - $17,499 | 14 | Robinson Bros. | 2,759.69 | 5 | 137.98 | 19 | 524.34 | 386.36 |
| $17,500 - $19,999 | 15 | Southern Auto Supply Co. | 3,440.61 | 5 | 172.03 | 19 | 653.72 | 481.69 |
| $20,000 - $22,499 | 16 | Tenn. Mill & Mine Co. | 1,492.70 | 5 | 74.64 | 19 | 283.61 | 208.97 |
| $22,500 - $24,999 | 17 | Voss Hutton Co. | 750.92 | None | | 19 | 142.67 | 142.67 |
| $25,000 - $27,499 | 18 | Wadel-Connally Co. | 3,610.53 | 5 | 180.53 | 19 | 686.00 | 505.47 |
| $27,500 and over | 19 | Williams Hdw. Co. | 1,072.02 | 5 | 53.60 | 19 | 203.68 | 150.08 |
| Totals | | | 33,482.88 | | 1,773.69 | | 6,361.75 | 4,588.06 |

[4] Compiled from Commission Exhibit No. 143-E-F, showing the actual purchases of coil action line from Moog Industries, Inc. during 1948 and comparison with Commission Exhibit No. 128 A-D, being the applicable Moog Industries, Inc. rebate contract.

## COTTON STATES, INCORPORATED

RESPONDENT JOBBERS' "GROUP-BUYING" METHOD OF PURCHASING [1]

| Manufacturer's published discount schedule to trade | | Member-jobbers | 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 |
|---|---|---|---|---|---|---|---|---|
| Net purchases | Retro-active rebate | | 1 | 2 | 3 | 4 | 5 | 6 |
| | *Percent* | | | *Percent* | | *Percent* | | |
| Under $1,000 | None | Alabama Auto Parts Co. | $417.52 | None | | 14 | $58.45 | $58.45 |
| $1,000 to $2,999 | 5 | Barnes Motor Supply | 3,094.92 | 7 | $216.64 | 14 | $433.29 | $216.65 |
| $3,000 to $4,999 | 7 | Christian Auto Supply Co. | 1,301.67 | 5 | 65.08 | 14 | 182.23 | 117.15 |
| $5,000 to $7,999 | 9 | D. & N. Auto Parts Co. | 5,671.96 | 9 | 510.48 | 14 | 794.07 | 283.59 |
| $8,000 to $10,999 | 10 | Davis Motor Supply Co. | 2,099.32 | 5 | 104.97 | 14 | 293.91 | 188.94 |
| $11,000 to $14,999 | 11 | Greiner Auto Parts Co. | 3,373.71 | 7 | 236.16 | 14 | 472.32 | 236.16 |
| $15,000 to $19,999 | 12 | Hart Supply Co. | 11,434.66 | 11 | 1,257.81 | 14 | 1,600.85 | 343.04 |
| $20,000 to $27,499 | 13 | Milton Supply Co. | 1,864.97 | 5 | 93.25 | 14 | 261.10 | 167.85 |
| $27,500 to $34,999 | 14 | Taylor Parts & Supply Co. | 3,640.08 | 7 | 254.81 | 14 | 509.61 | 254.80 |
| $35,000 and over | 15 | | | | | | | |
| Totals | | | 32,898.81 | | 2,739.20 | | 4,605.83 | 1,866.63 |

[1] Compiled from Commission Exhibit No. 3 showing actual purchases of leaf springs, coil springs, and chassis parts from Moog Industries, Inc. during 1950 and comparison with Commission Exhibit No. 43 being the applicable Moog Industries, Inc. rebate contract.

## COTTON STATES, INCORPORATED

RESPONDENT JOBBERS' "GROUP-BUYING" METHOD OF PURCHASING [2]

| Manufacturer's published discount schedule to trade | | Member-jobbers | 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 |
|---|---|---|---|---|---|---|---|---|
| Net purchases | Non-retroactive rebate | | 1 | 2 | 3 | 4 | 5 | 6 |
| | *Percent* | | | *Percent* | | *Percent* | | |
| | | Alabama Auto Parts Co. | $3.71 | None | | 9.83 | $0.37 | $0.37 |
| | | Barnes Motor Supply | 159.14 | None | | 9.83 | 15.64 | 15.64 |
| | | Capital City Welding & Machine Works | 111.75 | None | | 9.83 | 10.98 | 10.98 |
| $1,500 | 5 | Christian Auto Supply | 734.30 | None | | 9.83 | 72.18 | 72.18 |
| All above $1,500 | 10 | Davis Motor Supply Co. | 605.33 | None | | 9.83 | 59.50 | 59.50 |
| | | Greiner Auto Parts Co. | 230.87 | None | | 9.83 | 22.69 | 22.69 |
| | | Hart Supply Co. | 39.43 | None | | 9.83 | 3.87 | 3.87 |
| | | Milton Supply Co. | 1,427.59 | None | | 9.83 | 140.32 | 140.32 |
| | | Motor Bearing Supply Co. | 5.16 | None | | 9.83 | 0.51 | 0.51 |
| | | Taylor Parts & Supply Co. | 39.12 | None | | 9.83 | 3.85 | 3.85 |
| Totals | | | 3,356.40 | | | | 329.91 | 329.91 |

[2] Compiled from Commission Exhibit No. 4, showing actual purchases from Hygrade Products Division of Standard Motor Products, Inc. during 1949 and comparison with Commission Exhibit No. 15 being the applicable Rebate Contract of Hygrade Products Division, Standard Motor Products, Inc.

## COTTON STATES, INCORPORATED

RESPONDENT JOBBERS' "GROUP-BUYING" METHOD OF PURCHASING [3]

| Manufacturer's published discount schedule to trade | | Member-jobbers | 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 |
|---|---|---|---|---|---|---|---|---|
| Net purchases | Retro-active rebate | | 1 | 2 | 3 | 4 | 5 | 6 |
| | *Percent* | | | *Percent* | | *Percent* | | |
| | | Barnes Motor Supply | $8,375.56 | 10 – 5 | $1,190.56 | 10 – 7 | $1,332.11 | $141.55 |
| Up to $1,200 | None | Capitol City Welding & Machine Works | 837.78 | None | | 10 – 7 | 136.42 | 136.42 |
| $1,200 to $2,400 | 5 | | | | | | | |
| $2,400 to $3,600 | 7 | Christian Auto Supply | 2,823.33 | 7 | 166.32 | 10 – 7 | 448.65 | 282.33 |
| $3,600 to $6,000 | 10 | D & N Auto Parts | 11,676.67 | 10 – 6 | 1,665.73 | 10 – 7 | 1,748.74 | 83.01 |
| $6,000 to $8,400 | 10 – 5 | Davis Motor Supply | 8,180.00 | 10 – 5 | 1,159.85 | 10 – 7 | 1,296.59 | 136.74 |
| $8,400 to $12,000 | 10 – 6 | Greiner Auto Parts | 12,477.78 | 10 – 7 | 1,961.43 | 10 – 7 | 1,961.43 | |
| $12,000 and over | 10 – 7 | Hart Supply Co. | 7,616.67 | 10 – 5 | 1,077.37 | 10 – 7 | 1,203.65 | 126.28 |
| | | Milton Supply Co. | 7,890.00 | 10 – 5 | 1,084.25 | 10 – 7 | 1,202.35 | 118.10 |
| | | Taylor Parts & Supply | 8,198.89 | 10 – 5 | 1,149.09 | 10 – 7 | 1,280.77 | 131.68 |
| Totals | | | 68,076.68 | | 9,454.60 | | 10,610.71 | 1,156.11 |

[3] Compiled from Commission Exhibit No. 9, showing the actual purchases from C. E. Niehoff & Co. during 1949, and comparison with Commission Exhibit No. 104 setting forth the applicable C. E. Niehoff & Co. rebate schedule.

## COTTON STATES, INCORPORATED

RESPONDENT JOBBERS' "GROUP-BUYING" METHOD OF PURCHASING [4]

| Manufacturer's published discount schedule to trade | | Member-jobbers | Actual Net rebateable 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 |
|---|---|---|---|---|---|---|---|---|
| Net purchases | Non-retroactive rebate [5] | | 1 | 2 | 3 | 4 | 5 | 6 |
| | *Percent* | Alabama Auto Parts Co. | $3,585.70 | (5) *Percent* {0; 5; 7½; 10; 12½; 17½ | $514.29 | *Percent* 20 | $7117.14 | $202.85 |
| $600 or less | None | Barnes Motor Supply | 3,899.21 | {0; 5; 7½; 10; 12½; 17½ | 584.22 | 20 | 779.85 | 195.63 |
| $600 to $1,000 | 5 | Capitol City Welding & Machine Works | 523.19 | None | | 20 | 104.64 | 104.64 |
| $1,000 to $1,500 | 7½ | Christian Auto Supply | 743.70 | 0; 5 | 14.37 | 20 | 148.74 | 134.37 |
| $1,500 to $2,000 | 10 | D & N Auto Parts | 4,601.96 | {0; 5; 7½; 10; 12½; 17½ | 742.94 | 20 | 920.41 | 177.47 |
| $2,000 to $3,000 | 12½ | Davis Motor Supply | 2,494.70 | {0; 5; 7½; 10; 12½ | 294.08 | 20 | 498.94 | 204.86 |
| $3,000 and over | 17½ | Greiner Auto Parts Co. | 4,301.03 | {0; 5; 7½; 10; 12½; 17½ | 675.23 | 20 | 860.19 | 184.96 |
| | | Hart Supply Co. | 2,233.32 | {0; 5; 7½; 10; 12½ | 248.16 | 20 | 446.67 | 198.51 |
| | | Milton Supply Co. | 3,350.89 | {0; 5; 7½; 10; 12½; 17½ | 461.45 | 20 | 670.18 | 208.73 |
| | | Motor Bearing & Supply Co. | 613.33 | 0; 5 | 31.33 | 20 | 122.67 | 91.34 |
| | | Taylor Parts & Supply Co. | 3,285.13 | {0; 5; 7½; 10; 12½; 17½ | 445.53 | 20 | 657.02 | 211.49 |
| Totals | | | 29,632.16 | | 4,011.60 | | 5,926.45 | 1,914.85 |

[4] Compiled from Commission Exhibit No. 1 showing actual purchases from Whitaker Cable Corporation and comparison with Commission Exhibit No. 112 setting forth the applicable Whitaker Cable Corporation rebate schedule.

[5] In addition a 5% discount on $150 orders was paid.

of the parties so named no longer serve in the capacity of either officers or directors of these group organizations, and since the officers and directors of said group organizations change from time to time, it is the opinion of the hearing examiner that no useful purpose would be served by the entry of an order against the individuals named in the complaint as officers and directors of Mid-South Distributors and Cotton States, Incorporated.

CONCLUSIONS

1. The lower prices granted to the respondent jobbers through the group buying device constituted discriminations in price within the intent and meaning of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. The competitive opportunities of the less favored competitors of the respondent jobbers were injured when such competitors had to pay substantially more for a suppliers products than the respondent jobbers had to pay. The various Circuit Courts of Appeals in six cases have held that the granting of discounts or rebates by supplier's through group buying organizations, including respondents Mid-South Distributors and Cotton States, Incorporated, under the conditions and circumstances as herein found constituted a price discrimination in violation of Section 2(a) of the Clayton Act.[2]

2. The method of operation of the respondents Mid-South Distributors and Cotton States, Incorporated, including the adoption of the line of one seller to the exclusion of its competitors and the holding out to sellers the prospects of increasing their volume and obtaining new customers, served as an inducement to manufacturers and sellers of automotive parts, accessories and supplies to grant to the respondent jobbers a lower price than would have otherwise been obtained.

3. The price discriminations involved in this proceeding were substantial. The volume rebates, discounts and other allowances granted by the sellers in this proceeding were made in accordance with such sellers' published price lists distributed generally to their jobber customers. The volume rebates allowed to the respondent jobbers were in fact off scale prices based upon the

[2] Whitaker Cable Corporation v. Federal Trade Commission (C.C.A. 7) 239 F.2d 253; Moog Industries, Inc., v. Federal Trade Commission (C.C.A. 8) 238 F.2d 43; E. Edelmann & Company v. Federal Trade Commission (C.C.A. 7) 239 F.2d 152; C. E. Niehoff & Co. v. Federal Trade Commission (C.C.A. 7) 241 F.2d 37; P. & D. Manufacturing Co., Inc. v. Federal Trade Commission (C.C.A. 7) 245 F.2. 281; P. Sorensen Manufacturing Co., Inc. v. Federal Trade Commission (C.C.A. D.C.) 246 F.2d 287.

aggregate purchases of all the members rather than upon the purchases of the individual member. Each of the respondent jobber members of Mid-South Distributors and Cotton States, Incorporated, knew, or should have known, that the discriminatory prices granted them by sellers in the form of a volume rebate based upon the aggregate purchases of all members could not be cost justified. They knew that they, as well as their competitors in the same trade area, were buying from the seller at the sellers' published price lists; that shipments of merchandise by the sellers were made direct to the jobber respondents in the same manner and in substantially the same quantities as to their competitors; and that they received a lower price by means of the group buying organization than their competitors were receiving and lower prices than they themselves would have received had the volume rebate been based upon their individual purchases instead of the aggregate purchases of all the members.

4. The jobber respondents knew that the rebates allowed were based not on the quantities or other factors involved in a particular sale, but rather upon the combined dollar amount of all sales to the group organization and bear relationship to factors other than the actual costs of production and delivery. In view of this, evidence introduced that the respondent jobbers relied upon statements made by suppliers as to cost justification must be rejected. The respondent jobbers were successful operators in a highly competitive market and knew the facts of life so far as the automotive parts market was concerned and knew that no cost justification could be maintained by the sellers since no difference in the cost of manufacture, sale or delivery was involved. Furthermore, the jobber respondents were placed upon notice as to the illegality of price discriminations received through the medium of group buying organizations, including Mid-South Distributors and Cotton States, Incorporated, by the initial decisions of the hearing examiners, and the decisions of the Federal Trade Commission and the Circuit Courts of Appeals in the following cases:

*Whitaker Cable Corporation,* initial decision, February 11, 1954; Commission affirmance, April 29, 1955; Court affirmance, 239 F. 2d 253 (C.C.A., 7, December 14, 1956).

*Moog Industries, Inc.,* initial decision, March 8, 1954; Commission affirmance, April 29, 1955; Court affirmance, 238 F. 2d 43 (C.C.A., 8, November 5, 1956).

*E. Edelmann & Company,* initial decision, March 5, 1954; Commission affirmance, April 29, 1955; Court affirmance, 239 F. 2d 152 (C.C.A., 7, December 14, 1956).

*C. E. Niehoff & Co.,* initial decision, July 6, 1954; Commission affirmance, May 17, 1955; Court affirmance, 241 F. 2d 37 (C.C.A., 7, January 9, 1957).

*P. &. D. Manufacturing Co., Inc.,* initial decision December 21, 1954; Commission affirmance, April 26, 1956; Court affirmance, 245 F. 2d 281 (C.C.A., 7, April 30, 1957).

*P. Sorensen Manufacturing Co., Inc.,* initial decision, February 2, 1956; Commission affirmance, June 29, 1956; Court affirmance, 246 F. 2d 687 (C.A.A., D.C., May 23, 1957).

Regardless of these various decisions which came to the attention of the respondent jobbers they had, up until the time of the close of the hearings in these proceedings, continued the practice of purchasing through the group buying organizations.

5. The acts and practices of the respondent jobbers in knowingly inducing and knowingly receiving discriminations in price through the use of the group buying organizations Mid-South Distributors and Cotton States, Incorporated, prohibited by subsection (a) of Section 2 of the Clayton Act, as herein found are in violation of subsection (f) of Section 2 of said Act.

ORDER

*It is ordered,* That D & N Auto Parts Company, Inc., a corporation; Christian Auto Supply Co., Inc., a corporation; Milton Supply Company, a corporation; Taylor Parts & Supply Co., Inc., a corporation; William P. Barnes, an individual, doing business as Barnes Motor Supply; Davis Motor Supply Co., Inc., a corporation; Hart Supply Co., Inc., a corporation; and Greiner Auto Parts Company, Inc., a corporation, and their respective officers, agents, representatives and employees, in connection with the offering to purchase or purchase of any automotive parts, accessories or supplies or other similar products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

(1) Knowingly inducing, or knowingly receiving or accepting, any discrimination in the price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price known by respondents to be below the net price at which said products of like grade and quality are being sold by such

seller to other customers where the seller is competing with any other seller for respondents' business or where respondents are competing with other customers of the seller.

(2) Maintaining, managing, controlling or operating respondent Cotton States, Incorporated, or any other organization of like character, as a means or instrumentality to knowingly induce, or knowingly receive or accept, any discrimination in the price of automotive parts, accessories and supplies, by directly or indirectly inducing, receiving or accepting from any seller a net price known by respondents to be below the net price at which said products and supplies of like grade and quality are being sold by such seller to other customers where the seller is competing with any other seller for respondents' business or where respondents are competing with other customers of the seller.

*It is further ordered,* That Borden-Aicklen Auto Supply Co., Inc., a corporation; Central Electric Company, a corporation; Corpus Christi Hardware Co., Inc., a corporation; Crawford Co., Inc., a corporation; Maurice G. Whitley and Lorraine C. (Mrs. M. G.) Whitley, copartners doing business as Fulton, Conway and Co.; A. S. Hatcher Co., Inc., a corporation; Keith-Simmons Co., a corporation; Mills-Morris Co., Inc., a corporation; Motor Supply Co., Inc., a Mississippi corporation; Motor Supply Co., Inc., a Louisiana corporation; Motor Supply Co., Inc., a Georgia corporation; Sidney A. Robinson, Mrs. Elta A. Robinson, and Mrs. Elta R. Posey, copartners doing business as Robinson Brothers; Southern Auto Supply Co., Inc., a corporation; Tennessee Mill & Mine Supply Co., a corporation; Voss-Hutton, Barbee Company, Inc., formerly known as Voss-Hutton Company, Inc., a corporation; Wadel-Connally Hardware Company, Inc., a corporation; and Williams Hardware Co., Inc., a corporation, and their respective officers, agents, representatives and employees, in connection with the offering to purchase or purchase of any automotive parts, accessories or supplies or other similar products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

(1) Knowingly inducing, or knowingly receiving or accepting, any discrimination in the price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price known by respondents to be below the net price at which said products of like grade and quality are being sold by such seller to other customers where the seller is competing with any

other seller for respondents' business or where respondents are competing with other customers of the seller.

(2) Maintaining, managing, controlling or operating respondent Mid-South Distributors, or any other organization of like character, as a means or instrumentality to knowingly induce, or knowingly receive or accept, any discrimination in the price of automotive parts, accessories and supplies, by directly or indirectly inducing, receiving or accepting from any seller a net price known by respondents to be below the net price at which said products and supplies of like grade and quality are being sold by such seller to other customers where the seller is competing with any other seller for respondents' business or where respondents are competing with other customers of the seller.

*It is further ordered,* That respondents Cotton States, Incorporated, a corporation and Mid-South Distributors, a corporation, and their respective members, officers, agents, representatives and employees, in connection with the offering to purchase, or purchase, of any automotive parts, accessories or supplies or other similar products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

(1) Knowingly inducing, or knowingly receiving or accepting, any discrimination in price of automotive parts, accessories and supplies, by directly or indirectly inducing, receiving or accepting from any seller a net price known by respondents to be below the net price at which said products and supplies of like grade and quality are being sold by such seller to other customers where the seller is competing with any other seller for respondents' business or where respondents are competing with other customers of the seller.

*It is further ordered,* That the complaint be dismissed as to the following individual respondents: Louis Post, P. E. Lewis, J. E. Caruthers, G. W. Christian, W. R. McKinley, Mrs. Lynne S. Milton, Charles R. Harris, Marion D. Taylor, James N. Taylor, II, Cecil Roy Straughn, Carl A. Davis, Mrs. Carl A. Davis, Harold W. Hart, Joseph C. Greiner, Joseph N. Greiner, and Mrs. Joseph C. Greiner, named as respondents in Docket No. 5767; and T. N. Hagel, K. P. Allen, U. V. Boland, A. H. Borden, E. B. Conn, O. J. Koepke, E. J. Crawford, A. S. Hatcher, Jr., W. M. Parrish, R. R. Meadows, R. O. Hale, W. C. Thompson, J. A. Bumpas, W. B. Gates, J. W. Ellis, W. F. Barbee, H. V. Lee, and Jack Williams, name as respondents in Docket No. 5766.

For the purpose of determining the "net price" under the terms of this order, there should be taken into account discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are effected.

OPINION OF THE COMMISSION

By KERN, Commissioner:

The complaints in these cases charge the respondents, respectively named therein, with violating Section 2(f) of the Clayton Act, as amended by the Robinson-Patman Act.[1] The respondents (except for certain individual respondents against whom the complaints were dismissed) have appealed from the initial decision of the hearing examiner covering both cases which holds that they have violated Section 2(f) and which contains an order to cease and desist the practices found to be unlawful.

These are "group buying" cases. The respondents in each include jobbers for automotive parts, accessories and supplies and a membership corporation. In Docket No. 5766, the membership corporation is Mid-South Distributors, Memphis, Tenn.; in Docket No. 5767, Cotton States, Incorporated, Andalusia, Ala. These corporate groups were organized and have been maintained for the apparent purpose of inducing and receiving lower prices on automotive products than would otherwise be obtainable by most of the member jobbers acting individually. Automotive suppliers such as Standard Motor Products, Inc., and Moog Industries, Inc., and others, sold their lines of products to the respondent jobbers and granted them volume rebates based on the aggregate purchases of all the group members. In many, if not in all instances, the volume rebates were made pursuant to a system or plan which involved a sliding scale of discounts based upon the volume purchased in the preceding year.

The main issue on this appeal, it appears, is whether counsel in support of the complaint has met the burden of proof required by Section 2(f) as interpreted by the Supreme Court of the United States in *Automatic Canteen Co. of America* v. *Federal Trade Commission,* 346 U.S. 61 (1953). The subsection reads as follows:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

[1] These cases have been tried concurrently and under an agreement of all the parties the two have been considered as one case.

There is no question that respondent jobbers have been granted lower prices than some of their jobber competitors on goods of like grade and quality. This results from the discounts ranging up to 20% given by the various suppliers based on the aggregate purchases of all members of each group. The record shows that various competing jobbers did not purchase individually in sufficient volume to receive comparable discounts. There is likewise evidence of keen competition, small profit margins and other factors sufficient to justify a conclusion that the discounts may result in substantial injury to competition. It is also clear that respondents knew all such factors.

The *Automatic Canteen* case, *supra,* holds, however, that in order to establish a violation of Section 2(f), the Commission as a part of its case must show more than that the buyer knew of the price differentials and of their probable competitive effect. In other words, under the "balance of convenience" rule applied by the court, the burden is on counsel in support of the complaint to come forward originally with evidence that the buyer is not a mere unsuspecting recipient of the prohibited discriminations. Such evidence, under the Court's opinion, must include a showing that the buyer, knowing full well that there was little likelihood of a cost justification defense available to the seller, nevertheless induced or received the discriminatory prices. Just what evidence is necessary to make this showing, as the court indicated, will, of necessity, vary with the circumstances of each case. That trade experience in a particular situation can afford a sufficient degree of knowledge, however, is clear.

In this case, the record clearly shows that the buying groups were mere bookkeeping devices. There was nothing in their manner of operation which could possibly save a seller any significant amounts. The method of purchase was substantially the same and deliveries were made in the same manner and in substantially the same quantities as if each jobber member had been operating individually rather than as a group member. About the only saving a seller could expect would result from the fact that only one billing need be made instead of several separate billings. *Cf. C. E. Niehoff & Co.* v. *Federal Trade Commission,* 241 F. 2d 37 (1957). It is reasonable to conclude that where price differences are as great as those here shown, ranging up to 20%, any savings such as that on billing costs could not possibly justify the price discriminations.

Respondents obviously had knowledge of this fact. They knew that the jobber members generally would not be entitled to the higher discounts based on their individual purchases. They knew, or should have known, in addition, in view of their purchasing in substantially the same volumes and receiving shipments in the same manner as other jobbers, that any differences in the method of purchasing could not give rise to sufficient savings in cost to justify the price differentials.

Moreover, the price differences shown herein have their source in a rebate system based, not on quantities or other factors involved in any particular sale, but, rather, upon the combined dollar amount of all sales to a group made in the preceding year. Under such a system the prices necessarily bear relation to factors other than actual costs of production, sale or delivery, and the inevitable result is systematic price discrimination. *Moog Industries, Inc.* v. *Federal Trade Commission,* 238 F. 2d 43 (1956). Under such circumstances respondents are charged with the knowledge that the lower prices they received could not be cost justified.

If under the *Automatic Canteen* decision counsel in support of the complaint has the additional burden of producing evidence tending to show that respondent jobbers likewise knew or should have known that the "defenses" of fluctuating market conditions and bona fide attempts to meet lower competitive prices were not available to the sellers, the record is equally persuasive that this burden also has been met.

The last proviso of Section 2(a) exempts from the Act price changes from time to time where made in response to changing conditions affecting the market for or the marketability of the goods concerned. The substance of the proviso appears to be that a defense may be made out in occasional and temporary situations such as those set forth including imminent deterioration of perishable goods and obsolescence of seasonable goods. In view of this, respondents would have no reason to believe that the volume rebates they received based on aggregate annual purchases and continued from year to year could possibly have any relation to the aforesaid proviso.

The respondents also knew, or should have known, that the various sellers could not have defended the price discriminations on the basis of the proviso contained in Section 2(b). The respondents knew that the defense of cost justification was unavailable to the sellers for the reasons stated in preceding paragraphs, and for the same reasons knew that such a defense would

not be available to any competing sellers granting preferential prices on the same basis. Knowing, therefore, of the illegality of the pricing systems involved, the respondents knew that the sellers could not defend such prices on the basis of meeting in good faith the equally low prices of competitors for the reason that the prices so met would not be lawful prices.

In the *Automatic Canteen* case, the court in a note stated as follows:

> Our view that §2(b) permits consideration of conventional rules of fairness and convenience of course requires application of those rules to the particular evidence in question. Evidence, for example, that the seller's price was made to meet a competing seller's offer to a buyer charged under §2(f) might be available to a buyer more readily even than to a seller. (346 U.S. 61, note 23 at p. 79)

Therefore, while it has been shown sufficiently that respondents knew that the "defenses" of fluctuating market conditions and the meeting of lower competitive prices were not available to the sellers, it appears in the circumstances that counsel in support of the complaint does not have the burden of making such a showing. It seems to be quite clear that the court was referring to situations such as exist herein where the buyers would more readily have such evidence and would have the burden of coming forward with it.

Respondents further contend on this appeal that Mid-South Distributors and Cotton States, Incorporated, are cooperative associations, and, therefore, not prohibited from returning to their members the net earnings or surplus resulting from their trading operations, in proportion to purchases of the members of the association, citing Section 4 of the Robinson-Patman Act (49 Stat. 1528). It is our opinion that the reasoning of the court in *Quality Bakers of America* v. *Federal Trade Commission,* 114 F. 2d 393, 399–400 (1940), on this point in a Section 2(c) matter is equally applicable to a Section 2(f) matter. In other words, Section 4 does not authorize cooperative associations to engage in practices forbidden by Section 2(f), nor except them from its provisions.

Respondents also argue that the respondent jobber companies should not be ordered to cease and desist in their individual capacities the practices held illegal and request that the paragraphs in the order to this effect be stricken. The contention is that these respondent companies are charged with violating Section 2(f), by acting through Cotton States, Incorporated, and

Mid-South Distributors, and that it is unfair to issue an order against them relative to their activities as individuals. It is sufficiently clear, we believe, that these proceedings have included the respondent jobbers as individual concerns and that this type of order is necessary to bring an end to the unlawful practices. The Commission, of course, is not limited to prohibiting the illegal practice in the precise form in which it was found to have existed in the past. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952).

Respondents' appeal is denied. Accordingly, the findings, conclusions and order contained in the initial decision are adopted as those of the Commission.

FINAL ORDER

These matters having come on to be heard upon the common appeal of the respondents, respectively named therein, excepting certain individual respondents, from the hearing examiner's initial decision; and

The Commission having rendered its decision, denying the appeal and adopting the findings, conclusions, and order contained in the initial decision:

*It is ordered,* That the respondents, except those against whom the complaints have been dismissed, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order contained in the initial decision.

# IN THE MATTER OF

# CRAFTSMAN INSURANCE COMPANY

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

*Docket 6394. Complaint, July 18, 1955—Order, Feb. 24, 1959*

Order dismissing on jurisdictional grounds upon the authority of the Supreme Court's ruling in *Federal Trade Commission* v. *National Casualty Company* (357 U.S. 560), complaint charging a Boston insurance company with false advertising of its health and accident insurance.

Before *Mr. Loren H. Laughlin*, hearing examiner.

*Mr. Donald K. King* and *Mr. J. W. Brookfield, Jr.* for the Commission.

*Mr. David S. Kunian*, of Boston, Mass., for respondent.

## ORDER GRANTING MOTION TO VACATE COMMISSION'S DECISION

This matter having come on to be heard upon respondent's request that the decision of the Commission entered on January 14, 1957, be vacated, which request is unopposed by counsel supporting the complaint; and

The Commission having reconsidered the matter in the light of the United States Supreme Court ruling in *Federal Trade Commission* v. *National Casualty Company*, 357 U.S. 560, decided June 30, 1958, subsequent to said decision of the Commission, and having concluded that this proceeding should be dismissed on jurisdictional grounds upon the authority of said ruling of the Supreme Court:

*It is ordered*, That this proceeding be reopened.

*It is further ordered*, That the decision of the Commission entered on January 14, 1957,[1] be, and it hereby is, vacated and set aside.

*It is further ordered*, That the complaint herein be, and it hereby is, dismissed.

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[1] 53 F.T.C. 623.

Decision

# IN THE MATTER OF

# ERICKSON HAIR & SCALP SPECIALISTS

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

*Docket 6499. Complaint, Jan. 27, 1956* [1]*—Decision, Feb. 26, 1959*

Order requiring a Chicago seller of "home treatment kits" of hair and scalp preparations to cease advertising falsely that through use of said preparations, methods, and treatments by purchasers in their homes, fuzz would be replaced with long and strong hair; dandruff, itching, and irritation of the scalp would be permanently eliminated; and in the great majority of cases baldness, including the hereditary type, would be prevented and overcome, etc.; and to cease representing falsely, by use of the term "Trichologist," that he and his agents had had professional training in the treatment of scalp disorders affecting the hair.

*Mr. Harold A. Kennedy* supporting the complaint.

*Frank E. & Arthur Gettleman, Mr. Edward Brodky* and *Mr. Franklin M. Lazarus* all of Chicago, Ill., for respondent.

## INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

### Introductory Statement

Amended complaint in this proceeding charges violation of the Federal Trade Commission Act by the dissemination of false advertisements through the United States mails and by various means in commerce of cosmetic and medicinal preparations for external use in the treatment of certain conditions of the hair and scalp. It also alleges that the advertisements are false in that respondent is called a "Trichologist" in the advertising. The answer to the complaint was also amended and as amended it is in substance a denial of all the material allegations of the amended complaint, except respondent's trade name and address.

Hearings were held for the taking of evidence in support of and in opposition to the allegations of the complaint in Chicago, Ill., Ft. Wayne, Ind. and Philadelphia, Pa.

Both sides were represented by counsel and given full opportunity to and did introduce evidence pertinent to the issues, examine and cross-examine witnesses and argue points of law and evidence. All parties were given opportunity to and did file proposed findings, conclusions and orders and the reasons there-

[1] Amended May 9, 1957.

for which were given careful consideration by the hearing examiner. All such proposed findings, conclusions and orders not hereafter adopted, found or concluded are hereby specifically rejected.

Upon the entire record of the proceeding and from the observation of the witnesses while testifying, the hearing examiner makes the following findings as to the facts, conclusions and order:

## Findings as to the Facts and Counclusions

1. Respondent David W. Erickson is an individual trading and doing business as Erickson Hair & Scalp Specialists with his office and principal place of business located at 11103 South Kedzie Avenue, Chicago, Ill. He has conducted said business since September of 1953 which consists of the sale and distribution of various cosmetic preparations for external use in the treatment of conditions of the hair and scalp. He causes said preparations when sold to be transported from his place of business in Chicago, Ill. to purchasers thereof in the State of Illinois and in various other States of the United States. The total volume of respondent's business done from the Kedzie Avenue address runs between $60,000 and $80,000 annually. Of this amount 50% to 60% is shipped to persons residing outside the State of Illinois.

2. Respondent has another smaller office in Cicero, Ill., but most sales made from that office are local. There is another office run at Louisville, Ky., by a Mr. C. O. Brown who conducts approximately the same type of operation there that respondent conducts from his Kedzie Avenue office in Chicago. Brown uses respondent's business name, Erickson Hair & Scalp Specialists, with respondent's permission and respondent retains the right to generally supervise Brown's advertising. The only profit to respondent from Brown's operations comes from the sale to Brown in wholesale quantities of respondent's preparations.

3. Respondent's said preparations are composed of the following ingredients in various combinations:

Boric acid
Castor oil
Dyes
Hyamin 10X—Rohm & Haas Co. (di-isobutyl phenoxy ethoxy ethyl dimethyl benzyl ammonium chloride)
Isopropyl alcohol
Lanolin
Lanolin derivative
Mineral oil

Oil of Bay
Oxyquinoline sulfate
Perfume
Phenol
Propylene Glycol
Resorcinol
Sulfonated castor oil
Tegasept M—Goldschmidt Chem. Corp. (Methyl paraben)
Triethanolamine lauryl sulfate
Tween 20—Atlas Powder Co. (Polyoxyethylene sorbitan monolaurate)
Tween 60—Atlas Powder Co. (polyoxyethylene sorbitan monostearate)
Tincture of Capsicum
Veegum—R. T. Vanderbilt Co. (colloidal magnesium aluminum silicate)
Stearic acid
Precipitated sulphur
Ammoniated mercury
White precipitate
Beta Napthol
Oil of tar, rectified
Carbowax 400
Water

4. Respondent's said preparations, made from the above ingredients, are sold in home treatment kits. Each kit has a shampoo, a solvent and two types of dressing for the hair. In addition thereto there are a number of small vials. So far as the ingredients of these vials are concerned, there are three basic kits. There are fourteen basic formulas in all. Some of these fourteen formulas are in one kit, some of them are in the second basic kit and some in the third. There are some repetitions of the formulas in the various kits. One kit is prepared particularly for those cases that have an excessive amount of oil in the hair. The other two kits are used alternatively for those whose hair is drier. All of the formulas, shampoos, solvent and dressing are made from the above listed ingredients. Each vial in each kit is numbered and the instructions that go with each kit tell the order in which the numbered vials are to be used. There is also a hair brush in each kit and a form for reporting to the respondent the use that has been made of the kit and the condition of the hair and scalp after use as observed by the user. The various formulas have been made up for the respondent by a chemist.

5. Respondent and his representatives visit various cities of the United States, stopping one or two days at a time in each city, holding what is called a hair and scalp clinic in each city. An advertisement is placed in the local newspaper in each city visited, one or two days before the visit, inviting the public to

call on respondent or his representative on the date fixed for free consultation and advice as to their hair and scalp problems. These advertisements contain certain other representations, which will be discussed later.

6. The clinic is usually held in a hotel room. Those visiting the clinic are given a hair and scalp examination. This is done by focusing a flood light on the head and examining the hair and scalp with a magnifying glass. The subject is also asked questions about the history of his hair and scalp troubles. From this examination and history, respondent or his representative holding the clinic attempts to diagnose the condition and the cause of the condition of the subject's hair and scalp and to recommend treatment. About 5% of those visiting the clinic are refused treatment. In the other cases, when agreeable to the subject, respondent or his representative sells the prospect one of the home treatment kits. These orders for kits are then sent by respondent or his representative to respondent's Chicago office on Kedzie Avenue. The home treatment kit is mailed directly to the purchaser from that Chicago office. At the time the sale is made instructions are given the purchaser as to how to care for his hair and scalp until the home treatment kit is received.

7. As a part of the service rendered in connection with sale of a home treatment kit, the purchaser is contacted prior to the next return of respondent or his representative to that city and told to come in for a free checkup. As a result of the progress report to the Chicago office by the purchaser on the form provided therefor, or as a result of a checkup on one of the return visits, the formulas may be changed by respondent or his representative.

8. Since respondent started his business in 1953 he and his representatives have visited and held clinics in cities and towns in most of the States of the United States. There are some of these places that have been visited only once and others only two or three times. Respondent has gradually cut the itinerary to those places where experience has shown he can get the most business. At present his clinics are largely confined to cities and towns in Michigan, Wisconsin, Indiana and Illinois, with visits to a few cities and towns in Ohio.

9. The record contains copies of advertisements placed by respondent for respondent's clinics, which advertisements appeared in newspapers published in Columbia, S.C., Harrisburg, Pa., Knoxville, Tenn., Wilmington, Del., Elkhart and Plymouth, Ind.,

Pasadena, Calif., and Peoria and Rockford, Ill. Other such advertisements have appeared in a large number of newspapers in cities and towns in various other States. The record also shows substantial circulation by United States mail and substantial out of the State circulation by the newspapers in the cities and towns mentioned above of the issues of said newspapers carrying respondent's said advertisements. By way of illustration, the issue of the Columbia, S.C. newspaper carrying respondent's said advertisement had a circulation by mail of 19,073 and an out of the state circulation of 1,907 copies. The issue of the Knoxville, Tenn. newspaper carrying respondent's said advertisement had a circulation by mail of 31,311 and an out of the state circulation of 5,758 copies.

10. Said advertisements disseminated and caused to be disseminated as above set forth contained among other things the following statements and representations:

You can now treat baldness successfully at home. Hear the facts about baldness and thinning hair. One day clinic, Wednesday June 23, Hotel Harrisburger—Harrisburg.

(beneath a picture of respondent and another man appeared the following)

Internationally famous trichologist D. W. Erickson points out the dangers of clogged hair follicles to one whose hair is thinning. (Com. ex. 1)

New home treatment prevents baldness, Expert guarantees, Trichologist presents new evidence from recent case histories.

In an interview he (respondent) stated that his files contain reports from many current clients proving that his new home system of treatment is checking hair fall and stimulating thicker hair growth. * * * "Neglect and poor scalp hygiene" Erickson declared, "are the beginning of 85% of the cases of premature baldness today" (Com. ex. 4)

With few exceptions Erickson says The scalp that grows "fuzz" can be reactivated to grow hair of full length and strength.

* * * the Erickson organization has proved to thousands over a period of years that this progressive home hair and scalp treatment restores hair in a majority of cases where hair is thinning, thus preventing subsequent baldness. (Com. ex. 5)

Your only obligation is to yourself—to free your mind from worries about hair loss, dandruff, itching scalp and other disorders by learning to take care of your hair. * * * , less than 5% of the people we examine are "hopeless" (Com. ex. 6)

Other conditions that usually bring on excessive hair loss, dandruff, itching, irritated scalp, follicles clogged with sebum or seborrhea—can be corrected by Erickson home treatments if caught before the "hair factories" are destroyed. (Com. ex. 9)

Unfortunately many people misunderstand the meaning of heredity. They think they have to go bald because other members of the family are bald. Actually the theory of heredity states that some families have a tendency toward a weak scalp. My system is based on bringing strength back to that weak scalp. A strong scalp is a productive one.

* * * * * * *

Hundreds of his clients will tell you that the application of these methods has developed weak fuzz into healthy, mature hair. "If there is any fuzz at all" Erickson said, "We can restore a healthy scalp condition and the hair will grow normally again as nature intended." (Com. ex. 7)

11. Through the use of such statements and representations in the context in which they appear, respondent has represented directly and by implication that through the use of his preparations, methods and treatment by purchasers in their homes, fuzz will be replaced with long and strong hair, dandruff, itching and irritation of the scalp will be permanently eliminated,[2] that in approximately 85% of the cases excessive hair loss and baldness will be prevented and overcome and the growth of thicker hair promoted. To one whose hair is thin, thicker hair implies new hair between the sparse hairs remaining.

12. Dr. Rattner, one of the expert dermatologists who testified, said he had the type of baldness known as male pattern baldness. His hair and scalp illustrate what is commonly seen, a fringe of normal hair on the sides over the ears and in the back with sparse fuzz on top of the head. Respondent's advertising, among other things, says to men who are bald like Dr. Rattner that respondent's preparations, methods and treatment will restore a normal head of hair.

13. Under the evidence, by referring to himself as a "trichologist" respondent has represented, at least by implication, that he has had sufficient training in medicine, including dermatology, to qualify as an expert in scalp disorders affecting the hair.

14. It is evident that the advertisements mentioned above and others similar were for the purpose of inducing and likely to induce the purchase of respondent's preparations in commerce. In fact the evidence shows the respondent's advertising of this kind did result in sales of respondent's preparations in Illinois and other States. That the preparations were cosmetics as that term is defined in the Federal Trade Commission Act is established by the evidence. They were to be applied to the human

[2]If one can free one's mind from worries about dandruff, itching and irritation of the scalp by use of respondent's preparations, methods and treatment, that means to the hearing examiner that these things will be permanently eliminated.

head and were intended for cleansing, promoting attractiveness and altering the appearance. If such advertisements were false, violation of Sections 12(a) (1) and 12(a) (2) of the Act has been established.

15. The complaint limits the charge of false advertising in regard to preventing and overcoming excessive hair loss and baldness. The charge is that the great majority of cases of excessive hair loss and baldness are of the type known as male pattern baldness and that in cases of male pattern baldness respondent's preparations and methods of treatment will not prevent or overcome excessive hair loss and baldness or cause hair to grow thicker, or cause new hair to grow. A further charge is that failure to reveal in the advertising the alleged ineffectiveness of respondent's preparations and methods of treatment in cases of male pattern baldness is itself a cause of deception. Thus, there is no charge that respondent's preparations and methods of treatment are ineffective in preventing or overcoming excessive hair loss and baldness in other types of baldness.

16. The medical experts who testified in this proceeding were Drs. Hebert Rattner, Adolph Rostenberg, Jr., Seymour Weisberg, Eugene Lorant and Clark W. Finnerud, all of Chicago, and Dr. Albert Kligman of Philadelphia. The qualifications as an expert of each doctor who testified are in the record. Another expert in his field also testified. He was William Colburn of Chicago, a consulting chemist. His qualifications as an expert are also in the record.

17. Mr. Colburn's testimony was limited to the uses of the ingredients in respondent's preparations when applied to the scalp. For instance he said that lanolin, one of the ingredients, is used as a carrier of other ingredients in ointments and cosmetics and itself has the properties of dissolving greasy materials, of causing two dissemilar liquids to mix and of softening and smoothing the skin. He went through the list, similarly giving the properties of each ingredient.

18. Twenty-nine users of respondent's preparations also testified about their experiences and satisfaction with the results obtained. A number of them stated that they had experienced substantial growth of new hair in bald spots. Others that their hairfall had diminished since using respondent's preparations. Most of them testified that dandruff, itching and irritation of the scalp ceased after having used respondent's preparations for

awhile. Most of these witnesses were continuing to use respondent's preparations or some of them. The hearing examiner observed the hair and scalp of each of these user witness at the time they gave their testimony. Some of them had what appeared to be normal hair growth in places where they testified the hair had been thin prior to using respondent's preparations. In the majority of these witnesses, however, the hair was still thin in places where they testified that the hair had filled in while using respondent's preparations. Their testimony in regard to these places where the hair was still thin, was, that it had been thinner before using respondent's preparations.

19. From the expert testimony and the user testimony it must be determined whether the challenged representations made by respondent are true or false.

20. Dr. Rostenberg stated unequivocally that no combination of the ingredients in respondent's preparations would cause fuzz to be replaced with longer or stronger hair. Dr. Rattner stated unequivocally that no combination of the ingredients in respondent's preparations, alone or in combination with any physical methods of treatment will result in fuzz on the scalp being replaced by longer or stronger hair. Neither Dr. Weisberg, Dr. Lorant, Dr. Finnerud or Dr. Kligman were questioned on this point, which is one of the contested issues in the case.

21. Only three of the 29 user witnesses, Malhiot, Hallstein and Callahan said that fuzz grew into hair like the other hair on their scalps while using respondent's preparations and treatment.

22. Considering all the expert and user testimony, the preponderance of the evidence is to the effect that respondent's preparation whether used alone or in combination with any physical method of treatment will not cause fuzz on the scalp to be replaced by longer or stronger hair. It is so found.

23. All experts questioned on the subject agreed that the ingredients in respondent's preparations, if properly used will, during their use, eliminate dandruff and also eliminate itching and irritation of the scalp due to local conditions, but there is no assurance that such conditions will not return, when the use of the preparations is stopped. It is therefore found that respondent's preparations, methods and treatment will not permanently eliminate dandruff, itching or irritation of the scalp. Nowhere in the advertising is there any indication that the use of the

preparations must be continued for the remainder of one's life to achieve the results claimed.

24. Dr. Rattner expressed the opinion that male pattern baldness comprised "as near as you can get to 100%" of all cases of baldness although there are other types of baldness. Dr. Rostenberg stated that from his experience he would say that male pattern baldness comprised approximately 80% of all cases of baldness. Dr. Weisberg did not use the term "male pattern baldness" but was evidently referring to the same thing when he talked about "common baldness" and the "prevailing type of baldness." The very use of these terms indicated a recognition that this type of baldness was more prevalent than any other type, although he did not give any percentage figures. Dr. Weisberg admitted the possibility of plugged hair follicles causing baldness, but he did not confuse that type of baldness with "common baldness" or the "prevailing type of baldness." Dr. Lorant recognized alopecia prematura as a distinct type of baldness. This had been previously identified by Dr. Rattner and Dr. Rostenberg as the same thing as male pattern baldness. Dr. Lorant said that baldness could be caused by the hair follicles becoming plugged by a combination of the secretions from the sebaceous glands in the scalp and certain fungi that grow on the scalp. Dr. Lorant did not attempt to say or even indicate that alopecia prematura was caused by plugged follicles, nor did he attempt to say how prevalent either of these types of baldness was. Dr. Finnerud spoke of presenile baldness or common baldness or idiopathic baldness. The record shows that presenile and common baldness are terms meaning the same type of baldness as Dr. Rattner and Dr. Rostenberg called male pattern baldness. Dr. Finnerud recognized this as a distinct type of baldness. He also spoke of hair loss due to severe seborrhoeic dermatitis. He said that condition was accompanied by grossly evident inflammatory changes in the scalp. He further said the pattern of hair loss in such cases is similar to that in presenile baldness. By this he recognized presenile baldness and baldness due to severe seborrhoeic dermatitis as two distinct types of baldness. Dr. Kligman stressed the point that in male pattern baldness there is no irritation or inflammation of the scalp. Thus, all the medical experts who testified recognized a distinct type of baldness, called variously in the record, male pattern, common, pre-senile, the prevailing type of baldness and alopecia premature. The only experts who testified as to the prevalence of that type of

baldness were Dr. Rattner and Dr. Rostenberg. Thus, the preponderance of evidence is that the great majority of all cases of baldness are of the male pattern type. It is so found.

25. Dr. Rattner testified that no combination of the ingredients in respondent's preparation alone or in conjunction with any physical method of treatment will prevent or overcome male pattern baldness, or cause the hair to become thick, or thicker, or cause new hair to grow in such cases. He further testified that he knew of no method of treatment, whether involving topical application of preparations alone or in conjunction with any physical therapy which will prevent or ovecome the male pattern type of baldness or cause the hair to grow thicker or new hair to grow, or any other kind of hair to grow in such cases. Dr. Rostenberg gave similar testimony on these points. Dr. Kligman's testimony on these points was essentially the same in that he said nothing can be done for male pattern baldness.

26. Dr. Weisberg stated that local applications containing antiseptics and antipruritics coupled with massage "might and could" result in diminished hair fall and diminished hair loss, by one suffering from excessive hair loss. He did not state that these measures would have any effect in cases of male pattern baldness "or the prevailing type of baldness" or "common baldness" as he characterized it. He refused to give an opinion in regard to the efficacy of respondent's preparations because of his unfamiliarity with some of the ingredients. Dr. Lorant's testimony on plugged hair follicles, the cause and the remedy has been described above. He did not give any opinion as to whether alopecia prematura (which is another name for male pattern baldness) would be affected by respondent's preparations or any method of treatment. He did say that the cause of alopecia prematura is unknown.

27. Dr. Finnerud gave no statement on the question of whether respondent's preparation alone or in connection with any physical methods of treatment would prevent or overcome male pattern baldness or presenile baldness, as he called it, or cause hair to grow thicker or cause new hair to grow in such cases.

28. The testimony of the user witnesses is not helpful on this point. There is no evidence that any of them had male pattern baldness, whether called by that name, or any of the other names used to describe the same type of baldness. Only three of them had ever been to a medical doctor for the condition of their hair

and scalp. One of these three had only been to a medical doctor once and that was about 30 years ago.

29. It is therefore found that respondent's preparations, methods and treatment will not prevent or overcome male pattern baldness or cause the hair to grow thicker or cause new hair to grow in such cases.

30. Dr. Rostenberg testified and it is undisputed in the record that one does not have to be visibly bald to be afflicted with male pattern baldness. When one hair is gone that is not replaced, that is a bald spot, although it is not visible while still surrounded by other hairs. As the other hairs around that spot come out and are not replaced, except perhaps some of them are replaced by fuzz, a visible bald spot appears, but the difference is only one of degree. Before much hair is gone or a visible bald spot appears, Dr. Rostenberg said it was more difficult for the doctor to determine whether the excess hair fall is due to male pattern baldness. However, by examining the hair and scalp, the history of the hair loss and the family history of the individual, a diagnosis can be made. Dr. Kligman agreed with Dr. Rostenberg although he thought that during the early stages of development, it would require more than one examination to make a diagnosis of male pattern baldness.

31. Respondent sought to make the point during the hearings that prevention of further excessive hair loss, before one becomes bald was not covered by the expert testimony, because it is claimed that even the expert cannot tell whether one has male pattern baldness until the baldness becomes evident. The testimony of Dr. Rostenberg and Dr. Kligman above mentioned refutes this point.

32. Much of the expert testimony given by the experts called by respondent was devoted to the claimed uncertainty as to the cause of male pattern baldness. There is more apparent than real conflict in the evidence on this point. Dr. Rattner, Dr. Kligman and Dr. Rostenberg admitted that many experts formerly held the view that the cause of male pattern baldness was unknown. They further stated that they knew of no experts of stature who currently hold views contrary to those expressed by them on the point. The testimony of the experts called by respondent on this point reflected the earlier view point. The questions asked these witnesses and their answers indicated that their views were governed at least to some extent by the earlier rather

than the current writing on the subject. Of course they had the right to reject the current writing.

33. As stated above, male pattern baldness, whether called by that name or some other was recognized as a distinct type of baldness. That being true, the hearing examiner is of the opinion that its cause was not an issue in the case, under the pleadings.

34. The preponderance of the evidence also establishes that by calling himself a "Trichologist" respondent has falsely represented that he has had competent training in dermatology or other branches of medicine having to do with the treatment of scalp disorders affecting the hair. In addition to the testimony of the expert witnesses on this point, one user witness testified that after reading respondent's advertising, he went to him for correction of his hair troubles like he would go to a dentist for a toothache, that he thought Erickson had a license to practice medicine. Another user witness said he thought Erickson was a very learned man. Another said that his wife talked him into visiting somebody in the professional field who could help him. After seeing respondent's advertising he chose Erickson. He further said he called on Erickson to use his professional services. The facts are that Erickson was not a doctor, not a professional man and not learned. He has had no medical training. He has had only one semester of college work, that being a course in marketing taken at New York University.

35. It is therefore found that respondent has falsely represented through the advertising mentioned above that the use of his preparations, methods and treatment will permanently eliminate dandruff, itching and irritation of the scalp and result in fuzz being replaced by long and strong hair. The representations that the use of respondent's preparations, methods and treatment will prevent and overcome baldness and promote the growth of thicker hair are false because these claims are not limited to cases other than cases of male pattern baldness. The representation that respondent is a Trichologist is false for the reasons hereinbefore set forth.

36. Respondent's advertising is also false for another reason. In advertising that his preparations, methods and treatment will cause hair to grow and will overcome baldness, respondent suggests that there is a reasonable probability that hair loss or baldness in any particular case may be due to a cause for which his preparations, methods and treatment will be of benefit and

constitute an effective treatment. In truth and in fact the instances in which loss of hair or baldness is due to a cause or condition for which respondent's preparations, methods and treatment will be of benefit, and will constitute an effective treatment are rare. In the vast majority of cases, loss of hair or baldness is a male pattern type, having no relation to any cause for which respondent's preparations, methods or treatment will be of any value whatever in the treatment thereof. Thus, there is no reasonable probability that any particular case of baldness is caused by a condition for which the respondent's preparations, methods or treatment may be beneficial. Respondent's advertising is misleading because of respondent's failure to reveal the fact that in most cases loss of hair or baldness is of the type known as male pattern baldness and that when baldness is of that type, respondent's preparations, methods and treatment are of no value in the treatment thereof.

37. The use by the respondent of the foregoing false statements and representations disseminated as hereinabove described and his failure to reveal the material facts set forth above have had and now have the capacity and tendency to and do mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations are true and to cause them to purchase respondent's said preparations because of such erroneous and mistaken belief.

38. The aforesaid acts and practices of respondent are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices within the intent and meaning of the Federal Trade Commission Act.

39. So that there may be no misunderstanding in regard to the proposed findings filed, respondent's proposed findings of fact numbered 1, 2, 3, 4, 6 and 7 are rejected because they have no bearing on the issues in this proceeding as established by the amended complaint and the amended answer. Respondent's proposed finding numbered 5 has been accepted in essence. Respondent's proposed findings numbered 8 and 9 are rejected because they are contrary to the preponderance of the evidence. Respondent's proposed conclusion and order are rejected for the same reason. This initial decision unmistakably informs the parties of the action taken on the findings, conclusion and order proposed by counsel supporting the complaint.

ORDER

*It is ordered,* That the respondent David W. Erickson, trading as Erickson Hair and Scalp Specialists or under any other name or names, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the various cosmetic or other preparations described in the findings herein, or of any other preparations for use in the treatment of hair and scalp conditions, do forthwith cease and desist from:

1. Disseminating or causing to be disseminated by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents directly or by implication:

(a) That the use of said preparations alone or in conjunction with any method of treatment will:

(1) Permanently eliminate dandruff, itching or irritation of the scalp;

(2) Cause fuzz to be replaced with long or strong hair;

(3) Prevent or overcome excessive hair loss or baldness or cause new hair to grow, or cause hair to grow thicker or otherwise grow hair, unless such representations be expressly limited to cases other than those known as male pattern baldness and unless the advertisement clearly and conspicuously reveals that in the great majority of cases of baldness and excessive hair loss, respondent's said preparations and treatments are of no value whatever;

(b) That respondent, his agents, representatives or employees have had competent training in dermatology or other branches of medicine having to do with the diagnosis and treatment of scalp disorders affecting the hair, or are trichologists.

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

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Respondent having filed an appeal from the hearing examiner's initial decision; and the matter having been heard on briefs and oral arguments of counsel; and

The Commission having considered the record and having determined that the findings and conclusions of the hearing examiner are supported in all respects by the record and that the order contained in the initial decision is fully justified:

*It is ordered,* That respondent's appeal be, and it hereby is, denied.

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

*It is further ordered,* That the respondent David W. Erickson shall, within sixty (60) days after service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with the order to cease and desist contained in the aforesaid initial decision.

IN THE MATTER OF

# JACOB C. SWIMMER TRADING AS NATIONAL TITANIUM COMPANY

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

*Docket 7046. Complaint, Jan. 16, 1958—Decision, Feb. 26, 1959*

Order dismissing, due to the decease of the sole respondent, complaint charging a paint distributor in Vernon, Calif., with misrepresenting in advertising the quality, durability, composition, etc., of his "Genuine Exterior Paint."

*Mr. Garland S. Ferguson* and *Mr. John J. McNally* for the Commission.

*Mr. G. V. Weikert,* of Los Angeles, Calif., for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

Upon motion of counsel supporting the complaint, the sole respondent herein, Jacob C. Swimmer, having died December 31, 1958,

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

DECISION OF THE COMMISSION

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 26th day of February 1959, become the decision of the Commission.