distress merchandise of a supplier or that fur products are are offered for sale at a savings as a result of unusual circumstances.

8. Represents in any manner, contrary to fact, that special price concessions have been obtained from suppliers with respect to any fur products offered for sale.

9. Represents in any manner, contrary to fact, that the furs contained in fur products offered for sale were obtained directly from a supplier of fur pelts or at an auction of fur pelts.

10. Represents in any manner, contrary to fact, that middleman costs have been eliminated with respect to any fur products offered for sale.

11. Misrepresents in any manner the savings available to purchasers of respondents' fur products.

12. Falsely or deceptively represents in any manner that prices of respondents' fur products are reduced.

C. Making claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims and representations are based.

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

IN THE MATTER OF

JOHN SURREY, LTD., ET AL.

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

Docket 8605. Complaint, Nov. 8, 1963—Decision, Mar. 16, 1965

Order requiring a direct mail order catalog distributor of New York City engaged in selling articles of general merchandise—such as pens, radios, typewriters, tools, and drill bits—to cease making false and deceptive pricing, savings, and quality claims in advertising its merchandise by using the word "Reg.," or similar words, in comparative pricing claims to refer to prices which were higher than its regular selling price of such merchandise, using the words "manufacturer's list price," or similar words

to refer to retail prices which were appreciably higher than prevailing retail prices of such merchandise in respondents' trade area, and falsely representing that its drill bits were precision ground and of high speed quality.

COMPLAINT

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

PARAGRAPH 1. Respondent John Surrey, Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 11 West 32nd Street, in the city of New York, State of New York.

Respondent Joseph Ross is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of various articles of merchandise, including such items as visual control boards, typewriters, pens, electric can openers, radios, checkwriters, electra maids, tools, drill bits, and other articles of general merchandise to the consuming public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the further course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their said products, the respondents have caused catalogs to be published and distributed by the United States mails to prospective purchasers of

their said products. Said catalogs describe the numerous articles of merchandise offered for sale by respondents, and in connection therewith set forth various price amounts in connection with said articles of merchandise.

Among and typical and illustrative, but not all inclusive, of such statements appearing in respondents' catalogs and other advertisements are the following:

> VISUAL CONTROL BOARD * * * for HALF the USUAL PRICE! The cost of this revolutionary New VISUAL CONTROL BOARD is not the $49.95–$59.95 or even $69.95 the other boards sell for today, but only $29.95 * * * .
>
> * * * * * * *
>
> Consul Lightweight Portable Typewriter, Mfrs. Suggested List Price $79.95 plus Fed. Tax. OUR CLEARANCE SALE PRICE $39.95, plus Fed. Tax.
>
> * * * * * * *
>
> AMAZING PEN OFFER $1.69 Value—NOW 4 for $1.00 * * * .
>
> * * * * * * *
>
> Checkwriters like this cost as much as $150.00—each_________$18.75.
>
> * * * * * * *
>
> Power Packed Transistor Radio, The Tiny Radio with the Titanic Tone * * * Complete Value $49.95—$24.95.
>
> * * * * * * *
>
> Electric Can Opener . . . at an amazing low price—Advertised in Life—$19.95 * * * . Our Sale Price $9.95.
>
> * * * * * * *
>
> CHROME VANADIUM STEEL SPEED DRILL BITS 29 PC SET IN METAL STAND Reg. $42.50—NOW $6.75 * * * . (Said price of $42.50 also appears on the carton in which said bits are sold.)
>
> * * * * * * *
>
> NEW TROY ELECTRA-MAID Reg. $29.95—Sale Price $19.95.

PAR. 5. By and through the use of the above quoted statements, and others of similar import not specifically set out herein, the respondents represent that the higher stated prices set out in said advertisements in connection with the terms "Half the Usual Price" for Visual Control Boards and "Reg." for drill bits and electra maids were the prices at which the advertised merchandise had been usually and customarily sold by respondents at retail in the recent regular course of their business and that the differences between the said higher price amounts and the corresponding lower prices represented savings to purchasers from respondents' usual and customary retail price.

PAR. 6. In truth and in fact, the higher prices set out in said advertisements in connection with the terms hereinabove quoted in Paragraph Five were in excess of the prices at which the advertised merchandise had been usually and customarily sold by respondents in the recent regular course of business and the differences between said higher and lower prices did not represent savings to purchasers from respondents' usual and customary retail prices.

Therefore, the above referenced statements and representations as set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. Through the use of the above-quoted higher price amounts in connection with the following words and terms, and others not expressly set out herein, "Value" for pens and radios, "Mfrs. Suggested List Price" for typewriters, "like this cost as much as" for checkwriters and "advertised in Life" for can openers, respondents represent that said amounts were the prices at which the merchandise referred to was usually and customarily sold at retail in the trade area or areas where the representations were made, and through the use of said higher price amounts and the corresponding lesser amounts that the difference between said amounts represented a saving to the purchaser from the price at which said merchandise was usually and customarily sold in said trade area or areas.

PAR. 8. In truth and in fact, said higher price amounts set out in connection with the words and terms "Value" for pens and radios, "Mfrs. Suggested List Price" for typewriters, "like this cost as much as" for checkwriters and "advertised in Life" for can openers were not the prices at which the merchandise referred to was usually and customarily sold at retail in the trade area or areas where the representations were made, but were in excess of the price or prices at which the merchandise was generally sold in said trade area or areas, and purchasers of respondents' merchandise would not realize a saving equal in amount to the difference between the said higher and lower price amounts.

Therefore, the above referenced statements and representations as set forth in Paragraphs Four and Seven hereof were and are false, misleading and deceptive.

PAR. 9. In the further course and conduct of their afore-stated business and for the purpose of inducing the sale of their drill bits, respondents have made certain statements and representations with respect to the quality of their drill bits in catalogs and newspaper advertisements and on the carton in which the drill bits are packaged, of which the following are illustrative and typical:

Super Speed Drills Precision Ground—29 Tested Drills with Special Gun-Metal Finish * * * No. 1229. All 29 Drills of Alloy Chrome Vanadium Steel Sandblasted Degreased—Precision Ground for Chip Clearance—Polished Standard Jobber lengths—Fully Guaranteed.

PAR. 10. Each set of drill bits is composed of a number of individual items which are contained in a box. The country of origin is set forth in small and inconspicuous lettering on the box, the drill bits and on the bottom of the stand and sizer. Purchasers of said drill bits who fail to see the said inconspicuous lettering on the box can determine the country of origin only by opening the box and carefully examining the minute lettering on each drill or turning the metal stand upside down. Said disclosure is, therefore, inadequate to apprise prospective purchasers of the country of origin of said drill bits.

PAR. 11. In the absence of an adequate disclosure that a product, including speed drill bits, is of foreign origin, the public believes and understands that it is of domestic origin, a fact of which the Commission takes official notice.

As to the aforesaid articles of merchandise, a substantial portion of the purchasing public has a preference for said articles which are of domestic origin, of which fact the Commission also takes official notice. Respondents' failure clearly and conspicuously to disclose the country of origin of said articles of merchandise is, therefore, to the prejudice of the purchasing public.

PAR. 12. Through the use of aforesaid statements and representations, and other similar thereto, but not specifically set out herein, the respondents represent, and have represented, that:

1. Their drill bits are super speed or high speed drill bits.

2. Said drill bits are made of an alloy of chrome vanadium steel.

3. Said drill bits are "fully guaranteed."

PAR. 13. In truth and in fact:

1. Respondents' drill bits are not super speed or high speed drill bits.

2. Said drill bits are not made of an alloy of chrome vanadium steel.

3. The advertised guarantee for said drill bits fails to set forth the nature and extent of the guarantee, the manner in which the guarantor will perform thereunder and the identity of the guarantor.

Therefore, the above referenced statements and representations as set forth in Paragraphs Four and Nine are false, misleading and deceptive.

PAR. 14. In the further conduct of their business, at all times mentioned herein, respondents have been in substantial competition in commerce, with corporations, firms and individuals in the sale and distribution of visual control boards, typewriters, radios, electric can openers, electra maids, speed drill bits and articles of general merchandise of the same general kind and nature as those sold by respondents.

PAR. 15. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 16. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. William B. James and *Mr. Anthony J. Kennedy* supporting complaint.

Mr. Leonard Belford, New York, N.Y., for respondent.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

SEPTEMBER 2, 1964

This proceeding, brought against a direct mail order catalogue distributor and its president, by complaint issued November 8, 1963, charges respondents with unfair methods of competition and unfair and deceptive acts and practices, in violation of Section 5 of the Federal Trade Commission Act.

The Pleadings

The complaint, in addition to jurisdictional allegations, quotes certain advertisements issued by respondents and makes three different types of allegations:

1. As to some advertising, the complaint charged that the advertisements represent that respondents had previously sold the merchandise at a higher price than that contained in the advertising because of the use of "regular" or "usual" in describing the higher price.

2. As to other advertising, the complaint charged that the advertisements represent that the price in the trade area is higher than that contained in the advertising because of the use of "value" and "manufacturer's suggested list price."

3. As to still other advertising, the complaint charged that the advertising and the carton in which certain drill bits were packed, a) failed to disclose foreign origin; b) falsely represented the quality of the product; and c) "guaranteed" the product without setting forth the manner in which the guarantor would perform.

By answer filed December 12, 1963, respondents denied that the principal office of John Surrey, Ltd., was located where charged and that Joseph Ross was legally responsible for its acts and practices. Respondent Ross denied all of the other allegations of the complaint except paragraphs 10 and 16. Paragraph 10 states that drill bits are contained in the box (previously described), that the country of origin is in inconspicuous letters on the box, and purchasers cannot determine the country of origin except by opening the box and carefully examining the minute lettering on each drill and that said disclosure is inadequate to apprise prospective purchasers of the country of origin of said drill bits. Paragraph 16 charges that the acts and practices of respondents constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. Respondent Surrey denies that there is a substantial course of trade in the products and that the acts are being done presently. It also denies the allegation interpreting the advertising as representing the price at which goods were customarily sold in the trade area, and refers to the specific advertisements for a full statement of their contents. It denies specifically the other charging paragraphs including paragraphs 10 and 16 admitted by respondent Ross through his failure to deny them. The answers taken together thus constitute a general denial of the allegations of the complaint.

In addition to the general denial, four affirmative defenses are alleged: 1) the matters referred to in the complaint do not pertain to acts or practices of respondent Ross in commerce and are insufficient in law; 2) the activity has ceased, has no substantial effect on commerce, and the proceeding is not in the public interest; 3) the acts were "puffing" and not misleading, false or deceptive; 4) the proceeding is unfair because respondents cooperated in an investigation and readily consented and adhered to a course of business which would involve no further question of violations.

Preliminary Matters

Counsel supporting the complaint issued its request under Rule 3.13 for admission of the genuineness of documents CX 1-29 on January 28, 1964. Respondents admitted genuineness by failure to respond.

A prehearing conference was called by order dated February 28, 1964 and issued by Hearing Examiner Tocker, to whom this matter was then assigned, for March 9, 1964. Prehearing instructions were served with such order but respondent failed to appear at such conference. The initial hearing was then set for April 20, 1964.

Under date of April 10, 1964, counsel for respondents moved to disqualify Hearing Examiner Tocker and to adjourn the hearing date. Hearing Examiner Tocker had responded previously to counsel's informal suggestion that he disqualify himself on March 23, 1964. On April 14, 1964, the hearing examiner cancelled the hearing to be reset on ten (10) days notice, and on the same date filed with the Commission an answer to respondents' motion to disqualify him. The Commission denied respondents' motion by order dated April 24, 1964. On April 30, 1964, Hearing Examiner Tocker requested relief from assignment to this proceeding due to pressure of other work and Hearing Examiner Maurice Bush was appointed to succeed him. The matter was then reassigned to the undersigned on May 18, 1964, due to other engagements of Hearing Examiner Bush.

Counsel supporting the complaint moved May 13, 1964, that the initial hearing be set to commence June 8, 1964. After reading the papers submitted in opposition to such motion, the hearing examiner, on May 20, 1964, ordered that a prehearing conference be held June 15, 1964, in New York, New York, and that the initial hearing commence the following day. A prehearing order was dictated on the record after the prehearing conference which was held June 15, 1964 (Tr. 36-37). During such conference the hearing examiner specifically drew the attention of counsel to the Commission's Guides against Deceptive Pricing effective January 8, 1964, the Guides against Deceptive Advertising Guarantees (Tr. 23), and the Administrative Bulletin concerning liaison with Customs (Tr. 29-30). The hearing commenced June 16, 1964, and was concluded June 19, 1964. Proposed findings were ordered filed July 21, 1964, and counter-proposals, conclusions and briefs August 5, 1964. By order dated July 21, 1964, the time to file proposed findings was extended to July 24, 1964.

Basis for Decision

On the entire record[1] in this proceeding, including the hearing examiner's evaluation of the credibility of the witnesses who testified and of the meaning of the documentary evidence received, the following findings of fact, reasons for decision, conclusions, and order are made. Proposed findings of fact, and conclusions not adopted in terms or in substance, are rejected as irrelevant, immaterial or erroneous.

FINDINGS OF FACT

1. Respondent John Surrey, Ltd., is a corporation organized and existing under and by virtue of the laws of the State of New York. Its principal office and place of business is 59 Hempstead Gardens Drive, West Hempstead, Long Island, New York (Tr. 43; RF 1; CF 1).

2. Respondent Joseph Ross is president, treasurer, director, and a stockholder of respondent John Surrey, Ltd., and with his wife controls more than a majority of the stock of said corporation (Tr. 43–49, 492–496). Respondent Ross determined what items should be advertised, the prices at which they should be sold and the general principles of operating its catalogues (Tr. 58, 59, 253).

3. Respondent John Surrey, Ltd., has an informal arrangement with Grand Central Pipe Company, Inc., whereby the latter company sells at retail over the counter to customers in its store located at 1152 6th Avenue, New York, New York, the articles advertised by John Surrey, Ltd., in its catalogues and newspaper advertisements, and turns over to respondent John Surrey, Ltd., orders received to be filled by mail. Respondent Joseph Ross is president and majority stockholder of Grand Central Pipe Company, Inc. (Tr. 276–278, 497, 498).

4. Respondents are now, and for some time last past have been, engaged in the advertising and offering for sale, and in the sale and distribution of various articles of general merchandise, including such items as pens, radios, visual control boards, typewriters, electramaids, tools, and drill bits to the consuming public (respondents' answer, par. 2; CX 1, 8, 21, 22, 37; RF 2, 3; CF 3).

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[1] In compliance with Rule 3.21(b), references are made to the transcript (Tr.), to Commission exhibits (CX), to respondent's exhibits (RX), and to proposed findings and the record citations referred to therein (CF and RF). The citations to particular references are intended to be illustrative only and do not in any way indicate that the entire record has not been considered because all possible references have not been made.

5. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act (respondents' answer, par. 3; Tr. 47–48, 505–512; CX 50 a–j; 25).

6. In the further course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their products, the respondents have caused catalogues to be published and distributed by the United States mail to prospective purchasers of their products. Said catalogues describe the numerous articles of merchandise offered for sale by respondents, and in connection therewith, set forth various price amounts for said articles of merchandise. Typical and illustrative, but not all inclusive, of such statements appearing in respondents' catalogues and other advertisements, are the following:

> Visual Control Board for Half the Usual Price!
>
> (CX 1, p. 2; Tr. 49–55)
>
> The cost of this revolutionary New VISUAL CONTROL BOARD is not the $49.95–$59.95 or even $69.95 other boards sell for today, but only $29.95 * * *.
>
> (CX 1, p. 2; Tr. 49–55)
>
> Consul Lightweight Portable Typewriter
>
> * * * * * * *
>
> Manufacturer's Suggested List Price $79.50 plus Fed. Tax
> Our Clearance Sale Price $39.95
> Plus 10% Fed. Tax
>
> (CX 1, p. 3; Tr. 55)
>
> AMAZING PEN OFFER $1.69 VALUE—NOW 4 for $1.00 * * *
>
> (CX 5, p. 15; Tr. 57)
>
> Checkwriters like this, cost as much as $150.00 each ______________$18.95.
>
> (CX 1, p. 8; Tr. 64)
>
> POWER PACKED TRANSISTOR RADIO, THE TINY RADIO WITH THE TITANIC TONE * * * COMPLETE VALUE $49.95—$24.95.
>
> (CX 5, p. 13; Tr. 59)
>
> ELECTRIC CAN OPENER at an amazing low price.
> Advertised in Life $19.95.
> Our Sale Price $9.95.
>
> (CX 5, p. 26; Tr. 69)

CHROME VANADIUM STEEL SPEED DRILL BITS 29 pc SET IN METAL STAND
Reg. $42.50
NOW $6.75
[Price of $42.50 also appears on the carton in which said bits are sold.]
(CX 8, p. 29; Tr. 66-67; CX 31)

NEW TROY ELECTRA-MAID
Reg. $29.95
Sale Price $19.95
(CX 4, p. 16; Tr. 69)

(See also respondents' answer, par. 4.)

Representations of Prior Sales at Higher Prices

7. Through the use of the statements, "Advertised in Life—$19.95 —Our Sale Price $9.95" in connection with electric can openers, "Reg. $42.50—Now $6.75" in connection with drill bits, and "Reg. $29.95—Sale Price $19.95" in connection with electra-maids, respondents represented, directly or by implication, that the prices at which they were advertising such articles, were substantially less than the prices at which they had previously offered or sold said articles in the recent regular course of business and that the differences between the higher price amounts mentioned, and the correspondingly lower prices offered, represented savings to purchasers from respondents' usual and customary price (CX 4, p. 16; CX 5, pp. 13, 26; CX 8, p. 29; CX 31; Tr. 59, 66-67, 69). *Zenith Radio Corporation* v. *Federal Trade Commission*, 143 F. 2d 29 (7 Cir. 1944); *Stifel and Taylor's Value City Inc., et al.*, Docket 8440, April 30, 1964.

8. In truth and in fact, respondents never advertised in Life Magazine a price of $19.95 for electric can openers, and never sold the electra-maids or the drill bits at the higher advertised price, nor was proof offered that the products were openly and actively offered for sale at the higher price. As a consequence, such higher prices were in excess of the prices at which such merchandise had been usually and customarily sold by respondents in the recent regular course of business, and the differences between such higher and lower prices did not represent savings to purchasers from respondents' usual and customary prices. Accordingly, respondents' representations heretofore described, were and are false, misleading and deceptive (Tr. 69, 70, 460-475).

Representations of Higher Trade Area Prices

9. Through the use of statements such as, "$1.69 value" for pens, "Cost as much as $150.00" for checkwriters, and "Manufacturer's

Suggested List Price $79.95" for typewriters, respondents represented that said amounts were the prices at which identical merchandise, or merchandise of quality comparable to that referred to, was usually and customarily sold at retail in the trade area or trade areas where the representations were made, and that the difference between the higher price amounts mentioned and the correspondingly lower prices offered, represented savings to purchasers from the price at which such merchandise was usually and customarily sold in the trade area. *Giant Food, Inc.* v. *Federal Trade Commission*, 322 F. 2d 977 (1963); *Filderman Corporation*, Docket No. 7878, January 28, 1964 [64 F.T.C. 427].

10. With respect to the representations concerning the pens, respondent Ross testified that he compared his pen with the Paper-Mate pen which carried a price of $1.69 and reached his decision as to the value of his pen on that basis because the quality of his pen was as good as that of the Paper-Mate pen (Tr. 58). The manufacturer claimed, "no pen at any price writes better" on its invoice (CX 14). Counsel supporting the complaint offered as CX 47 a ball point pen purporting to be identical with the pens sold to respondent. The ex-president of the manufacturer who sold pens to respondents was unable to identify CX 47 but said he made a pen similar to it. He could not recall that he had given CX 47 to the Commission's investigator (Tr. 365–369). The Commission's investigator, however, identified CX 47 as the pen received from the manufacturer (Tr. 501) and an invoice (CX 14) shows that 5 gross of retractable ball point pens were sold by that manufacturer to respondent November 3, 1960. The hearing examiner accordingly infers that CX 47 is substantially the same as the pens sold to respondents and referred to in its advertising.

11. Three experienced witnesses, respectively responsible for pricing pens in Gimbel's, Macy's, and Stern's department stores, testified that in their opinion CX 47 would sell in their respective stores for much less than $1.69 (Tr. 370–414).

Mr. Richard A. Daniello of Stern's, testified that Stern's sold a pen of the type of CX 47 and that it would sell for approximately 29¢ in their Paramus, New Jersey, store (Tr. 372). He also said that CX 47 differed from the Paper-Mate pen which sells for $1.69. The Paper-Mate pen had a metal band separating the cap from the barrel and also a small metal tip (Tr. 373). On cross-examination, Mr. Daniello admitted that different stores had different price levels (Tr. 377) and that he did not know how well CX 47 wrote or how long it would write, both of which are factors to be considered in

pricing (Tr. 378). Mr. Daniello also testified that a storekeeper would be justified in getting $1.69 for an exact replica of a Paper-Mate pen if he could get it.

Mr. Sam Birnbaum of Gimbel's, testified that in his opinion the maximum retail price for CX 47 in the New York area in 1959 through 1962 would be 2 for $1.00 (Tr. 382). On cross-examination, Mr. Birnbaum said that he did not know how CX 47 wrote and that how it wrote and for how long had a bearing on price (Tr. 385).

Miss Josephine Skrainar, an assistant buyer at Macy's, testified that in her opinion CX 47 would not have sold for more than 69 cents in 1962 in Macy's (Tr. 390). It was brought out that in the first year after ball point pens were introduced they dropped in price from $12.50 to $1.00 (Tr. 391), that prices vary between stores (Tr. 392), that Macy's did not sell the particular pen (CX 47) (Tr. 393), that she could not recall having written with CX 47 and did not know how well it would write (Tr. 394, 404) although that factor would bear on the sales price of a pen (Tr. 396). She could not tell how long the pen would write but did not believe that that factor bore on the sales price (Tr. 395–398, 404). Paper-Mate was the only pen selling at $1.69 in the New York area in 1962 (Tr. 398). Macy's sells several Paper-Mate pens at different prices (Tr. 402–403). Paper-Mate was a fair traded pen until September or November 1963 (Tr. 403). CX 47 has all the parts that a Paper-Mate pen has (Tr. 404). On redirect, Miss Skrainar said that ball point pens generally sold at the same prices in Lord and Taylor (another department store) as in Macy's (Tr. 409). She also testified that Macy's sold, at one time, a ball point pen similar to that sold by a nationally known and advertised manufacturer at a lower price but could not say the lower price was due to the lack of advertising (Tr. 414).

12. From the foregoing testimony, and lacking countervailing proof offered by respondent of other prices in the trade area, the hearing examiner finds that the price at which CX 47 would be sold in leading department stores in the New York area was substantially less than the advertised value of $1.69, and that there was a sufficient difference in quality and appearance between the nationally advertised Paper-Mate Pen and CX 47 so that respondents were not justified in taking the fair trade price of Paper-Mate as the value of CX 47 despite the manufacturer's claim that no pen writes better (CX 14). The fact that the wholesale price of CX 47 was about 8⅓ cents substantiates this position. Hence, the advertisement of ball point pens was false, misleading and deceptive (Finding 11).

13. With respect to the representations concerning the checkwriter, respondent Ross testified that he used the price his firm had paid for its checkwriter to set the price at which it advertised the product it sold because "in performance, the Summit which we were selling here was very much like the one which we had gone out and paid $150 for [at] retail" (Tr. 64). CX 10, an invoice from Pearl Engraving Corporation dated November 29, 1961, showed that Summit checkwriters were purchased for $11.84 each. No evidence was offered concerning the retail price of the Summit checkwriter in any trade area or to disprove the statement that it was very much like the one for which respondents paid $150.00. Accordingly, it was not established that the advertisement for checkwriters was false and misleading despite the disparity in wholesale cost and the claimed retail value.

14. With respect to the representations concerning the Consul typewriters, "Manufacturer's Suggested List Price $79.95," respondent Ross testified that this price was on the specification sheet and brochure "that was furnished to us by the manufacturers" (Tr. 55). When shown CX 28, an order form with a suggested list price of $69.50 from General Consolidated Typewriter Company, Incorporated (undated), Ross testified, "This is not the only sheet that they gave us. We were supplied with different sheets at different times depending on what arrangements the company was making for the sale of its products" (Tr. 56). He produced no such sheets and claimed counsel supporting the complaint had them (Tr. 56). Complaint counsel offered the testimony of four witnesses each of whom fixed the highest price and the range of prices charged by his firm well below the manufacturer's suggested list price advertised by respondent (Tr. 85–95; 415–419, 419–426, 426–443).

Mr. Warren Edleman, Merchandise Manager and Advertising Director since July 1962 for fifteen jewelry stores, 8 in New Jersey, 3 in Philadelphia, 1 in New York, 2 in North Ohio and 1 in Erie, Pennsylvania (Tr. 85, 86), testified that the highest price for Consul typewriters was $59.95 and the lowest $29.95 in his stores. On cross-examination, he testified he could not recall whether the manufacturer ever suggested a $79.50 price for the typewriters (Tr. 93). At certain times of the year, *e.g.* around Christmas, his firm advertises typewriters by putting them in the windows with a price of $29.95, at other times they price them at $59.95 and about 60% of the time get the asking price (Tr. 94).

Mr. Jack Gindi has a retail business in Brooklyn, New York. In 1962 he sold the Consul typewriter for about $44 including Federal Tax (Tr. 416). He recalled selling it for as high as $50 when he first

received the machines in the latter part of 1961 (Tr. 417) but he never recalled having sold such typewriters for $79.50 plus Federal Tax during the period 1959–1962 (Tr. 417). On cross-examination, it was brought out that Mr. Gindi had a strictly retail store business, did no advertising, and knew nothing about a suggested retail price of General Consolidated Typewriter Company (Tr. 418).

Mr. Vincent Cottone has a retail business on 23rd Street in Manhattan (Tr. 419). He sold the Consul typewriter during 1959 to 1962. The lowest price was $39.95 and the highest $49.95. He never received promotional material from the manufacturer (Tr. 420–421). On cross-examination, Mr. Cottone testified that he did not have a fixed policy about markups. At one time he sold the Consul typewriter for $49.95 but when his competitors were selling it for less he brought the price down to $39.95 (Tr. 422). Mr. Cottone also testified on cross-examination that he needed a 25% overall markup and if some other concern had a lesser or greater markup they could sell for less or would sell for more (Tr. 422–423). His business was primarily cash and he did no advertising except that for which the manufacturer paid (Tr. 423–424). He never needed promotional material but he had seen figures from manufacturers some of which suggested a retail price (Tr. 424–425).

Mr. Arnold I. Silberstein, the secretary and counsel of a retail typewriter shop located on 125th Street in Manhattan, testified the firm had sold Consul typewriters in 1962. At the request of the Federal Trade Commission, he examined the firm's invoices to determine at what prices they were sold (Tr. 427). The highest price was $47.50 (Tr. 428). CX 49 is the complete list of sale prices made up by the witness and shows the highest price $47.50 (plus sales tax) and the lowest $39.50 (Tr. 430–436). The firm received no promotional material from the manufacturer (Tr. 436). On cross-examination, the witness admitted that his testimony concerning promotional material was based on his examination of the records of the company (Tr. 438). He was familiar with list prices and suggested list prices (Tr. 439). The witness did not know whether his firm used order forms like CX 28 (Tr. 439–440). He never saw a specification sheet on the Consul typewriter (Tr. 442). It was stipulated that four additional witnesses, one located in Long Island, two in Newark, New Jersey, and one in the Bronx, would testify "on both direct and cross-examination, substantially to the same facts and in the same manner" as the four witnesses who testified (Tr. 476–477).

15. From the foregoing testimony and exhibits and the lack of countervailing proof offered by respondent of other prices in the

trade areas, the hearing examiner finds that the price of $79.95 at which respondents advertised the Consul typewriter appreciably exceeded the highest price at which substantial sales were made in the New York and Newark, New Jersey, trade areas. Hence, the advertisement of Consul typewriters was false, misleading and deceptive and where respondent merely accepted the allegedly varying statements (which were not produced) by the manufacturer without making any independent estimate of the actual retail price, he cannot sustain the claim that the advertisement was an honest estimate of the retail value.

Inadequacy of Proof on Radio and Data Board Advertising

16. With respect to the representations concerning radios, no evidence was offered relating to the price at which such radios were usually and customarily offered or sold at retail in any trade area. The sole testimony, except for identification of the advertising bearing on the radios, was given by Mr. Robert S. Siegel, sales manager of Continental Merchandise Company (Continental). He identified an invoice for merchandise shipped to respondent (CX 15), stated it was identical to that advertised by respondent (CX 5) and that the price for which Continental sold the radio included the leather case, earphones, battery, instruction booklet and box (Tr. 433–435). Respondent's advertisement indicated that certain of the accessories were supplied free (CX 5). However, the complaint contains no charge that respondent improperly used the representation, "free."

17. With respect to the representations concerning control boards, no evidence was offered as to the price at which respondent had previously offered or sold the boards, nor was there competent evidence concerning the price at which such boards were usually and customarily sold at retail in any trade area (Tr. 331). The sole testimony, except for identification of exhibits by respondent Ross bearing on the control board, was that given by the sales manager, Mr. Charles T. McLaughlin, of Graphic Systems (Graphic) which manufactures a series of patented boards known by the name Boardmaster (Tr. 297–299). These sold at $49.50 and $67.00 depending on the size (Tr. 323). The witness compared advertising for the respondents' data board (CX 40) with that contained in Graphic's catalogue (CX 41). By this comparison, he purported to show that respondents' advertising slavishly followed the Graphic catalogue (Tr. 304–318) although the two boards differed in material and in the manner in which data cards were affixed (Tr. 320–324). Mr. McLaughlin also testified that in his opinion the value of the board

did not compare with the Boardmaster (Tr. 327). He did not know the price at which the respondents' data board was selling (Tr. 331). On cross-examination, the witness admitted that the data board could perform substantially all the functions described in the advertising (Tr. 333–364). Accordingly, since there was no charge of design piracy in the complaint and no competent proof of the price at which the respondents' data boards sold in any trade area, there was no definitive demonstration that respondents' advertising of data boards was false or misleading.

Foreign Origin, Quality and Guarantee Representations

18. With respect to the charge in the complaint concerning the failure to disclose the foreign origin of drill bits (CX 31 and 32), it is clear that the catalogue (CX 8, p. 29) does not mention foreign origin. One carton (CX 31) in which the drill bits are sold is plainly marked on top of the carton in letters approximately ⅛ inch in height: "Made in West Germany." It is readable by a person of normal vision from at least four feet away. The second carton (CX 32) is stamped on the side of the carton "West Germany" in letters approximately ⅛ inch in height. There is no proof as to whether or not the cartons are stacked so that the stamp is not visible to the purchaser. The color of the stamp blends with the cross-striping on the carton and is placed so that the stamp is not prominent. There is no charge in the complaint concerning the respondents' activity with respect to other articles of foreign origin.

19. The hearing examiner has taken official notice in accordance with paragraph 11 of the complaint, that in the absence of adequate disclosure of foreign origin, the public believes that products are of domestic origin and that the purchasing public has a preference for articles which are of domestic origin. Testimony offered by respondents failed to rebut the presumption thus made. Respondent Ross testified, "Merchandise made anywhere in the world now had general acceptance in this country." (Tr. 259) He described the resistance to merchandise from Japan and Germany shortly after the war, but said this objection had disappeared (Tr. 259–260). Mr. Robert Siegel of Continental Merchandise Company which sold respondents the radios, testified that they sold principally Japanese imports (Tr. 450) and that there was a "positive" reaction (Tr. 450–451) but he later testified that he could not say what the customer reaction was "because we sell radios that are made in Japan. People that come to us know that our radios are made in Japan, so it is never a question to them whether we are selling Japanese radios" (Tr. 452).

20. No proof was offered by either party of the position of the Treasury Department as to the adequacy of the markings on respondents' drill cartons, and there is no charge in the complaint that the failure to state in respondents' catalogues that respondents' drills, radios and typewriters were of foreign origin is a failure properly to advise prospective customers of a material fact without which advice they might be misled.

21. With respect to the quality of the drills, respondents' catalogue uses the term "speed" coupled with the words "Chrome Vanadium" and "finest hardened and tempered steel available." Through the use of this combination of words, respondents represent to the ordinary purchaser that the drill bits are high speed drill bits made of an alloy of chrome vanadium steel (CX 8, p. 29; CX 31 and 32). *Zenith Radio Corporation* v. *Federal Trade Commission*, 143 F. 2d 29 (7 Cir. 1944).

22. Mr. Kurt J. Spiegel, respondents' supplier, identified the invoice covering the importation of the drills from West Germany and the sale to respondents (CX 11, 32, 35). He testified there were three types of drills, "carbon speed [sic] drills, high speed drills—[and] in-between drills that are called chrome vanadium drills." (Tr. 103) He also testified that the drills supplied respondents were carbon steel drills (Tr. 105). He agreed on cross-examination that he watched a test of his drills to determine at what rate of speed they would disintegrate. Mr. Edward Bloom, metallurgist for Avildsen Tools and Machine Company, testified he had spark-tested certain of the drills and they were carbon steel and definitely not high speed drills (Tr. 219–222). On cross-examination, the witness testified that he could not tell whether the bits contained chrome or vanadium (Tr. 221–222). He further testified that it was not the speed alone but the friction which was created that would soften the carbon steel but not the high speed drill (Tr. 222–223). Mr. Bloom did not test the drills to find out at what speed they became useless (Tr. 225–226) and testified that it was the temperature rather than the revolutions per minute which determined when high speed drills should be used. He could not give precise answers as to the number of revolutions necessary to cause softening without consulting a table and knowing the material drilled (Tr. 226–234). Mr. Bloom stated that drill bits do not disintegrate at high speeds but lose their cutting edge which becomes soft and useless, and that disintegrate is a poor word to describe it (Tr. 223–226).

23. With respect to the quality of the grinding on the drills, respondents' catalogue uses the description, "precision ground for chip

clearance." Through the use of this phrase, respondents represent to the ordinary purchaser that the drills are ground with precision and will clear the chips created by the drilling.

24. Wilbur A. Johnson, who is in charge of production at the Avildsen Tool and Machine Company (Tr. 130), testified that the term precision ground "as made in the industry here in this country" is "a machine ground point; and from drill to drill they are very uniform" (Tr. 132). From an examination of the 27/64″ drill bit in CX 31, the witness testified it was not possible that the drill had been machine ground because of the appearance of the chisel angle (Tr. 137). The witness also testified that precision ground for chip clearance meant that the drill would "take the chips and clear them out of the hole" (Tr. 142). The witness testified that some of the drill bits shown in CX 31 would not do this (Tr. 142). Avildsen Tool and Machine Company had sold carbon steel drills to the hardware trade prior to 1959–1960 when they discontinued selling them because of low cost import carbon drills (Tr. 149–151). The witness, on cross-examination, identified a particular drill in CX 31 in which he claimed the deficiencies were obvious, *e.g.* 17/64″ (Tr. 160). The examiner has carefully scrutinized the exhibit and observes that the 17/64″ bit is not symmetrical and ground at a different chisel angle on one side from the other. The witness made a sketch (CX 45) which diagrammatically supplies the nomenclature of the various parts of the drill (CX 48). The witness testified in effect that while the drills would make holes in wood for a time they would not satisfactorily perform over a period of time and that some of the drills would not clear chips at all (Tr. 185). Mr. Johnson did not try these drills (Tr. 167).

Respondent Ross testified that he had used a drill bit like the ones contained in CX 31 in repairing a metal chaise lounge (Tr. 255). He did not know the type of metal but he said with oil and the application of a little pressure he had had no difficulty and the bit cleared the chips (Tr. 256). He has used the bits a half dozen times and they always worked effectively (Tr. 257).

25. On the cross-examination of Mr. Johnson, reference was made to his conference with complaint counsel and to the fact that a memorandum of a previous interview with other company officials was read to him (Tr. 201–215). The hearing examiner, after reading the memorandum, determined that its use had not become necessary and should not be produced under the provisions of Rule 1.133 (Tr. 237). He, accordingly, denied respondents' motion to have it produced (Tr. 238). The memorandum was placed in a sealed envelope marked

RX 2A for identification and the reporter was directed to place it in the rejected exhibits file (Tr. 239). It has not been considered by the hearing examiner in making his decision.

26. From the foregoing evidence concerning the quality of the drill bits (CX 31), the hearing examiner finds that the representations concerning their quality as speed drills were false, misleading and deceptive (Findings 22–24).

27. With respect to the charge in the complaint concerning the statement on the carton that the drills were "fully guaranteed" (CX 31, Complaint, par. 9), the only evidence offered was that only one return was made on drill bits and full refund was given (Tr. 255). Hence, there is no evidence that the guarantee on drill bits was not honored or that there were qualifications on the guarantee which were not set forth.

Facts Bearing on Respondents' Alleged "Affirmative" Defenses

28. With respect to the allegation that the activities of Joseph Ross are not in commerce, respondent Ross is president, treasurer, and a stockholder of respondent John Surrey, Ltd., and he and his wife control more than a majority of its stock (Tr. 43–49; 492–496). In addition, respondent Ross determined what items should be advertised, the prices at which they should be sold, and the general principles of operating its catalogues (Tr. 253, 258, 259). Respondents utilized without checking in any way the specification sheets supplied by manufacturers from whom the products in their catalogues were made and relied implicitly on the representations made by such manufacturers (Tr. 249).

29. With respect to the allegations that the alleged acts and practices have ceased, had no substantial effect on commerce and are not in the public interest, it is clear from the testimony of respondent Ross that some of the violations were continuing up until the investigation by the Federal Trade Commission. On the basis of respondents' own exhibits, RX 3A and 3B, respondents were informed as early as March 12, 1959, that the term "comparable value," as used in advertising an adjustable back aid car seat, was misleading when comparable merchandise was not generally available at the price quoted. Yet, in its catalogue mailed in March of 1962 (CX 1, p. 19), it uses the term "Value $5.00" with respect to briar pipes and other comparable prices with respect to typewriters (p. 3) even though respondent Ross testified that the pattern of specification sheets and catalogues showing comparative prices or values, prevalent in 1959, had ceased (Tr. 248–250).

30. Respondent John Surrey, Ltd., since 1937, has been engaged in advertising, offering for sale, sale and distribution of various articles of merchandise to the consuming public. Such activities included, from 1959 to 1962, the preparation and mailing of eight different issues of catalogues. Each catalogue advertises about three to four hundred products. The total number of items of advertising in all eight catalogues was about three thousand. However, the same products were advertised in more than one catalogue so that the number of products did not equal the number of items. Said catalogues were mailed to prospective customers throughout the United States. Respondent Surrey, Ltd., had a sales volume of between $600,000 and $1,000,000 and sales were made geographically as follows:

The West Coast, about 30% of sales.

From the West Coast to the Eastern Region, including the Southwest, about 20% of sales.

The Eastern Region, from Maine to Florida, exclusive of the New York City Metropolitan Area, about 40% of sales.

The New York City Metropolitan Area, about 10% of sales.

(CX 1–8; Tr. 526, 527)

31. For the period 1959 through 1963, the dollar volume of sales by respondent John Surrey, Ltd., of visual control boards, typewriters, pens, electric can openers, radios, checkwriters, electra-maids and drill bits were as follows:

Items	Year	Dollar amount of sales
Visual Boards	1962	$1, 587. 35
Typewriters	1962	599. 25
Pens	1959	149. 00
	1960	180. 00
Electric Can Openers	1961	477. 60
Radios	1960	1, 247. 50
Checkwriters	1960	1, 368. 75
	1961	11, 962. 50
	1962	1, 237. 50
	1963	562. 50
Electra Maids	1960	718. 20
	1963	478. 80
Drill Bits	1959	1, 012. 50
	1960	675. 00

(RX 4 A–B)

32. The number of items of catalogue advertising established by the Commission to have been false and misleading, constituted a small percentage of the total number of items advertised in such catalogues (CX 1-8).

33. It is in the public interest to prevent all advertising which is false or misleading and the Commission in this instance has made a determination that it is in the public interest to prevent continuation of the type and quality of advertising described in the complaint. *Federal Trade Commission* v. *Algoma Lumber Company*, 291 U.S. 67, 77-78 (1934); *Fingerhut Mfg. Co., et al.*, Docket No. 8565, May 27, 1964 [65 F.T.C. 751]

34. With respect to the allegation that the acts and practices were mere puffing, the foregoing findings of fact demonstrate the contrary (Findings 1-29 incl.).

35. Respondents' claim of cooperation and following a course which they were informed would involve no further possible violations, and their charge of bad faith were not established. Despite respondent Ross' testimony that the investigator told him he felt "there was nothing for the Commission to proceed on" (Tr. 244), even after the 1959 warning by the Commission, contained in respondents' exhibit 3-A, there were a number of instances of false advertising in 1960, 1961 and 1962 (see RX 4 a-b; CX 1-8; Findings 1-26).

36. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition in commerce with corporations, firms and individuals, in the sale of articles of general merchandise of the same general kind and nature as those sold by respondents (Tr. 248, 148-151).

37. The use by the respondents of false, misleading and deceptive statements, representations and practices has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of respondents' products by reason of said erroneous and mistaken belief.

REASONS FOR DECISION [2]

Respondents' advertising in its catalogue (CX 1-8) contained the terms "half the usual price" and "regular—sale price" or "regular—now" with two prices quoted in each instance. The hearing examiner has determined that the impression which a purchaser might get from

[2] Pursuant to the provisions of § 8b of the Administrative Procedure Act, and § 3.21(b) of the Rules of the Commission.

such juxtaposition of prices is that prior to the time of the sale, respondents' usual price, for a reasonable period of time, had been the higher price.[3] Respondent Ross, president of John Surrey, Ltd. (Surrey), testified that he had not sold the articles at the higher price in the case of two of the articles advertised. Accordingly, as to these articles, it was clear to the hearing examiner that the advertisements contained in the catalogue were false and misleading.

As far as the visual control board advertisements were concerned, the hearing examiner did not find that the evidence showed that respondents had not sold or offered to sell previously at a higher price or what the trade area price was for a comparable board. Similarly, in connection with the advertisements for checkwriters and radios, there was no proof of the retail price in the trade area. Thus, it could not be determined that the price advertised with respect to those items was false and misleading.

The evidence in connection with the Consul Light Weight Portable Typewriter related principally to the Metropolitan New York area market and to the prices which were charged by particular firms in that area. With respect to one chain store firm, however, the evidence related to Erie and Philadelphia, Pennsylvania, New Jersey, and Northern Ohio as well. By stipulation, the Newark, New Jersey, as well as Bronx and Long Island trade areas were treated in the same fashion.

The hearing examiner, on the basis of this testimony and because no countervailing evidence of prices was offered by respondents, has inferred that the highest prices in the trade areas were substantially lower than the prices at which respondents' catalogue represented the retail price in the trade areas to be through the use of the term, manufacturer's suggested list price."[4]

Because of respondent Ross' testimony that there had been several suggested list prices dependent on what arrangements the manufacturer was making for the sale of its products and the existence of one undated sheet showing a suggested retail price of over ten dollars lower than the price which respondents claimed as the manufacturer's list, as well as the hearing examiner's observance of the witnesses who testified including those who could not recall any manufacturer's suggested price in the amount advertised, the hearing

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[3] *Zenith Radio Corp.* v. *Federal Trade Commission*, 143 F. 2d 29 (7 Cir. 1944); *J. Fiddelman & Son, Inc.*, Docket No. 8043 [58 F.T.C. 31]; *Arnold Constable Corp.*, Docket No. 7657 [58 F.T.C. 49]; *Stifel and Taylor Value City, Inc., et al.*, Docket No. 8440, April 30, 1964 [65 F.T.C. 569].

[4] See *Gimbel Brothers, Inc.*, Docket No. 7834, Oct. 17, 1962 [61 F.T.C. 1051].

examiner has found that the advertised manufacturer's suggested price was not an honest estimate of the actual retail price.[5]

Similarly, in connection with the ball point pen advertisements which used the terms, "value" and "now," the hearing examiner has inferred from the testimony of the representatives of the department stores, and in the absence of any contradictory testimony on behalf of respondents, that the testimony of the experienced buyers in these department stores as to the value of the pen, and the price at which they thought it would sell, indicated the highest price in the New York trade area. The hearing examiner took the position that in view of the substantial difference in construction, as well as good will, between the pen offered by respondents and that sold under the Paper-Mate name, respondents could not properly use the sales price of the Paper-Mate pen as "value" on its pen. In light of these facts, and the extremely low cost of respondents' pen, the hearing examiner finds that the price of $1.69 was not an honest estimate of the retail value.

The advertisement concerning checkwriters, because of the absence of any showing of its falsity except the wide difference between the wholesale and retail price, was insufficient on which to base a finding of false and misleading advertising. Similarly, in connection with the advertisements for transistor radios, the evidence was insufficient to base a finding of false and misleading advertising.

The evidence concerning the electric can opener "as advertised in Life at $19.95," was simply not true as the testimony of the witnesses from the magazine amply demonstrated. There was, accordingly, no justification for this advertisement.[6]

Charges with respect to foreign origin were inadequate to base a finding that there was an improper failure to disclose a material fact. The boxes were clearly marked with the country of origin. It was not charged that the failure to designate the country of origin in the catalogue amounted to concealment of a material fact and there was no charge that the advertisements for the radios, which were of non-domestic manufacture, were false and misleading for that reason. Accordingly, the hearing examiner has made no finding of false and misleading advertising in connection with the concealment of foreign origin charge.

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[5] See *Waltham Watch Company*, Docket No. 8396, February 28, 1964 [64 F.T.C. 1150]; *The Regina Corporation*, Docket No. 8323, April 7, 1964 [65 F.T.C. 246]; *Gruen Industries, Inc. et al.*, Docket No. 8455, February 28, 1964 [64 F.T.C. 1194].

[6] See *Motorola, Inc.*, Docket No. 8473 [64 F.T.C. 62].

In connection with the advertisement that the drill bits were fully guaranteed, there was no evidence of any failure to make good the guarantee, and direct testimony was given that in the one case, where a return was made, a full refund was given. On the other hand, the hearing examiner has inferred from his reading of the catalogue advertisements for the drill bits that an ordinary purchaser would be misled into believing that a better grade of drill bit than a carbon steel bit would be supplied to the purchaser.[7] Moreover, the testimony of the witnesses and the hearing examiner's own examination of the drill bits, convinced him that the drill bits were not manufactured in accordance with the representations in the advertising. Mr. Ross' testimony that he had used the bits and that they were satisfactory was no basis for advertising a drill which a reader would reasonably assume was of high quality when in fact a different product was supplied.[8]

On the basis of his analysis of the evidence offered in support of the complaint, the hearing examiner has determined that a prima facie case of false and misleading advertising was established and, accordingly, he denies respondents' motion to dismiss this complaint at the close of the Commission's case which was heretofore reserved.

By way of defense, respondents primarily stood on Ross' claim that he relied upon specification sheets supplied to him by the manufacturers of the articles which he advertised in his catalogue and having found these manufacturers reliable took the position that he need not go any further. This contention has of course no bearing on respondents' misrepresentation of the prices at which they had sold articles previously nor to representations of an affirmative fact such as that a product had been advertised in a particular magazine at a particular price.

Moreover, Ross' own testimony, in connection with the typewriters, was that there had been several specification sheets with different prices although the only specification sheet produced with suggested prices listed a price substantially lower than the manufacturer's suggested list price advertised. If, as was testified, the manufacturer had such a substantial variation in its suggested retail price, that very fact should have put Ross on inquiry. Similarly, in connection with the ball point pens. Ross' testimony was that he fixed the price of $1.69 as the value because of the Paper-Mate pen and a representation by the manufacturer as to the fine quality of the pen. Hence, in this case, also, from Mr. Ross' own testimony, he failed to make an honest

[7] *Zenith Radio Corporation* v. *Federal Trade Commission*, 143 F. 2d 29 (7 Cir. 1944).
[8] *Federal Trade Commission* v. *Algoma Lumber Company*, 291 U.S. 67, 77–78 (1934).

estimate of the retail value of the pen. He relied rather on his knowledge of the price at which a nationally advertised pen, of somewhat different physical characteristics, was selling at retail under a price stabilization agreement sometimes referred to as a fair trade contract.

Respondents pleaded defenses were either not established in fact or were insufficient in law. The first defense pertaining to Ross was simply not established. Mr. Ross was the responsible figure in the management of Surrey and he and his wife are owners, directors and officers. Moreover, Mr. Ross determined what items should be advertised in interstate commerce and the general principles of operating its catalogue.[9]

The second defense of abandonment, lack of substantial effect, and of public interest, has also not been established. To establish the defense of abandonment truly unusual circumstances must be shown.[10] None were present here. The Federal Trade Commission, as early as 1959, by letter introduced by respondents (RX 3 A–B) had informed respondents that their use of comparable value advertising was misleading when compared with the actual price at which the product advertised was being sold. Yet, in the subsequent eight issues of catalogues, respondents continued to advertise comparable prices which the proof established were not comparable. It is clearly in the interest of the public to be protected against any species of deception.[11] We must infer from the widespread dissemination of respondents' catalogue throughout the United States that respondents' false representation have had a substantial effect on commerce.

Respondents' third defense of puffing is simply not established. The advertisements affirmatively make representations which are palpably false.

Respondents' fourth defense was likewise not established. Although respondents were informed as early as March 1959 (RX 3 A–B), it continued to utilize advertising in its catalogue which affirmatively misrepresented the quality and value of the goods advertised and there is no evidence whatsoever of any breach of faith by the Commission or of any stipulation of any character by respondents such as they inferred in the fourth defense.

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[9] *United States* v. *Wise*, 370 U.S. 405 (1962); *Pati Port, Inc., et al.*, v. *Federal Trade Commission*, 313 F. 2d 103, 105 (4 Cir. 1963); *Product Testing Company, et al.*, Docket No. 8534, February 17, 1964 [64 F.T.C. 857]; *Pacific Molasses Company, et al.*, Docket No. 7462, May 21, 1964 [65 F.T.C. 675].

[10] *Ward Baking Co.*, 54 F.T.C. 1919 (1958); *Product Testing Company, Inc.*, Docket No. 8534, February 17, 1964 [64 F.T.C. 857]; *Eugene Dietzen Co.* v. *Federal Trade Commission*, 142 F. 2d 321 (7 Cir. 1944); *Galter* v. *Federal Trade Commission*, 186 F. 2d 810, 813 (7 Cir. 1951).

[11] *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212 (1932).

The Commission's adoption, January 8, 1964, of new Guides Against Deceptive Pricing constituted a policy decision binding on the hearing examiner and applicable to cases brought prior to January 8, 1964.[12] Accordingly, the hearing examiner has evaluated the proof in the light of the policy established by the Guides and has redrafted the proposed order to conform to the Commission's decisions rendered after the adoption of such guides.[13]

CONCLUSIONS

1. Respondents are engaged in interstate commerce and the acts and practices complained of occurred in the course of such commerce. The Federal Trade Commission has jurisdiction over the persons of respondents and of the subject matter of this proceeding.

2. Respondent Joseph Ross was chargeable equally with respondent John Surrey, Ltd., for the acts and practices engaged in.

3. Respondents, through the use of words or phrases such as "regular" or "reg." with a price in juxtaposition to a word or phrase such as "now" or "sale price" followed by a lower price, represented that they had previously regularly sold or offered to sell in the usual course of business at the regular price and that the lower price constituted a saving of the difference between the two prices.

4. Respondents, through the use of words or phrases such as "manufacturer's suggested list price," "value," and "advertised in Life at" followed by a price in juxtaposition to a word or phrase such as "sale price," "clearance sales price" followed by a lower price, represented that the usual and customary price in the trade areas in which the product was sold was the higher price and that the lower price constituted a saving of the difference between the two prices.

5. The evidence established that: a) in a number of instances where the term "regular" or "reg." was used, the respondents had never sold at the higher price stated, b) in a number of instances where the terms "manufacturer's suggested list price," "value," and "ad-

[12] *Bulova Watch Company, Inc.*, Docket No. 7583, Feb. 28, 1964 [64 F.T.C. 1054]. *Continental Products, Inc.*, Docket No. 8517 [65 F.T.C. 361]. *Filderman Corporation*, Docket No. 7878, January 28, 1964 [64 F.T.C. 427]. *Waltham Watch Company*, Docket No. 8396, February 28, 1964 [64 F.T.C. 1150]. *David Mann, et al.*, Docket No. 8533, April 24, 1964 [65 F.T.C. 497]. *Clinton Watch Company*, Docket No. 7434, February 17, 1964 [64 F.T.C. 1443]. *Majestic Electric Supply Co., et al.*, Docket No. 8449, February 28, 1964 [64 F.T.C. 1166].

[13] *Waltham Watch Co.*, Docket No. 8396, February 28, 1964 [64 F.T.C. 1150]. *The Regina Corp.*, Docket No. 8323, April 7, 1964 [65 F.T.C. 246]. *Gruen Industries, Inc.*, Docket No. 8455, Feb. 28, 1964 [64 F.T.C. 1194]. *Giant Food, Inc.*, Docket No. 7773, August 5, 1964 [66 F.T.C. 476].

vertised in Life at," were used, the higher prices advertised appreciably exceeded the highest price at which substantial sales were made in respondents' trade area and were not an honest estimate of the retail price prevalent in such areas. Hence, said advertising was false, misleading and deceptive.

6. The evidence established that respondents advertised drill bits in a manner which constituted a representation that said drill bits were precision ground for chip clearance and of high speed quality. In fact, the drill bits were not precision ground for chip clearance and were not of high speed quality. Accordingly, said advertising was false, misleading and deceptive.

7. The evidence failed to establish that respondents engaged in false, misleading and deceptive advertising in connection with foreign imports or a guarantee which was charged in the complaint.

8. Respondents failed to establish any affirmative defense which constituted a bar to relief in this proceeding.

9. The acts and practices of respondents, as found herein, constituted unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

10. The following order should issue.

ORDER

It is ordered, That respondents John Surrey, Ltd., a corporation, and its officers, and Joseph Ross, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of drill bits, typewriters, pens, electric can openers, electra maids or other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "Reg.," or words of similar import, to refer to any amount which is in excess of the price at which such merchandise has been sold or offered for sale in good faith by the respondents in the recent regular course of their business, or otherwise misrepresenting the price at which such merchandise has been sold or offered for sale by respondents;

2. Advertising or disseminating any manufacturer's list or suggested price that is not established in good faith as an honest estimate of the actual retail price or that appreciably exceeds the highest price at which substantial sales are made in respondents' trade area;

3. Using the words "manufacturer's list price," or "suggested list price," or words of similar import, unless the merchandise so described is regularly offered for sale at this or a higher price by a substantial number of the principal retail outlets in the trade area;

4. Using the words "comparable price," "advertised in Life at —," "value," or words of similar import, to refer to any amount unless they are reasonably certain that such amount does not appreciably exceed the highest price at which substantial sales of such merchandise are being made in the trade area where the representation is made, or otherwise misrepresenting the usual and customary retail selling price or prices of such merchandise in the trade area;

5. Misrepresenting, in any manner, the savings available to purchasers of respondents' merchandise;

6. Representing, directly or by implication, that their drill bits are super speed or high speed drill bits unless they are composed of the materials and have the physical properties and performance characteristics generally required for and possessed by high speed drill bits;

7. Misrepresenting, in any manner, the grade, quality, or performance of any product.

OPINION OF THE COMMISSION

BY REILLY, *Commissioner:*

The complaint in this matter charges respondents with violating Section 5 of the Federal Trade Commission Act. The hearing examiner held in his initial decision that, except for two charges, the principal allegations of the complaint had been sustained and included in his decision an order to cease and desist. Respondents have appealed from this decision.

Corporate respondent, John Surrey, Ltd., is engaged in the business of selling to the public by mail order, articles of general merchandise such as pens, radios, visual control boards, typewriters, tools, and drill bits. This merchandise is advertised in catalogs and newspapers and is distributed by respondents throughout the United States.

Stated briefly, the complaint charges John Surrey, Ltd., and its president with using false and deceptive representations as to (1) the prices at which they usually sold certain articles of merchandise and (2) the generally prevailing prices of certain other articles. The complaint further charges respondents with misrepresenting the quality

of certain drill bits and the scope of the guarantee pertaining thereto, and with failing to disclose the country of origin of such bits. The hearing examiner held that there was insufficient evidence to sustain the "guarantee" and "foreign origin" charges. Complaint counsel have not appealed from this ruling.

The principal question raised by respondents' appeal concerns the adequacy of the proof offered in support of the charge that respondents had misrepresented the prices at which certain merchandise was sold in their trade area.[1] The record shows in this connection that respondents' advertising contained comparative pricing claims of which the following are typical:

> Consul Lightweight Portable Typewriter
>
> * * * * * * *
>
> Manufacturer's Suggested List Price $79.50 plus Fed. Tax
> Our Clearance Sale Price $39.95
> Plus 10% Fed. Tax
> AMAZING PEN OFFER $1.69 VALUE — NOW 4 for $1.00 . . .
> ELECTRIC CAN OPENER at an amazing low price.
> Advertised in Life $19.95.
> Our Sale Price $9.95.[2]

The complaint alleges that through use of such representations respondents have represented that the higher amounts set forth in the advertisements "were the prices at which the merchandise referred to was usually and customarily sold at retail in the trade area or areas where the representations were made." While respondents do not dispute that consumers would so understand these claims, they argue that complaint counsel failed to establish that the higher amounts set forth in the advertising were in excess of the prevailing prices of the merchandise in the trade area in which respondents were doing business. Respondents contend in this connection that although their trade area encompasses the entire United States the only evidence offered by complaint counsel related to the prices at which the merchandise was sold in the New York City metropolitan area.

It is true that with respect to most of the products the only proof as to trade area prices presented by counsel supporting the complaint

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[1] Respondents do not challenge the examiner's finding that the claims concerning their own regular prices and the representation with respect to the quality of drill bits were false and deceptive.

[2] The examiner erroneously construed this claim as a comparison of respondents' selling price with their own former price. (See paragraph seven of the complaint.) A seller may, of course, use this form of wording to make a comparison with another seller's (or the manufacturer's list) price, so long as the comparison is neither false nor misleading.

relates to an area in which only 10% of respondents' sales were made. There is also evidence, however, which would support the conclusion that the higher prices used by respondents were in some instances wholly fictitious. The record shows in this connection that respondents purchased ball point pens for about 8⅓¢ each, offered them at four for $1.00, and claimed that each pen was a "$1.69 value." Respondents attempted to justify this claim by asserting that the quality of the pen was as good as the Paper-Mate pen which has a manufacturer's list price of $1.69. The fallacy of this position, however, is that respondents did not indicate in their advertising that they were comparing their pen with another selling for a higher price. They used instead a representation which could be construed by the reader to mean that the advertised pen sold elsewhere at the higher price.[8] Moreover, even if respondents had clearly disclosed that they were comparing their pen with another selling for a higher price, their advertising would still have been deceptive since the record shows that respondents' pen was not of similar quality to the higher priced pen.

Respondents also represented that an electric can opener had been advertised in Life at $19.95 and that their "Sale Price" was $9.95. The record shows however that the can opener in question had never been advertised in Life at $19.95. Respondents also represented that the "Manufacturer's Suggested List Price" of a typewriter was $79.95. The record shows however that the manufacturer's "Suggested Retail" price was $69.95.

In a case such as this where the seller is doing business on a nationwide scale it would be completely unrealistic to place on complaint counsel the burden of ascertaining the prevailing price of an article of merchandise in such a large trade area. To make this determination would necessitate an investigation into prices charged by literally thousands of retailers located in numerous communities in every section of the country. Nor do our Guides place this burden on a seller who wishes to advertise throughout a large geographical area that his selling price of an article of merchandise is less than the prevail-

[8] The Commission's Guides Against Deceptive Pricing, effective January 8, 1964, state that advertising in which the price of one article is compared with the price of another article of like grade and quality "can serve a useful and legitimate purpose when it is made clear to the consumer that a comparison is being made with other merchandise and the other merchandise is, in fact, of essentially similar quality and obtainable in the area." Also as stated by the Court in *U.S.* v. *95 Barrels of Vinegar,* 265 U.S. 438, "It is not difficult to choose statements, designs or devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to accomplishment of the purposes of the Act."

ing price of the article in that trade area. As stated in Guide III " * * * a manufacturer or other distributor who does business on a large regional or national scale cannot be required to police or investigate in detail the prevailing prices of his articles throughout so large a trade area. If he advertises or disseminates a list or preticketed price in good faith (*i.e.*, as an honest estimate of the actual retail price) which does not appreciably exceed the highest price at which substantial sales are made in his trade area, he will not be chargeable with having engaged in a deceptive practice."

Under this concept, the seller must have reason to believe that substantial sales of the merchandise are being made at a particular price before he represents in advertising or by preticketing that such price is the prevailing trade area price. He must have some information upon which to base this belief, but, as stated above, he is not required to investigate in detail all prices at which the product is being sold throughout the entire country. It is enough if he ascertains the price at which substantial (that is, not isolated or insignificant) sales of the product are being made by principal retail outlets in representative communities. This information should be readily available to any seller and should be in his possession before he makes a comparative pricing claim. If it is not available and if the seller has no reliable information as to the actual retail price of the product, he should not make an affirmative claim that the product is being sold elsewhere at a higher price.[4] Consequently, in any proceeding challenging the propriety of trade area pricing claims the information upon which such claims are based should be within the peculiar knowledge of the seller.

In this case complaint counsel adduced evidence that respondents' advertised prices were substantially in excess of the prices charged by retailers in the New York City metropolitan area. We need not decide, however, whether this showing constituted prima facie proof of the allegations sufficient to shift to respondents the burden of going forward with the evidence to show that the merchandise was in fact sold at the advertised prices by various retail outlets in other communities.[5] As stated above, there is also evidence in the record that respondents had not predicated certain of their claims on information

[4] It has been stated with respect to the practice of using false pricing claims that "morally it is not defensible and the Commission might hold it 'unfair,'" *F.T.C.* v. *Standard Education Society,* 86 F. 2d 692 (1936), rev'd on other grounds, 302 U.S. 112.

[5] Complaint counsel's case would of course be stronger if they had established that the higher amounts in respondents' advertising appreciably exceed the prices at which the products are sold by principal retail outlets in other communities located in different sections of the trade area in which respondents are doing business.

concerning the actual prices at which the merchandise was sold at retail but had, in fact, invented or fabricated the prices. In view of this showing, and in the absence of any countervailing evidence, we think the examiner was fully warranted in holding that respondents had misrepresented trade area prices.

Also rejected is respondents' contention that the complaint should be dismissed because only five out of 4,000 advertisements were found to be deceptive.[6] In the first place, this argument is based on the erroneous premise that all but five of respondents' advertisements were truthful and non-deceptive. There is no showing, in this connection, that counsel supporting the complaint examined all of respondents' advertising and found only five deceptive claims as respondents seem to contend. Secondly, we do not believe that evidence that an advertiser has made non-deceptive, as well as deceptive, claims would tend to overcome our initial determination that a proceeding to prevent the continued use of the deceptive claims would be in the public interest. As stated by the court in *Basic Books, Inc.* v. *F.T.C.*, 276 F. 2d 718 (1960) "that a person or corporation * * * may have made correct statements in one instance has no bearing on the fact that they made misrepresentations in other instances."[7] In this case, it has been shown that respondents have failed to comply with the law although given an opportunity to do so voluntarily. An order to cease and desist is therefore necessary to prevent continuation of the practices found to be deceptive.

No appeal has been taken from the order to cease and desist contained in the initial decision. We note, however, that several prohibitions in this order deal with the same practice and are somewhat redundant. Consequently, the order will be modified by incorporating the terms of the various prohibitions in one paragraph.

Most of the examiner's difficulty in framing a clear and effective order to cease and desist seems traceable to his effort to incorporate verbatim large segments of the Commission's Revised Guides Against Deceptive Pricing (effective January 8, 1964). An attempt to put the Guides to such a use reflects a misunderstanding of their nature and

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[6] Complaint counsel point out in their brief that respondents did not advertise 4,000 different items for sale. Respondents were selling approximately 300 to 400 items which were advertised repeatedly over the period 1959–1962.

[7] See also *Gimbel Bros.* v. *F.T.C.*, 116 F. 2d 578 (1941) and *Western Radio Corporation* v. *F.T.C.*, 339 F.2d 937 (1964). In the latter case the court could "see no merit in the contention that tests of two of 20,000 transmitters produced by petitioners as of January 8, 1960, was insufficient evidence on which to base a finding of misrepresentation as to all of the transmitters."

purpose. The Guides are not designed to be an encyclopedic restatement of the law regarding deceptive pricing, as it has been developed in Commission and court decisions under Section 5 of the Federal Trade Commission Act, and are not written in the kind of "lawyer's language" that may be appropriate in a formal order.

The Guides are intended to serve a different purpose. Addressed to the businessman who desires in good faith to conduct his business in accordance with the law and who wants to know, in advance, how he may assure that his price advertising will be completely fair and non-deceptive, the Guides set forth in clear and uncomplicated layman's language the practical steps that a businessman should take to avoid becoming involved in scrapes with the law. The Guides themselves make this very clear:

> These Guides are designed to highlight certain problems in the field of price advertising which experience has demonstrated to be especially troublesome to businessmen who in good faith desire to avoid deception of the consuming public. Since the Guides are not intended to serve as comprehensive or precise statements of law, but rather as practical aids to the honest businessman who seeks to conform his conduct to the requirements of fair and legitimate merchandising, they will be of no assistance to the unscrupulous few whose aim is to walk as close as possible to the line between legal and illegal conduct. They are to be considered as *guides*, and not as fixed rules of "do's" and "don'ts," or detailed statements of the Commission's enforcement policies. The fundamental spirit of the Guides will govern their application.

Therefore, when the Commission has reason to believe that a person or firm has violated the law by deceptive price advertising, and issues a complaint, one should not expect to find the answer to every question in the case within the four corners of the Guides—with respect either to whether the law has in fact been violated or to what form of order is appropriate to prevent recurrence of the unlawful conduct.

As we have frequently said, the Commission's duty in fashioning an order is to impose such prohibitions as will fairly and adequately "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88. It is apparent that the Guides, designed to assist persons who desire in good faith to avoid violations of the law, will not in every case supply the language precisely suited to drafting an order to cease and desist. We have fashioned an order in this case which, in the light of the Commission's past experience in remedying deceptive-pricing violations, will accomplish this purpose.

Respondents' appeal is denied and the initial decision as modified by this opinion will be adopted as the decision of the Commission.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal and directing modification of the initial decision:

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 respondents John Surrey, Ltd., a corporation, and its officers, and Joseph Ross, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of drill bits, typewriters, pens, electric can openers, electra maids or other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "Reg.," or words of similar import, to refer to any amount which is in excess of the price at which such merchandise has been sold or offered for sale in good faith by the respondents in the recent regular course of their business, or otherwise misrepresenting the price at which such merchandise has been sold or offered for sale by respondents;

2. Using the words "manufacturer's lists price," "suggested list price," "value," or words of similar import, to refer to the price at which any product is generally sold by others, when such amount appreciably exceeds the highest price at which substantial sales of the product are being made by principal retail outlets in representative communities throughout respondents' trade area at the time such representation is made;

3. Misrepresenting, in any manner, the savings available to purchasers of respondents' merchandise;

4. Representing, directly or by implication, that their drill bits are super speed or high speed drill bits unless they are composed of the materials and have the physical properties and performance characteristics generally required for and possessed by high speed drill bits;

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

It is further ordered, That 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 compiled with the order to cease and desist.

IN THE MATTER OF

PERMANENTE CEMENT COMPANY ET AL.[1]

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 7939. Complaint, June 14, 1960—Decision, March 23, 1965[2]

Consent order, following remand of proceeding by the Court of Appeals, Ninth Circuit, on Mar. 18, 1965, requiring the second largest cement producer on the West Coast, and its subsidiary, to divest, absolutely and in good faith, within four years, to purchasers approved by the Commission, all the assets, properties, rights and privileges, tangible or intangible, of the Olympic Portland Cement Co., Ltd., a principal competitor in the manufacture and sale of portland cement acquired in 1958, the divestment to prohibit any change which might impair present production capacity;

To divest, absolutely and in good faith, within two years, to purchasers approved by the Commission, the ready-mixed concrete, and cement aggregates facilities, including all equipment, acquired in 1959 from Pacific Building Materials Co. and Readymix Concrete Co., located in Albina (Portland) and Vancouver (Washington), the divestiture to prohibit any change of assets which might impair present production capacity, and to make available and affirmatively offer to purchasers certain raw materials at prices, terms, and conditions as prescribed by this Order;

To cease and desist from acquiring any part of any corporation engaged in the manufacture or sale of ready-mixed concrete in the States of Oregon and Washington for the next two years, or until the Commission issues a Trade Regulation Rule concerning acquisitions in the cement industry, and to comply with other obligations of this Order as set forth below.

DECISION AND ORDER

The Commission having issued its complaint on June 14, 1960, charging respondents with violation of Section 7 of the Clayton Act,

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[1] Now known as Kaiser Cement & Gypsum Corp.

[2] This order supersedes the Commission's Order of Apr. 24, 1964, 65 F.T.C. 410, with respect to Count I which required respondent to divest itself of Olympic Portland Cement Co., Ltd., within one year.

Complaint, Initial Decision, Opinions, and Order as to Count I reported in 65 F.T.C. 410.

as amended, and respondents having been served with a copy of that complaint; and

The Commission having determined that the circumstances are such that the public interest would be served by waiver here of the requirement of the Commission's Notice of July 14, 1961, requiring the filing of notice of intention to enter into a consent agreement; and

The hearing examiner having certified to the Commission respondents' duly executed agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in the complaint, and waivers and provisions as required by the Commission's Rules; and

The Commission having considered the aforesaid agreement and having determined that it provides an adequate basis for appropriate disposition of this proceeding, the agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered:

1. Respondent Permanente Cement Company (hereinafter referred to as "Permanente") is a corporation organized, existing and doing business under the laws of the State of California with its office and principal place of business located at 300 Lakeside Drive, Oakland, California.

2. Respondent Glacier Sand & Gravel Company (hereinafter referred to as "Glacier") is a corporation organized, existing and doing business under the laws of the State of Washington with its office and principal place of business located at 5975 East Marginal Way, Seattle, Washington.

3. The Federal Trade Commission has jurisdiction over the subject-matter of this proceeding and the respondents.

ORDER

COUNT I.

It is ordered, That respondent Permanente Cement Company, a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, within four (4) years from the date of service of this Order, shall divest, absolutely and in good faith, all stock, assets, properties, rights and privileges, tangible or intangible, including but not limited to all properties,

plants, machinery, equipment, raw material reserves, trade names, contract rights, trademarks, and goodwill acquired by Permanente Cement Company as a result of the acquisition by Permanente Cement Company of the stock and assets of the Olympic Portland Cement Company, Ltd., together with all plants, machinery, buildings, land, raw material reserves, improvements, equipment and other property of whatever description that has been added to or placed on the premises of the former Olympic Portland Cement Company, Ltd., so as to restore the Olympic Portland Cement Company, Ltd., as a going concern and effective competitor in the manufacture and sale of cement.

It is further ordered, That pending divestiture, Permanente Cement Company shall not make any changes in any of the plants, machinery, buildings, equipment, or other property of whatever description, of the former Olympic Portland Cement Company, Ltd., which might impair its present capacity for the production, sale and distribution of cement, or its market value, unless such capacity or value is fully restored prior to divestiture.

It is further ordered, That by such divestiture, none of the stock, assets, properties, rights or privileges hereinabove described in this Order as to Count I shall be sold or transferred, directly or indirectly, to (a) any person who is at the time of the divestiture an officer, director, employee, or agent of, or under the control or direction of, Permanente Cement Company or any of the subsidiaries or affiliated corporations of Permanente Cement Company, or owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of Permanente Cement Company, (b) any company producing cement in Western Washington, as that term is defined in the complaint, as amended, or (c) to any purchaser who is not approved in advance by the Federal Trade Commission.

It is further ordered, That if Permanente Cement Company divests the assets, properties, rights and privileges hereinabove described in this Order as to Count I to a new corporation, the stock of which is wholly owned by Permanente Cement Company, and if Permanente Cement Company then distributes all of the stock in said corporation to the stockholders of Permanente Cement Company in proportion to their holdings of Permanente Cement Company stock, then the preceding paragraph of this Order shall be inapplicable, and the following provisions of this paragraph shall take force and effect in its stead. No person who is an officer, director or executive employee of Permanente Cement Company, or who owns or controls, directly or indirectly, more than one (1) percent of the stock of Permanente

Cement Company, shall be an officer, director or executive employee of any new corporation described in this paragraph, or shall own or control, directly or indirectly, more than one (1) percent of the stock of any new corporation described in this paragraph. Any person who must sell or dispose of a stock interest in Permanente Cement Company or the new corporation described in this paragraph in order to comply with this paragraph may do so within six (6) months after the date on which distribution of the stock of the said corporation is made to stockholders of Permanente Cement Company.

It is further ordered, That, as used in this Order as to Count I, the word "person" shall include all members of the immediate family of the individual specified and shall include corporations, partnerships, associations and other legal entities as well as natural persons.

It is further ordered, That respondent Permanente shall carry out its obligations to sell and divest as provided in this Order as to Count I as follows: (a) during the second half of the third year of the period herein provided for, said respondent shall prepare the required program for actively soliciting bids on the properties and assets to be divested and shall submit a written report to the Commission every sixty (60) days in said half year of the steps so taken by it; (b) during the fourth year of said period said respondent shall actively solicit and make a bona fide effort to sell the properties and assets to be divested, any such sale to be effective at the end of said fourth year, and shall make a written report of such activities to the Commission every ninety (90) days during said year; (c) in the event that at any time during said four year period said respondent shall receive a written offer to purchase said properties and assets, it shall submit a copy thereof to the Commission within sixty (60) days after receipt, and if any such offer appears to said respondent or to the Commission to be bona fide said respondent shall use its best efforts to keep said offer open until the fourth year of said period; and (d) in negotiating for the sale and divestment ordered hereby, said respondent shall have the right to negotiate with any prospective purchaser for, and to attempt to contract for, the purchase by said respondent of not in excess of fifty (50) percent of the cement produced at the Bellingham plant in the three (3) year period following the effective date of such sale and divestment.

COUNT II

It is ordered, That respondents and their subsidiaries, affiliates, officers, directors, agents, representatives, employees, successors and

assigns, shall, within two (2) years from the date of service of this Order, divest, absolutely and in good faith, and to a purchaser or purchasers approved by the Federal Trade Commission, the ready-mixed concrete and aggregates facilities acquired by respondent Glacier from Pacific Building Materials Company and Readymix Concrete Company which are located at Albina (Portland)[1] and Vancouver (Washington),[2] including, without limitation, all machinery or equipment which is presently being used at either of said locations in the manufacture and sale of ready-mixed concrete and aggregates (including twelve (12) ready-mixed concrete mixer trucks at each of said facilities and such additional other types of vehicles as may be necessary to establish such purchaser or purchasers as effective competitors in the manufacture and sale of ready-mixed concrete and aggregates). The land upon which the Albina facility is located shall be subleased to the purchaser thereof on terms no less favorable than those contained in the lease between respondent Glacier and the Union Pacific Railroad, the owner of said property. The Vancouver Warehouse Building (formerly used for the sale of building materials), and the land upon which it is situated, need not be divested, unless the purchaser desires to acquire said warehouse building and land, and offers to pay the fair market value thereof. Respondents shall, in any event, lease that portion of said building presently used as an office for said Vancouver facility to the purchaser of the Vancouver facility.

It is further ordered, That respondents shall begin to make good faith efforts to divest the aforesaid facilities promptly after the date of service of this Order and shall continue such efforts to the end that the divestiture thereof shall be effected within the aforesaid period of two (2) years. If divestiture of either or both of said facilities shall not have been accomplished within the specified two (2) year period, or any extension thereof, the Commission will give respondents notice and an opportunity to be heard before the Commis-

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[1] The "Albina facility" to be divested is shown by CX 151 B, page 2467 of the record (Volume 1-2, 7939-1) entitled in the lower right hand corner:

"Pacific Building Materials Co.
Portland, Oregon
Albina Plant
March 1, 1959."

[2] The "Vancouver facility" to be divested is shown by CX 151 A, page 2465 of the record (Volume 1-2, 7939-1) entitled in the lower right hand corner:

"Pacific Building Materials Co.
Portland, Oregon
Vancouver Plant
(Vancouver, Wash.)
March 1, 1959."

sion issues any further Order or Orders which the Commission may deem appropriate. If respondents are unable to divest either or both of said facilities, as an entity, but have received a bona fide offer to purchase the ready-mixed concrete plant at either or both of said locations, they may apply to the Commission for permission to divest said ready-mixed concrete plant or plants without divesting the aggregate facility at the same location.

It is further ordered, That, in said divestiture, respondents shall not sell or transfer, directly or indirectly, any of the aforesaid assets (a) to any corporation, or to anyone who is at the time of divestiture an officer, director, employee or agent of a corporation, engaged in the production and sale of portland cement, or the principal business of which is the distribution of portland cement, (b) to any corporation or person controlled by one of the foregoing corporations or persons, (c) to any person who is an officer, director, employee or agent of, or under the control or direction of, Permanente Cement Company or any of its subsidiaries or affiliates, or who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of Permanente Cement Company, or (d) to Ross Island Sand & Gravel Company or to any officer, director, employee, agent or stockholder of said company.

It is further ordered, That, pending divestiture, respondents shall not make any changes in any of the assets to be divested which shall impair their present capacity for the manufacture, sale and distribution of ready-mixed concrete or aggregates, or their market value.

It is further ordered, That, for a period of three (3) years from the date of such sale and divestiture respondent Glacier shall, in each calendar year, make available and affirmatively offer: (a) to the purchaser of the Vancouver facility, in the event said facility is sold and divested as a separate and distinct unit in good faith and at prices, terms and conditions, then currently offered by respondent, Glacier, to competing purchasers in the Vancouver area, a quantity of processed mineral aggregates, for the use of such purchaser in the manufacture of ready-mixed concrete at said facility, equivalent to the quantity consumed by such facility in the manufacture of ready-mixed concrete in the calendar year 1964; and the foregoing shall apply with like force and effect to the Albina facility (substituting the phrase "the Portland area" for "the Vancouver area") should respondent receive permission from the Commission to divest only the ready-mixed concrete plant at the Albina facility; and (b) to the purchaser of the Albina facility, in good faith and at a reasonable price, a quan-

tity of unprocessed mineral aggregates for the use of such purchaser in the manufacture of ready-mixed concrete at said facility, equivalent to the quantity consumed by such facility (and, if the same purchaser acquires the Vancouver facility, at such facility also) in the manufacture of ready-mixed concrete in the calendar year 1964.

It is further ordered, That respondent Permanente shall not supply in any calendar year to the purchaser or purchasers of the aforesaid facilities, for consumption in the manufacture of ready-mixed concrete, more than thirty-five percent (35%) of the portland cement consumed, in the aggregate, by both of the divested ready-mixed concrete plants: *Provided, however*, That:

(i) The foregoing limitations shall not apply to sales of portland cement to either of the divested facilities following the expiration of three years from the date of divestiture of each such facility; and

(ii) Sales of portland cement to either of the divested facilities as a result of the specification by a customer of said plant, in an oral or written agreement with the operator of said plant, requiring the purchase of respondent Permanente's cement shall not be taken into consideration in computing the amount of cement supplied or consumed in accordance with this paragraph.

It is further ordered, That, for a period of eighteen (18) months from the date of the last divestiture made hereinunder, respondents shall not sell or distribute ready-mixed concrete in the Portland, Oregon-Vancouver, Washington area except from its Curry Street facility: *Provided*, That the above limitation shall not apply to ready-mixed concrete produced by any temporary plant established for the purpose of supplying concrete to a single project which requires from respondent Glacier at least 15,000 cubic yards of concrete. For the purpose of the foregoing proviso a single project shall include, without limitation, projects such as a shopping center, housing development, apartment house, school, factory, bridge or a highway section.

It is further ordered, That, for a period of two (2) years from the date of service of this Order, or until the issuance or announcement by the Federal Trade Commission of a trade regulation rule or report concerning mergers or acquisitions in the cement industry, if such event occurs prior to the expiration of such two-year period, respondents shall cease and desist from acquiring, directly, or indirectly, through subsidiaries or otherwise, any part of the share capital or assets of any corporation engaged in the manufacture or sale of ready-mixed concrete in the States of Oregon and Washington.

It is further ordered, That respondents shall, within sixty (60) days after the date of service of this Order, and every sixty (60) days thereafter until respondents have fully complied with the provisions of this Order as to Count II, submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which respondents intend to comply, are complying or have complied with this Order. All compliance reports shall include, among other things that are from time to time required, a summary of all contacts and negotiations with potential purchasers of the specified facilities, the identity of all such potential purchasers, and copies of all written communications to and from such potential purchasers.

In the Matter of
SUN OIL COMPANY

ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(a) OF THE CLAYTON ACT AND THE FEDERAL TRADE COMMISSION ACT

Docket 6641. Complaint, Sept. 26, 1956—Decision, Mar. 25, 1965

Order setting aside the initial decision and dismissing the complaint which charged a major oil company with unlawful price discrimination in the marketing of gasoline, after a decision by the Supreme Court, 371 U.S. 505, 7 S.&D. 621, and a remand to the Commission by the Court of Appeals, Fifth Circuit, 7 S.&D. 808.

COMPLAINT

The Federal Trade Commission, having reason to believe that Sun Oil Company, a corporation, has violated and is now violating the provisions of Section 2(a) of the Clayton Act (15 U.S.C. Section 13), as amended by the Robinson-Patman Act, approved June 19, 1936, and the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. Section 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges with respect thereto as follows:

COUNT I

Paragraph 1. Respondent Sun Oil Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 1608 Walnut Street, Philadelphia, Pennsylvania. Respondent is now, and for several years last past has been, among other things, engaged in the offering for sale, sale and distribution

of gasoline in the city of Jacksonville, Florida, and adjacent territory.

PAR. 2. Respondent sells its gasoline to a number of retailers located in the Jacksonville area and with whom respondent has entered into contracts, now in force, obligating said respondent to sell and deliver to such retailers all of their respective requirements of respondent's brand of gasoline during the term of such contracts. For the purpose of supplying said customers and of making deliveries pursuant to said contracts, respondent ships or otherwise transports its gasoline in tank cars, tankers, pipe lines and trucks from its different refineries, terminals and distribution points, located in various States of the United States to distributing points within the State of Florida and from there by tank cars or trucks to the various retailers selling its gasoline, and there is now and has been at all times mentioned herein a continuous stream of trade in commerce of said gasoline between respondent's refineries, terminals, and distribution points and said retail dealers purchasing said gasoline in Jacksonville, Florida. All of such purchases by said retail dealers are and have been in the course of such commerce. Said gasoline is transported into Florida and sold by respondent for resale in the Jacksonville area.

PAR. 3. Since on or about December 1955, in the course and conduct of its business as above described, respondent has sold its gasoline to a dealer in the Jacksonville, Florida, market area engaged in selling said gasoline at retail at prices substantially lower than the prices charged by respondent to its other retail purchasers for gasoline of the same grade and quality in the same market area. Said dealer is one Gilbert V. McLean, who operated a gasoline station in Jacksonville, Florida, under contract with respondent, where respondent's gasoline was and is sold at retail to consumers thereof, in competition with other retailers of gasoline purchasing the same from respondent or from other manufacturers. The price at which respondent sold its gasoline to said dealers since on or about December 1955, ranged up to 1 7/10 cents per gallon lower than the prices charged by respondent to other Jacksonville retailers of the same gasoline.

PAR. 4. The effect of the discrimination in price described in the preceding paragraph hereof has been and may be to injure, destroy and prevent competition with each of the other retailers of respondent's gasoline, and others, in the resale of said gasoline at retail in the Jacksonville market area.

PAR. 5. The acts and practices of respondent, as above alleged and described, violate subsection (a) of Section 2 of the Clayton Act, as amended.

COUNT II

PAR. 6. The allegations of Paragraphs One through Four of Count I of this complaint are hereby adopted and incorporated herein by reference and made a part of this Count II the same as if they were repeated herein verbatim.

PAR. 7. In the course and conduct of its business respondent is now, and has been at all times referred to herein, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that it ships or otherwise transports its gasoline in tank cars, tankers, pipe lines, and trucks from its different refineries, terminals and distribution points, located in various States of the United States, to retail dealers located in the Jacksonville, Florida, area and to various other States of the United States.

PAR. 8. Except to the extent that competition has been hindered, frustrated, and lessened as set forth in this complaint, respondent has been and is now in substantial competition with other corporations, individuals and partnerships engaged in the sale and distribution of gasoline in "commerce" as that term is defined in the Federal Trade Commission Act.

PAR. 9. Beginning on or about December 1955, respondent, acting through its Regional Sales Manager, one Maximilian Dietsche, and the aforementioned Gilbert V. McLean, for the purpose of suppressing, preventing, hindering and lessening price competition in commerce among the various States, entered into and have since maintained and carried out a combination, understanding and agreement through which they fixed and maintained the retail price at which gasoline was sold in the gasoline service station leased by the said Gilbert V. McLean from respondent.

PAR. 10. Pursuant to and in furtherance of the aforesaid unlawful combination, understanding and agreement, respondent, acting through the aforesaid Maximilian Dietsche, together with the aforesaid Gilbert V. McLean, did and performed the following acts and things:

1. Agreed to fix and maintain and did fix and maintain the retail price at which gasoline was sold at the gasoline service station operated by the said Gilbert V. McLean under lease from respondent.

2. Agreed to and adhered to certain discounts, terms and conditions upon which the said gasoline would be sold to said Gilbert V. McLean and to the purchasing public.

PAR. 11. This alleged unlawful planned common course of action is singularly unfair, oppressive and to the prejudice of the public and

respondent's competitors and retailers of gasoline in the Jacksonville, Florida, market area, and has a dangerous tendency to unduly restrain, hinder, suppress and eliminate competition between and among respondent's retail dealers, or others, in the sale and distribution of gasoline in commerce within the meaning of the Federal Trade Commission Act, and constitutes an unfair method of competition and an unfair act and practice in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Rufus E. Wilson and *Mr. Americo M. Minotti* for the Commission.

Mr. Leonard J. Emmerglick of Washington, D.C., and *Mr. Henry A. Frye* and *Mr. Richard L. Freeman* of Philadelphia, Pa., for respondent.

Revised Initial Decision After Remand by Robert L. Piper, Hearing Examiner

JUNE 9, 1964

Preliminary Statement

On January 5, 1959, the Commission issued its decision,[1] affirming the undersigned, finding respondent in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, by reason of price discrimination; finding that the Section 2(b) defense under said Act was not available when the discriminatory lower price was given to a customer to enable him to meet price reductions of his competitor; and further finding respondent had engaged in price fixing in violation of Section 5 of the Federal Trade Commission Act. On July 24, 1961, upon appeal the United States Court of Appeals for the Fifth Circuit reversed, finding the Section 2(b) defense applicable and dismissing the price fixing count.[2]

On January 14, 1963, upon appeal the Supreme Court reversed the Court of Appeals, affirming the Commission and the undersigned with respect to the unavailability of the Section 2(b) defense under such circumstances.[3] There was no dispute on appeal as to the requisite elements of a violation of Section 2(a), and no appeal from the dismissal of the price fixing count. The Supreme Court concluded that the defense under Section 2(b) of a lower price "to meet an equally low price of a competitor" is not available unless made to meet the price

[1] 55 F.T.C. 955 (1959).
[2] *Sun Oil Company v. Federal Trade Commission*, 294 F. 2d 465 (5th Cir. 1961).
[3] *Federal Trade Commission v. Sun Oil Company*, 371 U.S. 505 (1963).

of the grantor's own competitor rather than to enable the customer to meet his competition. The Court held:

* * * we conclude that § 2(b) of the Act contemplates that the lower price which may be met by one who would discriminate must be the lower price *of his own competitor;* since there is in this record no evidence of any such price having been set, or offered to anyone, by any competitor of Sun, within the meaning of § 2(b),[10] Sun's claim to the benefit of the good-faith meeting of competition defense must fail. * * * (Footnote omitted; emphasis supplied.)

In this connection the Court assumed, based on the absence of any other evidence in the record, that Super Test Oil Company, the competitor of Sun's customer, was solely a retailer. The Court pointed out that the Court of Appeals had assumed Super Test to be an integrated supplier-retailer of gasoline but that the record did not support this conclusion. The Supreme Court observed that if Super Test were an integrated supplier-retailer (*i.e.*, a competitor of Sun), or had received a price cut from its own supplier, a competitor of Sun, it would be a different case. With respect thereto the Court specifically stated in footnote seven:

[7] Were it otherwise, *i.e.*, if it appeared either that Super Test were an integrated supplier-retailer, or that it had received a price cut from its own supplier—presumably a competitor of Sun—we would be presented with a different case, as to which we herein neither express nor intimate any opinion.

The concurring opinion of Mr. Justice Harlan and Mr. Justice Stewart suggested a remand to the Commission to ascertain whether such were the facts.

On October 9, 1963, the Court of Appeals, upon motion of Sun and request of the Commission, remanded the cause to the Commission with the following directions:

1. That the Federal Trade Commission afford Sun Oil Company an opportunity to adduce additional evidence relating to the status of Super Test Oil Company as an integrated supplier-retailer of gasoline and evidence relating to any price concessions Super Test Oil Company may have received from its supplier during the relevant 1955–1956 period, and afford counsel supporting the complaint an opportunity to adduce evidence in rebuttal;

2. That the Federal Trade Commission consider whether the Section 2(b) defense is available to Sun Oil Company on the evidence adduced and whether an order to cease and desist is warranted; and

3. That the Federal Trade Commission, if an order to cease and desist is deemed warranted, reconsider the question of the desirable scope of such order with respect to the products covered.

On November 14, 1963, the Commission remanded the proceeding to the undersigned "for such further proceedings as are necessary to comply fully with the said judgment of the Court of Appeals" and

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a revised initial decision thereafter. Pursuant to said order, additional hearings were held, concluding on March 25, 1964. Both parties filed additional proposed findings of fact, conclusions and briefs. All such findings of fact and conclusions proposed not hereinafter specifically found or concluded are herewith specifically rejected.

The facts prior to remand have now been found by the Supreme Court, the Court of Appeals, the Commission and the undersigned, and are substantially undisputed. For the purpose of clarity herein, a very brief summary is as follows: Sun granted a price reduction to only one of its independent service station dealers, McLean, who was in competition with other Sun dealers, to enable him to "meet" a price reduction of a "private" brand station, Super Test, across the street.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following additional findings of fact, conclusions and revised order.

FINDINGS OF FACT

I. The Issues

The issues, as delineated by the remand order of the Court of Appeals, are whether Super Test was an integrated supplier-retailer or received any price concession from its supplier, and if either, the availability of the Section 2(b) defense, and if an order is warranted, its scope with respect to the products covered.

II. Integrated Supplier-Retailer

Super Test operated a chain of some 65 retail service stations selling "non-major" or "private" brand gasoline, one of which was across the street from McLean, Sun's dealer, in Jacksonville, Florida. Sun, a major integrated refiner and supplier of gasoline, sold "major" brand gasoline. Unlike Sun and other major suppliers, Super Test itself operated its retail stations. (All of the above facts are from the prior decisions.) An integrated company in the oil industry is one performing the functions of production, refining, transportation and marketing (Tr. 932, 1205). Super Test, instead of being its own supplier, purchased all of its gasoline requirements from others, primarily Orange State Oil Company (RX 19, 31; Tr. 969). Orange State was a wholly owned subsidiary of Arkansas Fuel Oil Corporation, which in turn was owned in the majority by Cities Service Oil Company, a major integrated refiner like Sun (Tr. 867). Orange

State marketed only Cities Service products (Tr. 871). Cities Service branded gasoline was a major brand gasoline (Tr. 874, 945). (For the purposes of simplicity, Orange State will be referred to hereinafter as Cities Service.) The gasoline sold to Super Test by Cities Service was unbranded and had a lower octane rating than Cities Service branded regular gasoline (Tr. 876, 916–17). It could not be resold under the brand name Cities Service (Tr. 915). Super Test sold a small part, about ten percent, of its gasoline at "wholesale" [4] to other retailers (Tr. 1024–25).

Cities Service, a major integrated refiner-supplier like Sun, was a competitor of Sun (Tr. 874). Sun not only concedes but contends that it was in competition with Cities Service (Tr. 873). Cities Service, as a major, operated on the same competitive level as Sun. Cities Service was the supplier and Super Test the customer. It seems clear that as such Super Test was not in competition with Sun. Super Test, Cities Service's customer, was in competition with McLean, Sun's customer.

As previously noted, the Supreme Court held that the 2(b) defense was available to Sun only to meet the lower price "of [its] *own* competitor." The Court further pointed out that there was "no evidence of any such price having been set * * * by any *competitor of Sun*." [Emphasis supplied.] From this clear statement, read in conjunction with its reference to an integrated supplier-retailer in footnote seven, quoted above, it seems apparent that the Court had reference to an integrated supplier-retailer in the sense of a direct competitor of Sun. In any other sense, based upon the Court's conclusion, such status would not be relevant. As the Court further stated: "(In this case, this would mean a competitor of Sun, the refiner-supplier, and not a competitor of McLean, the retailer dealer.)" Clearly, Super Test as a customer of Cities Service, an integrated supplier, was not a competitor of Sun, likewise an integrated supplier.

It seems clear that the Court had reference to a situation where the retailer is its own supplier. If Cities Service were substituted for Super Test, *i.e.*, ran its own retail station in competition with McLean, Sun's customer, then clearly Cities Service would be its own supplier, there would be no wholesale price from it to itself which Sun could meet, and the only way Sun possibly could meet the competition of Cities Service under such circumstances would be by a

[4] While it is somewhat anomalous to refer to Super Test's sales to other retailers as "wholesale," inasmuch as the sales by Cities Service to Super Test were characterized as wholesale, nevertheless to this limited extent Super Test did perform the function of a distributing middleman.

price reduction to McLean. This was the possibility postulated by the Court when it referred to an integrated supplier-retailer. That the Court of Appeals also had reference to an integrated supplier-retailer in the same sense seems clear from its statement:

> Super Test, a vertically-integrated company operating its own filling stations, could fix any retail price it pleased. McLean's price to the public was dependent on Sun's price to him.

However, in fact, as the record on remand reveals, Super Test was a customer of Cities Service and Super Test's price to the public was as much dependent on Cities Service's price to Super Test as McLean's price to the public was on Sun's price to him.

The fact that Super Test also made some sales to other retailers did not make it an integrated supplier-retailer in competition with Sun. Super Test was still a purchaser from Cities Service, Sun's competitor. It is concluded and found that Super Test was not an integrated supplier-retailer, and was not in competition with Sun.

III. Supplier Price Concessions

Super Test purchased its gasoline from Cities Service pursuant to a written contract establishing a variable-price formula based upon the current, published low Gulf Coast price for unbranded gasoline plus certain added variable cost factors, such as freight and handling (RX 19, 28, 31; Tr. 951). While the price per gallon varied a fraction of one cent from time to time, it was always around 12 cents per gallon delivered at the Jacksonville terminal of Cities Service (Tr. 947, 1064, 1113; RX 40–47; RX 49a–z56; RX 54). As of July 1, 1955, the price to Super Test delivered at the terminal was $.11691 (Tr. 1043; RX 40). The cost of delivery by Super Test from the terminal to its station was approximately ¼ of a cent per gallon (Tr. 1063). Super Test also paid the Florida State inspection fee of ⅛ of a cent per gallon (RX 28).

As previously found, the gasoline Super Test bought was unbranded. It was substantially lower octane, 87½, than Sun's gasoline, which was 92½ octane (Tr. 638). Being unbranded and of lower quality, it normally sold at wholesale for several cents less than the tank wagon price of major brand regular grade gasoline (Tr. 605, 945–47, 1197). Super Test did not receive any price "cut" as such from its supplier during the relevant period, its price from Cities Service remaining fixed by the contract between them (RX 40–47, 49a–z56). Sun's tank wagon price excluding taxes to its dealers throughout the relevant period, as well as that of Cities Service and the other majors, was 15.1 cents per gallon (24.1 cents less 9 cents

taxes) for regular branded gasoline (previously found). While Cities Service did not give any price cut to Super Test, it is undisputed that its price to Super Test was lower than Sun's price to McLean, the net difference prior to Sun's price reduction to McLean being approximately 3 cents, *i.e.*, the difference between Super Test's cost of $.12066 ($.11691 + .0025 + .00125) delivered to its station and Sun's delivered price of $.151.

Sun was not privy to the contract between Super Test and Cities Service and hence had no knowledge concerning what price Cities Service actually was charging Super Test (Tr. 1189–90). Sun did know that Cities Service's posted terminal wholesale price for unbranded gasoline was 12.9 cents per gallon (Tr. 1112, 1165; RX 54). Sun knew that Super Test's gasoline was only 87½ octane compared to Sun's 92½ octane (Tr. 638, 1169; RX 1, 2, 10, 11, 61).[5] Sun also knew that unbranded gasoline of such octane normally sold at wholesale for several cents less than the tank wagon price of major-brand regular gasoline (Tr. 605, 1112, 1163, 1189–90); RX 54).

As found above, Cities Service unbranded gasoline was of inferior quality and public acceptance. The Supreme Court found that the normal *retail* price differential in the area between major and non-major brands of gasoline was two cents, stating:

> The two-cent per gallon difference in price between McLean and Super Test represented the "normal" price differential then prevailing in the area between "major" and "non-major" brands of gasoline. This "normal" differential represents the price spread which can obtain between the two types of gasoline without major competitive repercussions * * * .

As previously found in this matter, on December 27, 1955, Super Test dropped its retail price to 24.9 cents a gallon, four cents below McLean's price of 28.9 cents. Prior thereto the difference between them had been the "normal" two cents. McLean advised Sun that he wanted to post a price of 25.9 cents in order to "meet" this competition. Sun then gave McLean a price discount of 1.7 cents. This exact amount was arithmetically required because of Sun's established policy that no dealer should have a mark-up or gross margin of profit less than 3½ cents per gallon, because he could not "exist" on less. Because Sun's tank wagon price was 24.1 cents and McLean intended to post 25.9, a 1.7 cents discount was arithmetically required to enable him to gross 3.5 cents. Without exception Sun's witnesses all stated that that was the reason that the discount Sun gave McLean

[5] While not directly germane to the issues here, it is interesting to note that the octane difference between major brand "regular" and "premium" gasolines of the same brand presently is approximately the same, and the "normal" price differential is 4 cents per gallon.

totalled 1.7 cents (Tr. 185, 363, 371–2, 388, 621–24, 630–31). In accordance with his stated intention (CX 26). McLean did post the price of 25.9 cents.

In considering whether Super Test, not being its own supplier, received any price concessions from its supplier, we are again concerned with such supplier as a competitor of Sun. The remand order of the Court of Appeals refers to price "concessions." In footnote seven (quoted above), the Supreme Court said it would be a different case: " * * * if it appeared * * * that Super Test * * * had received a price *cut* from its own supplier—presumably a competitor of Sun— * * * ." (Emphasis supplied.) As previously noted, the Supreme Court also found that "the lower price which may be met * * * must be the *lower price* of his own competitor," and that there was "no evidence of any *such* price having been * * * offered to anyone by any competitor of Sun." (Emphasis supplied.) While the Supreme Court referred in note seven to a price "cut," it will be noted that in its concluding statement it referred to the competitor's "lower price," the same terminology found in Section 2(b), which provides that the seller's "lower price" must be "made in good faith to meet an equally low price of a competitor." In view of this, it would appear that such a "lower price" would meet the test of the Court and the statute.

Inasmuch as Super Test did receive a "lower price" from Cities Service, it becomes necessary to determine whether Sun's price reduction to McLean was "made in good faith to meet an equally low price of [its] competitor." The Supreme Court has held in construing Section 2(b) that while the discriminatory price does not have to in fact meet the competitive price, "the statute *at least* requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would *in fact meet* the equally low price of a competitor." [6] (Emphasis supplied.) Here Sun's lower price to McLean had no connection whatsoever with Cities Service's price to Super Test. Not only did Sun not know what Cities Service's actual price was, or have any reason to believe that Sun's reduced price would in fact meet it, but on the contrary Sun's price was set to enable McLean to post the price he selected, and was dictated by Sun's policy concerning dealers' minimum gross margins.

The record demonstrates beyond doubt that the lower and discriminatory price to McLean had nothing to do with the price of Cities Service to Super Test. For the same legal reason that a seller

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[6] *Federal Trade Commission* v. *Staley Manufacturing Co.*, 324 U.S. 746 (1945).

must have good reason to believe his price would in fact meet the equally low price of his competitor, an *ex post facto* showing that a discriminatory price coincidentally met that of a competitor does not constitute a good faith meeting of such lower price.[7] In fact, the Supreme Court has held that hearsay evidence of a competitor's offers, believed by the respondents therein, was not sufficient "to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor."[8] Thus Sun's price to McLean was not made in good faith to meet the equally low price of its competitor, Cities Service, to Super Test.

The Supreme Court has also held that the meeting of competition defense under Section 2(b) does not permit the undercutting of a competitor's price. The Court has specifically stated:

> It [the defense in subsection (b)] also excludes reductions which undercut the "lower price" of a competitor * * * .[9]

Even assuming *arguendo* that Sun's lower price to McLean was made in an effort to meet Cities Service's price to Super Test, Sun knew that the gasoline sold Super Test by Cities Service was unbranded and hence had substantially less public acceptance, that it was five octane ratings lower than Sun's gasoline and hence of substantially inferior quality, and that it normally sold at wholesale for several cents less than the tank wagon price for major brand regular gasoline. Sun was also aware of the usual retail price differential of two cents. As above noted, the Supreme Court found this to be the prevailing normal retail differential, which represented "the price spread which can obtain without major competitive repercussions." In other words, increasing or decreasing the normal retail price spread would cause major competitive repercussions.

Manifestly such a retail price differential reflects and indeed necessitates a concomitant price differential at the wholesale level. In fact, Cities Service, a major brand refiner-supplier and a competitor of Sun, in effect acknowledged the normal and competitively necessary price differential between unbranded and major brand gasoline at the wholesale level by charging substantially less for its unbranded gasoline while charging the same tank wagon price for its branded gasoline as Sun and the other majors. Sun had no reason to believe that Cities Service had reduced its wholesale price of unbranded gasoline

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[7] *Forster Mfg. Co., Inc.*, 62 F.T.C. 852, D.N. 7207 (1963); *Exquisite Form Brassiere, Inc.*, 64 F.T.C. 271, D.N. 6966 (1964).

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

[9] *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951).

to Super Test, *i.e.*, increased the normal differential in price between unbranded and branded regular gasoline, and in fact Cities Service had not.

If Sun had set the same tank wagon price to McLean for its gasoline as Cities Service's price to Super Test (which Sun argues it had a right to do under Section 2(b)), clearly such action could and undoubtedly would have eliminated the "normal" retail price differential and resulted in "major competitive repercussions." In short, unbranded inferior gasoline could not sell at the same price. Thus a meeting of such price, or a destruction of the competitively necessary differential, would have resulted in undercutting and destroying competition rather than "meeting" competition. The courts and the Commission have held that meeting the price of an inferior product or one of substantially less public acceptance amounts to undercutting rather than meeting a competitor's price.[10] By reducing the normal wholesale differential between branded and unbranded gasoline, Sun necessarily enabled a corresponding reduction at the retail level, which would cause a major competitive repercussion, the converse of a bona fide meeting of competition. Patently a "meeting" of competition in good faith would not cause such a competitive repercussion. By doing so, Sun was "undercutting" the competitive price rather than "meeting" it.

It is concluded and found that Sun's discriminatory lower price to McLean was not made in good faith to meet an equally low price of a competitor. It is further concluded and found that, since Super Test was not an integrated supplier-retailer in competition with Sun, and Sun's lower price was not made in good faith to meet an equally low price of Super Test's supplier, the defense under Section 2(b) is not available to Sun.

At the conclusion of the remand hearings, counsel for respondent moved to dismiss the complaint for lack of public interest upon the bases of staleness and an isolated occurrence, in reliance upon two recent decisions of the Commission.[11] The motion was taken under advisement. The issues in this remand were delineated by the Supreme Court and defined by the Court of Appeals. As noted in the concurring opinion of Mr. Justice Harlan:

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[10] *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234, 237 (2d Cir. 1929); *F.T.C.* v. *Standard Brands*, 189 F. 2d 510, 514 (2d Cir. 1951); *Minneapolis-Honeywell Co.*, 44 F.T.C. 351, 396 (1948); *Anheuser-Busch, Inc.*, 54 F.T.C. 277 (1957); *American Oil Co.*, 60 F.T.C. 1786, D.N. 8183 (1962); *Callaway Mills Co.*, 64 F.T.C. 732, D.N. 7634 (1964); *Purolator Products, Inc.*, 65 F.T.C. 8, D.N. 7850 (1964).

[11] *Bearings, Inc.*, 64 F.T.C. 373, D.N. 7134 (1964); *Sperry-Rand, Inc.*, 64 F.T.C. 842, D.N. 7559 (1964).

> * * * we are dealing with an extremely difficult question arising under a singularly opaque and elusive statue * * *. I see no reason to foreclose development of the relevant facts in this proceeding. This case is one of far-reaching importance in the administration of the Robinson-Patman Act * * *. The Commission * * * has as much interest as the respondent in definitive answers to these perplexing problems.

To now dismiss the complaint upon such bases after so much time and effort would appear the height of futility. The majority opinion of the Supreme Court held: "If the [2(b)] defense is unavailable, there is no issue as to violation of Section 2(a) of the Clayton Act; respondent Sun does not dispute that the requisite elements of a price discrimination otherwise illegal under Section 2(a) have been shown." Accordingly, it is concluded and found that an order to cease and desist is warranted.

IV. The Order

The remand directed the reconsideration of the desirable scope, with respect to the products covered, of any order deemed warranted. The prior cease and desist order covered all of Sun's products. Since then, in several similar cases, the Commission has limited such orders to "gasoline."[12] There is no evidence in the record that Sun has discriminated in price, or is likely to, with respect to any of its other products. Accordingly, the order will be so modified.

ORDER

It is ordered, That respondent Sun Oil Company, a corporation, its officers, directors, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of gasoline in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

> Discriminating in price by selling gasoline of like grade and quality to any purchaser at net prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of respondent's gasoline.

Dissenting Statement

By MacIntyre, *Commissioner:*

This is a case of "far-reaching importance in the administration of the Robinson-Patman Act."[1] The issues raised herein present ex-

[12] *American Oil Co.*, 60 F.T.C. 1786, D.N. 8183 (1962); *Sun Oil Co.*, 63 F.T.C. 1371, D.N. 6934 (1963); *Atlantic Refining Co.*, 63 F.T.C. 1407, D.N. 7471 (1963).

[1] See separate memorandum of Mr. Justice Harlan in which Mr. Justice Stewart joined *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505, 529 (1963).

tremely significant questions on the proper limits of the meeting of competition defense in gasoline marketing. The case has been before the Supreme Court once, it has been before the Fifth Circuit twice, and, of course, during the pendency of the proceeding before this Agency there have been two initial decisions and each has been appealed. Nevertheless, those Commissioners in the majority, with the exception of Commissioner Reilly, have, in this instance, again dismissed a gasoline pricing case with no apparent consideration of the substantive issues involved. The Majority cites, in support of its action, the dismissal without adjudication in *Pure Oil Company*, Docket No. 6640 [66 F.T.C. 1336], *The Texas Company*, Docket No. 6898 [66 F.T.C. 1336], *Standard Oil Company (Indiana)*, Docket No. 7567 [66 F.T.C. 1336], and *Shell Oil Company*, Docket No. 8537 (decided December 28, 1964) [66 F.T.C. 1336]. I have already made plain my opposition to that procedure. There is no need to restate it here,[2] but I do intend to state my views on the substantive issues raised on respondent's appeal from the initial decision on remand.

The Majority also relies on *American Oil Company* v. *Federal Trade Commission*, 325 F. 2d 101 (7th Cir. 1964), *cert. denied*, 377 U.S. 954 (1964). It is not clear for precisely what proposition the case is cited. I can only assume that the citation of this decision constitutes a tacit holding that the injury criteria of Section 2(a) have not been met in this proceeding. If that is, in fact, the position of two members of the Commission, then I can only say that this issue is not properly before us at this time.[3] It is interesting that Commissioner Reilly, who concurs in the order of dismissal, and I seem to be in agreement on that point.[4]

Moreover, although the question of injury was not directly before the Supreme Court, I can only infer from its opinion an implicit holding that under the circumstances of the record the injury criteria requisite to Section 2(a) have been met. In this connection, the Court held that:

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[2] See my dissenting statement to the orders of dismissal in *Pure Oil Company*, Docket No. 6640 [66 F.T.C. 1336, 1485], *The Texas Company*, Docket No. 6898 [66 F.T.C. 1336, 1485], *Standard Oil Company (Indiana)*, Docket No. 7567 [66 F.T.C. 1336, 1485], and *Shell Oil Company*, Docket No. 8537 (December 28, 1964) [66 F.T.C. 1336, 1485].

[3] The Supreme Court, in its consideration of this matter in *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505, 511 (1963), expressly stated that the issues at this stage of the proceeding were confined to the scope of the meeting of competition defense under the circumstances documented by the record.

[4] In fact, Commissioner Reilly informs us, "* * * Of course, we are not applying that case to this, particularly to the extent that it was concerned with the question of competitive effect. On the contrary, competitive effect is not being questioned here. * * *" (Separate statement of Commissioner Reilly, p. 3 [p. 363 herein].)

* * * to allow Sun to pursue its discriminatory pricing policy will, as has been indicated, harm other Sun dealers who compete with McLean [the favored customer]; * * * .[5]

The Court recognized that, although not inevitable, prohibiting assistance by way of price discrimination might injure McLean, it held nevertheless that the statute precludes a balancing of the comparative degree of individual injury between McLean and the nonfavored customers in each instance, since that is "foreclosed by the determination in the statute itself in favor of equality of treatment." [6] In a broader context, the Court held that denying Sun the right to reduce its prices as it did would not impair price flexibility and promote price rigidity. On the contrary, the Court stated:

* * * While allowance of the discriminatory price cut here may produce localized and temporary flexibility, it inevitably encourages maintenance of the long-range and generalized price rigidity which the discrimination in fact protests * * * .[7]

Moreover, the Court held:

* * * the large supplier's ability to "spot price" will discourage the enterprising and resourceful retailer from seeking to initiate price reductions on his own. Such reasoning may be particularly applicable in the oligopolistic environment of the oil industry.[8]

The Court further noted that "* * * Super Test's challenge as an 'independent' may be the only meaningful source of price competition offered the 'major' oil companies of which Sun is one." [9] There is no need to belabor the point.

At any rate, in the present posture of the case, it is clear that the issues are confined to the applicability of the meeting of competition defense under the facts of this record. According to my understanding, the issues on remand are the following:

1. We are to determine whether Super Test was an integrated supplier-retailer of gasoline and whether it received any price concessions from its suppliers in the relevant period in 1955 and 1956.

2. Whether the 2(b) defense is available to Sun on the evidence adduced on remand and whether an order to cease and desist is warranted.

3. The question of the scope of the order, if an order to cease and desist is warranted.

Before turning to these issues, a brief review of the facts and the history of this proceeding may be helpful in putting my views in con-

[5] *Federal Trade Commission* v. *Sun Oil Co., supra* n. 3, at 519.
[6] *Ibid.*
[7] *Id.*, at 523.
[8] *Ibid.*
[9] *Ibid.*

text. As the Supreme Court noted, this case grew out of a gasoline price war in Jacksonville, Florida, involving a discriminatory price reduction granted in the period December 1955-February 1956 by Sun to McLean, a lessee operator of a Sunoco service station in the area, to enable that dealer to meet the price of a competing private brand retailer (Super Test).

The Commission, on January 5, 1959, issued its order and decision, finding respondent had violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, by virtue of the price differential and holding further that the Section 2(b) defense was unavailable when the discriminatory lower price was given by the seller to its customer to enable the latter to meet his competitor's price. On July 24, 1961, the United States Court of Appeals for the Fifth Circuit reversed, ruling the Section 2(b) defense applicable and dismissing the price fixing charge.

On January 14, 1963, the Supreme Court reversed the Court of Appeals, affirming the Commission's holding on the Section 2(b) defense. The court held that the record did not show, as the Fifth Circuit had assumed, that Super Test was an "integrated supplier-retailer of gasoline," finding that on the basis of the record as then constituted, the availability of the defense had to be determined on the assumption that Super Test was engaged solely in retailing operations. The Court's opinion, however, did contain the caveat that if Super Test were an integrated supplier-retailer or if it had received a price cut from its own supplier, presumably a competitor of Sun, that would be a different case.

In light of the Supreme Court's observation, subsequently, on October 9, 1963, the case was in fact remanded by order of the Court of Appeals upon the request of the Commission and Sun. The scope of the remand was narrow and, as noted above, was essentially limited to the meeting of competition defense and the scope of the order should one be warranted. All the other issues raised by the complaint have already been settled.

Turning to the initial decision, which is the subject of this appeal, I am gratified to see that Commissioner Reilly is "in complete agreement with the hearing examiner's findings of fact on remand that Sun failed to show either of these preconditions [to the 2(b) defense]," namely, that Super Test is an integrated wholesaler-retailer or that it has received price concessions from its supplier.[10] Since the Majority has decided to set aside the initial decision of the hearing examiner on

[10] Separate statement of Commissioner Reilly, p. 5 [p. 364 herein].

remand, a brief resume of his essential findings on the disputed issues is in order.

The examiner found that Super Test, which operates a chain of some sixty-five retail service stations selling private brand gasoline was not an integrated supplier-retailer. The examiner found that an integrated company in the oil industry is one performing the functions of production, refining, transportation, and marketing. He further found that Super Test purchased all its gasoline requirements from others and the gasoline sold to Super Test by its supplier, Cities Service, a major oil company, was unbranded and had lower octane ratings than the latter's branded regular gasoline.

The examiner found that Super Test sold only a small part of its over-all gasoline volume (approximately 10 percent) at "wholesale" to other retailers. Going to the heart of the matter, the examiner held that Cities Service, as a major oil company, operated on the same competitive level as Sun and that Super Test was the customer of the former. Under the circumstances, the examiner found that Super Test was not in competition with Sun but that Super Test, Cities Service's customer, was in competition with McLean, Sun's customer. The examiner further found that Super Test's price to the public was as much dependent on Cities Service's price to it as McLean's price was on Sun's price to him. The examiner concluded and found that the fact that Super Test made some sales to other retailers did not make it an integrated supplier-retailer in competition with Sun.

With respect to the question of whether Super Test received a price break, the examiner made the following crucial finding, namely, that "Super Test purchased its gasoline from Cities Service pursuant to a written contract establishing a variable price formula based upon the current, published low Gulf Coast price for unbranded gasoline plus certain added variable cost factors such as freight and handling." He found that while the price per gallon varied by fractions of a cent, it was always in the neighborhood of twelve cents per gallon delivered at the Jacksonville terminal of Cities Service. As of July 1, 1955, according to the examiner, the price to Super Test at the Jacksonville terminal was .11691; the cost of delivery by Super Test from the terminal to its station was approximately a quarter of a cent per gallon. In addition, he found that Super Test also paid the Florida State inspection fee of one-eighth of a cent per gallon. The tank wagon price of the majors, including Sun, according to the examiner, was 15.1 cents per gallon for regular branded gasoline in the relevant period. He also found that Super Test's unbranded gasoline of lower quality

normally sold at wholesale for several cents less than the tank wagon price of major brand regular gasoline.

He further found that Super Test did not receive a price "cut" as such from its supplier in the relevant period but that the price to Super Test remained fixed by the contract with its supplier, Cities Service. The examiner held that, although Cities Service did not give a price cut to Super Test, its price to Super Test was lower than Sun's price to McLean, the net difference per gallon prior to Sun's price reduction to McLean being approximately three cents.[11]

The examiner made the finding that Sun was not conversant with the contract between Super Test and Cities Service and, hence, had no knowledge of the actual price Cities Service was charging Super Test. The examiner noted that Sun did know that Cities Service's posted terminal wholesale price for unbranded gasoline was 12.9 cents per gallon and that Sun knew that Super Test gasoline was of a lower octane than its own gasoline. He found further that Sun knew that unbranded gasoline of the kind sold by Super Test normally sold at wholesale for several cents less than the tank wagon price of major brand regular gasoline.

The examiner concluded it became necessary to determine whether Sun's price reduction to McLean was made in good faith to meet an equally low price of its competitor (Cities Service). The examiner found that the element of good faith was lacking, since Sun's lower and discriminatory price to McLean had no connection with Cities Service's price to Super Test. In this connection, the examiner found that Sun did not know what Cities Service's actual price to Super Test was or have any reason to believe that Sun's reduced price would, in fact, meet it, but that, on the contrary, Sun's price was set to enable McLean to post the price he selected and was thus dictated by Sun's policy concerning dealers' minimum gross margins.[12]

Further, the examiner made the finding that Sun's lower price to McLean, taking into consideration the normal price spread between Sun's 92½ octane gasoline and Super Test's unbranded 87½ octane gasoline, was undercutting the price of Cities Service to Super Test. This, the examiner found, enabled a corresponding reduction in price

[11] Taking into consideration the costs to Super Test of delivery from the terminal and the payment of the State inspection fee.

[12] The examiner found:

"* * * Because Sun's tank wagon price was 24.1 cents and McLean intended to post 25.9, a 1.7 cent discount was arithmetically required to enable him to gross 3.5 cents. Without exception Sun's witnesses all stated that that was the reason that the discount Sun gave McLean totalled 1.7 cents (Tr. 185, 363, 371–2, 388, 621–24, 630–31). In accordance with his stated intention (CX 26), McLean did post the price of 25.9 cents." (Initial decision, p. 8 [p. 349 herein].)

at the retail level which reduced the competitively necessary differential between branded and unbranded gasoline which would cause a "major competitive repercussion." He, therefore, concluded that for this reason also the prices granted McLean did not meet the good faith test required by the Section 2(b) proviso.

On the basis of my review of the record, it is my opinion that the factual findings in the hearing examiner's initial decision, with perhaps very minor changes, should have been adopted by the Commission. It remains only for me to outline my position on the issues raised by the appeal on the basis of my evaluation of the record.

I agree with the examiner that Super Test, which has no production facilities, is not integrated to the point where as a practical matter it competes with Sun. The record shows that essentially Super Test is an independent chain retailer making occasional sales of gasoline to other retailers in the order of approximately 10 percent.[13] Under the circumstances, to hold that Super Test is an integrated supplier-retailer would be wholly unrealistic. Nor can I find that Super Test's status is changed by the fact that it acquired certain minimal storage and transportation facilities (that is, a tugboat, two barges, two storage tanks and three tank trucks). These facilities, while they may increase the efficiency of Super Test's essentially retailing operations, do not, according to my reading of the record, change its fundamental character in that respect.

Super Test's financial position is a most persuasive indication that this distributor of unbranded gasoline, no matter how it is labeled, is not in competition on the wholesale level with major oil companies such as Sun. Super Test simply lacks the capital resources to do so. Mike Hughey, Super Test's president, testified that at one point "I went 37-some thousand dollars into the hole one month and it scared me to death, because if it would have stayed at that, they [Cities Service] would have owned the company at the end of the year because I couldn't pay it off."[14] This testimony is most persuasive. There could be no more graphic depiction of Super Test's niche in hierarchy of the oil industry or one which is more inconsistent with the hypothesis that Super Test was an integrated concern competitive with the majors.

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[13] Super Test's president displayed some uncertainty about his estimates on this subject, according to the record, but the hearing examiner who heard him credited his testimony on this point. I see no reason for going behind that finding. Clearly, the transfers of gasoline to Super Test's Georgia affiliate, also wholly owned by Super Test's principal, must be, in spite of respondent's contentions to the contrary, considered part of this independent's over-all retail operation.

[14] Tr. 1016.

Finally, the evidence on remand is clear that Super Test, which purchased its gasoline from Orange State, a subsidiary of Cities Service, was not the beneficiary of a price break on the part of the seller. On the contrary, the record shows, as the examiner found, that Super Test purchased unbranded gasoline at a price fixed by a contract establishing a variable price formula based upon the current published low Gulf Coast price for unbranded gasoline with certain added factors such as freight and handling. The record indicates that Super Test clearly was not receiving a special or "lower" price insofar as distributors of unbranded gasoline similarly situated were concerned. Under these circumstances, Super Test was clearly not receiving a special price or discriminatory price for its gasoline, which, as has been noted, was five octanes lower than Sun's product. The examiner's finding that the gasoline purchased by Super Test is unbranded and of lower quality and inevitably sold for several cents less at the wholesale level than the tank wagon price for major brand gasoline is not disputed. Although McLean paid Sun approximately three cents more than Super Test was charged by Cities Service, because of the inherent differences in the two fuels their prices cannot be compared, purely arithmetical considerations apart, for the purpose of determining whether one of them is a "lower price" contemplated by Section 2(b).

Furthermore, while the Supreme Court opinion at first glance seems to use the terms "lower price" and "price cut" interchangeably, it would be unrealistic to hold that a seller may discriminate in price so his customer may lower prices to compete with another retailer who apparently is paying his supplier a nondiscriminatory price and, for all practical purposes, the usual price for those purchasers similarly situated for products of an inferior grade and quality. Here there was no enabling price cut by Cities Service to enable Super Test to lower its prices. It would seem axiomatic in situations of the kind with which we are confronted here that unless the other supplier *cuts* prices to enable his customer to charge lower prices, the kind of competition contemplated by the Section 2(b) defense is simply nonexistent.

The final issue, then, is whether the complaint should be dismissed on administrative grounds despite the violation of law documented by the record. In my view, on this point we should defer to the Commission's decision in 1959 [55 F.T.C. 955], issuing an order to cease and desist on the basis of the violation then documented in the record, which has been affirmed by the Supreme Court. Certainly, none of the evidence brought out on remand, in which Sun failed to establish the meeting of competition defense, justifies the reversal of those Commissioners then sitting, who in 1959 decided that the public interest re-

quired the issuance of an order to cease and desist. While I support the Commission's broad inquiry into the marketing problems of gasoline, the scope of that inquiry has yet to be fully defined and there is no assurance that the Commission will in fact be in command of data giving us a clearer insight into the problems of the industry than that information which is now embodied in the records of the litigated cases.

On the last question presented on this remand, I agree with the examiner that the scope of the order should be limited to the sale of gasoline, since the record does not indicate a likelihood of illegal pricing activity on the part of the respondent with respect to other products.

Finally, the Fifth Circuit has already given considerable time and attention to this proceeding. It would have been appropriate, therefore, it seems to me, to have advised the Court of our findings on the issues giving rise to the remand.

SEPARATE STATEMENT

BY REILLY, *Commissioner:*

I join with the majority of the Commission in setting aside the initial decision and dismissing the complaint; however, because of the importance of this case, I find it necessary to make my position as clear as possible.

This matter has been before the Supreme Court and remanded to us in circumstances suggesting that the reviewing courts would not question the propriety of an order based on appropriate findings. This being so, the question why the Commission should dismiss this complaint on administrative grounds requires a carefully considered answer.

Let me state at the outset, that to accuse the Commission of avoiding a difficult legal and policy problem here by seizing upon a procedural or administrative escape hatch is captious and overly simplistic.

On the contrary, to dispose of this case on any but an administrative basis when the Commission now has reason to believe that it is symptomatic of problems characterizing the entire gasoline distribution system would be an abdication of the Commission's duty "* * * to develop that enforcement policy best calculated to achieve the ends contemplated by Congress * * *" (*Moog Industries* v. *F.T.C.*, 355 U.S. 411, 413). Uncritical and mechanical enforcement of the Robinson-Patman Act in an individual case is not always the most desirable

course in achieving these ends, particularly when the underlying economic problem is industry-wide.

This is especially true of the gasoline industry where product distribution has distinctive aspects setting it apart from the systems of distribution prevailing in other industries. It goes without saying that the Robinson-Patman Act, designed though it is for plenary application, lends itself more readily to certain historic forms of distribution than to others.

In product distribution, generally the competitive conflict emerges at various levels of distribution, distributor versus distributor, jobber versus jobber, retailer versus retailer. In the marketing of gasoline however, competition is joined at the retail level and its impact as well as its fruits are transmitted back up the distribution ladder. Seldom does distributor compete with distributor for retailers or manufacturers for distributors. There is no easy and casual switching back and forth. Investment and brand commitment insure that competing brands move through their own channels of distribution in isolation from one another until they reach the retailer where they compete for the consumer dollar. This tends to inject the manufacturer and distributor into the retail fight giving them a stake both in the retail price and in the retailer's prosperity. This unusual character makes it more difficult to apply the Robinson-Patman Act to this industry.

I want to repeat that this Commission is not unaware that the Robinson-Patman Act was designed for general application without regard to the eccentricities of individual industries; but I do feel that the Act lends itself to more facile application in some areas than in others and that the Commission can most effectively protect the public interest in certain instances by resorting to remedial instruments available to it more precisely applicable to the peculiarities of the industry.

Moreover, just as the Commission's responsibilities are best discharged by a rational selection of an appropriate remedy so also it is best discharged when the Commission acts in particular instances not *in vacuo* but after the most careful deliberation as to the best course to pursue.

Sometimes the necessity for alternative approaches emerges prior to issuance of complaint. At others, the Commission only latterly has been made aware that the adjudicative approach is not necessarily the best one.

The competitive problems confronting the Commission in this case, that is, the anomalies arising out of the peculiar system of distribu-

tion in the gasoline industry, have found expression in an industry-wide clamor for a broad administrative approach. These problems have taken on a degree of urgency which may not have been apparent when the complaint was originally issued in this case. And the reaction of the industry finds its counterpart in reactions of the Commission and the courts.

On December 28, 1964, the Commission dismissed the complaints in four matters involving large oil companies[1] on the ground that orders in those cases could not provide complete or effective solution to the competitive problems of the gasoline industry.[2]

In *The American Oil Company* v. *F.T.C.*, 325 F. 2d 101, *cert. denied*, 6/1/64, the Court of Appeals for the 7th Circuit dwelt at some length upon the competitive problems in this industry. Of course, we are not applying that case to this, particularly to the extent that it was concerned with the question of competitive effect. On the contrary, competitive effect is not being questioned here. Here, the Court of Appeals for the 5th Circuit and the Supreme Court in addressing themselves to propriety of the 2(b) defense implicitly accepted as sufficient the finding of the Commission that a *prima facie* case had been made out with the requisite showing of competitive effect. Nonetheless, the problem presented in *American* is symptomatic of the competitive aberrations arising out of the peculiar distribution system in the oil industry.

As pointed out in our final order in the four oil cases,[1] the Commission has undertaken a broad inquiry into the problems of competition in the marketing of gasoline. This inquiry has been undertaken not only in response to the Commission's conviction that this is the best approach to resolution of the problems plaguing this industry but also in response to the insistent requests of many and various groups in the industry itself as well as Members of Congress and of the consuming public. I, of course, share the Commission's concern with this problem and feel that an industry-wide inquiry is the best method for attempting to resolve these problems.

I think it especially important to emphasize that the Commission's decision in this case and my views expressed herein should not in any way be taken as a determination to avoid the adjudication of specific cases. This after all is the Commission's ultimate deterrent and therefore absolutely necessary in discharging its statutory obligations. Furthermore, there are some areas wherein the Commission's choice of

[1] *Pure Oil Company*, D. 6640 [66 F.T.C. 1336], *The Texas Company*, D. 6898 [66 F.T.C. 1336], *Standard Oil Company (Indiana)*, D. 7567 [66 F.T.C. 1336], *Shell Oil Company*, D. 8537 [66 F.T.C. 1336].

[2] Order of dismissal December 28, 1964.

remedies as between adjudication and administration is far less flexible, for example, in those areas of *per se* antitrust violations proscribed under the Sherman Act and the Federal Trade Commission Act.

In the area of price discrimination, however, I feel that flexibility is necessary and can be appropriately employed.

Having decided that the complaint should be dismissed for the reasons cited above, nevertheless, the Commission, it seems to me, is compelled by virtue of the Supreme Court's opinion and the remand order of the Court of Appeals to consider the substantive issues confronting it in this case. To do otherwise would, as Mr. Justice Harlan stated, "* * * leave unanswered as many questions as we have resolved." [3]

This case raises immensely important questions under the Robinson-Patman Act and the Commission's duty in administering that Act is not entirely discharged by a determination to seek an administrative solution leaving the business community and the public in the dark on the legal and factual issues involved.

Prescinding from the central rule of law in the Supreme Court's opinion that Sun cannot assist its dealer in meeting the dealer's competition, both the Supreme Court in a footnote to its opinion and the Court of Appeals in its remand order raised the question whether the 2(b) defense may not be available to Sun upon a showing that Super Test is an integrated wholesaler-retailer or, if exclusively a retailer, one who receives a price concession from its supplier.

Let me state at the outset that I am in complete agreement with the hearing examiner's findings of fact on remand that Sun has failed to show either of these preconditions. I do not believe however that the Commission should stop there and leave unanswered the central question whether, if the preconditions are met, a 2(b) defense is available. Since the rigorous effect upon competition resulting from the application of this question to the realities of gasoline distribution in part motivated my joining in the administrative disposition of this matter, I feel it necessary to say a word about it.

Sun can rebut a showing of price discrimination, according to Section 2(b), by "* * * showing that [its] lower price * * * was made in good faith to meet an equally low price of a competitor." Thus, *good faith meeting* of a *competitor's price* is the operative language for present purposes and it remains only to apply it to the preconditions of integration and price concession.

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[3] *F.T.C.* v. *Sun Oil Company,* 371 U.S. 505, 530.

If Super Test were integrated with its wholesaler-supplier, Sun would be confronted with an indivisible wholesaler-retailer competitor whose price it could meet through price concessions to its dealers. Since the only price existing in these circumstances would be the wholesaler-retailer's pump price, Sun need only show that price and the fact of integration to justify a price concession to its dealer which *at the dealer's election* would enable the latter to post a competitive price. Sun, in granting the concession to its dealer, would be *meeting* the price of its competitor, the wholesaler-retailer, at the only point of competitive encounter, the pump.

Sun could not of course directly set the actual pump price posted by *its* dealer for fear of being charged with price fixing, and, in granting the concessions, Sun would be relying on its dealer's desire for survival which would prompt the dealer to post a price competitive with his and Sun's competitor's posted pump price.

The amount of Sun's concession to its dealer would be determined by the difference between Sun's dealer's price and the lowered price of the wholesaler-retailer. The price break given to the dealer could not in any way reflect a narrowing of any historic differential occasioned by brand or octane differences.

A more difficult problem is presented in the question whether and to what extent Sun may meet a price break granted to an independent Super Test by its supplier by giving equivalent price concessions to its, Sun's, dealer.

Assuming no integration of Super Test and its supplier, Super Test's price is strictly a retailer's price and Sun cannot, as the Supreme Court has said, assist its dealer in meeting a lowered price posted by the dealer's competitor; in this case Super Test.

To the extent however that Super Test's lowered pump price is made possible by a special price concession from its supplier, Sun can match that price concession by one of equivalent size to its dealer. In such a case Sun's price concession to its dealer is a competitive response at the wholesale level and it is at that level that Sun's competition is located.

Because such a response is so readily susceptible of the interpretation that it is a subsidy to assist its own dealer in meeting a retail price, Sun has an immense burden in these circumstances in establishing the good faith required by the statute. If the only fact available to Sun is a lower pump price posted by Super Test, Sun cannot in good faith grant a concession to its dealer since it does not know whether the lower competitive retail price reflects greater efficiency or lowered profit margin on the part of the retailer or historic octane

and brand differentials. Any one of these considerations would arise out of retail pricing and of course it is only wholesale pricing that Sun can meet.

Sun's difficulty is further compounded by the possibility that the lower posted pump price reflects some combination of the above factors plus a wholesale price concession. In such a case Sun, since it can only meet and not beat a competitor's, that is, wholesaler's, price, would have the obligation of determining what part of the lower posted price was accounted for by a wholesale price concession.

Moreover, in meeting a wholesaler-competitor's price concession to its dealer, Sun cannot attach strings to the price break given its own dealer. It can do no more than grant the concession, trusting that its dealer will meet his competitor by lowering his own pump price. Sun cannot engage in vertical price fixing by conditioning the price concession upon an agreement by its dealer to establish a specific price level.

Sun's burden in these circumstances is considerably heavier than in the ordinary 2(a) case, largely because the unique character of gasoline marketing makes for a somewhat anomalous application of the 2(b) defense.

In most industries price competition at the wholesale level is governed by a desire to retain one's own customers. Other things being equal, retailers will buy from the wholesaler with the lowest price. In gasoline marketing however the likelihood of such an event is remote owing to investment and brand commitment ties that tend to bind retailers to their suppliers. In this industry the wholesaler meets a lower competitive price in order to avoid loss of sales occasioned by decreased demand at the retail level owing to its dealers' higher priced product. Loss of retail sales will of course induce loss of wholesale sales. The ultimate purpose in both conventional as well as gasoline marketing is of course the same, viz., preservation of sales volume either through keeping one's customers or keeping them competitive. However, achieving this result is, as I have stated, much more complicated in the case of gasoline for here the wholesaler must tread a narrow path in order to avoid appearing to assist a retail dealer in meeting his competitor's price.

In fact, the burden upon the wholesaler in such a case is so great as to warrant consideration of this entire matter by the Commission in its projected hearings relating to the marketing of gasoline.

It is for this reason that I concur in the administrative dismissal of this complaint.

FINAL ORDER

The Court of Appeals for the Fifth Circuit, on October 9, 1963, with the consent of the Commission, remanded this proceeding with directions that the Commission reopen the proceeding and determine, *inter alia*, "whether an order to cease and desist is warranted." The Commission has determined that entry of a cease and desist order at this time is not warranted. *Cf. Pure Oil Co.*, F.T.C. Docket 6640 [66 F.T.C. 1336], *The Texas Co.*, F.T.C. Docket 6898 [66 F.T.C. 1336], *Standard Oil Co. (Indiana)*, F.T.C. Docket 7567 [66 F.T.C. 1336], *Shell Oil Co.*, F.T.C. Docket 8537 (decided December 28, 1964) [66 F.T.C. 1336]; *American Oil Co.* v. *F.T.C.*, 325 F. 2d 101 (7th Cir. 1964).

It is ordered, That the initial decision of the hearing examiner filed June 9, 1964, be, and it hereby is, set aside and that the complaint be, and it hereby is, dismissed.

Commissioner Dixon not participating. Commissioner Reilly concurs and has filed a separate statement of his views. Commissioner MacIntyre dissented for the reasons set forth in his dissenting opinion.

IN THE MATTER OF

MARGO'S, INC., TRADING AS MARGO'S-LA MODE, ETC.

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

Docket C-890. Complaint, Mar. 25, 1965—Decision, Mar. 25, 1965

Consent order requiring a Dallas, Texas, retailer of fur and textile fiber products, to cease misbranding, falsely advertising, and deceptively invoicing its fur products, and falsely advertising its textile fiber products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Fur Products Labeling Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Margo's, Inc., a corporation, trading as Margo's-La Mode, and Margo's-Downtown, and Margo's-Preston, Inc., corporations, and Joseph Glickman and Hyman Glickman, individually and as officers of said corporations, hereinafter referred to as respondents, have violated the pro-

visions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act and the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Margo's, Inc., trading as Margo's-La Mode, and Margo's-Downtown, and Margo's-Preston, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Texas. Their office and principal place of business is located at 3607 Oak Lawn Avenue, Dallas, Texas.

Individual respondents Joseph Glickman and Hyman Glickman are officers of said corporations and formulate, direct and control the acts, practices and policies of said corporations, including those hereinafter set forth. Their office and principal place of business is the same as that of said corporations.

Respondents are retailers of fur products and textile fiber products and operate fifteen branch stores.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act of August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the sale, advertising and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products; and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed:

1. To show the true animal name of the fur used in the fur product.
2. To show the name, or other identification issued and registered by the Commission, of one or more of the persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale, in commerce, or transported or distributed it in commerce.

PAR. 4. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

1. The term "natural" was not used on labels to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

2. Required item numbers were not set forth on labels, in violation of Rule 40 of said Rules and Regulations.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced by respondents in that they were not invoiced with any of the information required by Section 5(b)(1) of the Fur Products Labeling Act, and in the manner and form prescribed by the Rules and Regulations thereunder.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in that:

(a) The term "natural" was not used on invoices to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(b) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 7. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforesaid advertisements, but not limited thereto, were advertisements of respondents which appeared in issues of the Dallas Morning News, a newspaper published in the city of Dallas, State of Texas.

PAR. 8. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in that certain of said fur products were falsely or deceptively identified with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

Among such falsely and deceptively advertised fur products, but not limited thereto, were fur products advertised as "Broadtail" thereby implying that the furs contained therein were entitled to the

designation "Broadtail Lamb" when in truth and in fact they were not entitled to such designation.

PAR. 9. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in violation of the Fur Products Labeling Act in that the said fur products were not advertised in accordance with the Rules and Regulations promulgated thereunder in that:

(a) The term "Dyed Broadtail-processed Lamb" was not set forth in the manner required, in violation of Rule 10 of the said Rules and Regulations.

(b) The term "natural" was not used to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of the said Rules and Regulations.

(c) The disclosure that fur products were composed in whole or in part of paws, tails, bellies, sides, flanks, gills, ears, throats, heads, scrap pieces or waste fur was not made, where required, in violation of Rule 20 of the said Rules and Regulations.

PAR. 10. The acts and practices of the respondents, as set forth in Paragraphs Three, Four, Five, Six, Seven, Eight and Nine were and are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and constituted and now constitute unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

PAR. 11. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960, respondents have been and are now engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce; and in the transportation or causing to be transported in commerce, and in the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported or caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 12. Certain of said textile fiber products were falsely and deceptively advertised in that respondents in making disclosures or

implications as to the fiber content of such textile fiber products in written advertisements used to aid, promote, and assist directly or indirectly in the sale or offering for sale of said products, failed to set forth the required information as to fiber content as specified by Section 4(c) of the Textile Fiber Products Identification Act and in the manner and form prescribed by the Rules and Regulations promulgated under said Act.

Among such textile fiber products, but not limited thereto, were articles of wearing apparel which were falsely and deceptively advertised in newspapers of interstate circulation in that the true generic names of the fibers in such articles were not set forth.

PAR. 13. Certain of said textile fiber products were falsely and deceptively advertised in violation of the Textile Fiber Products Identification Act in that they were not advertised in accordance with the Rules and Regulations promulgated thereunder.

Among such textile fiber products but not limited thereto, were textile fiber products which were falsely and deceptively advertised in newspapers of interstate circulation in the following respects:

A. A fiber trademark was used in advertising textile fiber products, namely women's apparel, without a full disclosure of the fiber content information required by the said Act and the Rules and Regulations thereunder in at least one instance in said advertisement, in violation of Rule 41(a) of the aforesaid Rules and Regulations.

B. A fiber trademark was used in advertising textile fiber products, namely women's apparel, containing more than one fiber and such fiber trademark did not appear in the required fiber content information in immediate proximity and conjunction with the generic name of the fiber in plainly legible type or lettering of equal size and conspicuousness, in violation of Rule 41(b) of the aforesaid Rules and Regulations.

C. A fiber trademark was used in advertising textile fiber products, namely women's apparel, containing only one fiber and such fiber trademark did not appear, at least once in the said advertisement, in immediate proximity and conjunction with the generic name of the fiber, in plainly legible and conspicuous type, in violation of Rule 41(c) of the aforesaid Rules and Regulations.

PAR. 14. The acts and practices of the respondents, as set forth in Paragraphs Twelve and Thirteen were and are in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated under said Act, and constituted and now constitute unfair and deceptive acts and practices and unfair methods of

competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, the Fur Products Labeling Act and the Textile Fiber Products Identification Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondents Margo's, Inc., a corporation, trading as Margo's-La Mode, and Margo's-Downtown, and Margo's-Preston, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Texas, with their office and principal place of business located at 3607 Oak Lawn Avenue, Dallas, Texas.

Respondents Joseph Glickman and Hyman Glickman are officers of said corporations and their office and principal place of business is the same as that of said corporate respondents.

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

ORDER

It is ordered, That respondents Margo's, Inc., a corporation, trading as Margo's-La Mode, and Margo's-Downtown, and Margo's-Preston, Inc., corporations, and Joseph Glickman and Hyman Glickman, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from intro-

ducing into commerce, or selling, advertising or offering for sale in commerce, or transporting or distributing in commerce, any fur product; or selling, advertising, offering for sale, transporting, or distributing, any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act unless each such product has securely affixed thereto or placed thereon a stamp, tag, label or other means of identification:

(a) Correctly showing in words and in figures all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

(b) Setting forth the term "natural" as part of the information required to be disclosed on labels under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

(c) Setting forth on labels the item number or mark assigned to fur products.

It is further ordered, That respondents Margo's, Inc., a corporation, trading as Margo's-La Mode, and Margo's-Downtown, and Margo's-Preston, Inc., corporations, and Joseph Glickman and Hyman Glickman, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation, or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Falsely and deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Failing to set forth the term "natural" as part of the information required to be disclosed on invoices under the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

3. Failing to set forth on invoices the item number or mark assigned to fur products.

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 any fur product, and which:

1. Falsely or deceptively identifies any such fur product as to the name or designation of the animal or animals that produced the fur contained in the fur product.

2. Fails to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term instead of the words "Dyed Lamb."

3. Fails to set forth the term "natural" as part of the information required to be disclosed in advertisements under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

4. Fails to disclose that fur products are composed in whole or in substantial part of paws, tails, bellies, sides, flanks, gills, ears, throats, heads, scrap pieces or waste fur.

It is further ordered, That respondents Margo's, Inc., a corporation, trading as Margo's-La Mode, and Margo's-Downtown, and Margo's-Preston, Inc., corporations, and Joseph Glickman and Hyman Glickman, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, sale, advertising, or offering for sale, in commerce, or in the transportation or causing to be transported in commerce, or the importation into the United States, of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from falsely and deceptively advertising textile fiber products by:

1. Making any representations, by disclosure or by implication, as to the fiber contents of any textile fiber product in any written advertisement which is used to aid, promote, or assist, directly or indirectly, in the sale or offering for sale of such textile fiber product, unless the same information required to be shown on the stamp, tag, label or other means of identification under Sections 4(b)(1) and (2) of the Textile Fiber Products Identification Act is contained in the said advertisement, except that the percentages of the fibers present in the textile fiber product need not be stated.

2. Using a fiber trademark in advertisements without a full disclosure of the required content information in at least one instance in the said advertisement.

3. Using a fiber trademark in advertising textile fiber products containing more than one fiber without such fiber trademark appearing in the required fiber content information in immediate proximity and conjunction with the generic name of the fiber in plainly legible type or lettering of equal size and conspicuousness.

4. Using a fiber trademark in advertising textile fiber products containing only one fiber without such fiber trademark appearing at least once in the advertisement, in immediate proximity and conjunction with the generic name of the fiber, in plainly legible and conspicuous type.

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

IN THE MATTER OF

ADMIRAL CORPORATION

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

Docket 7094. Complaint, Mar. 26, 1958—Decision, Apr. 7, 1965

Order vacating the initial decision and dismissing the complaint which charged a Chicago, Ill., manufacturer and distributor of electrical appliances with discriminating in price between competing resellers of its merchandise and paying discriminatory advertising and promotional allowances.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party named in the caption hereof and hereinafter more particularly designated and described, has violated, and is now violating, the provisions of Sections 2(a) and 2(d) of the amended Clayton Act, approved June 19, 1936 (U.S.C., Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

COUNT I

PARAGRAPH 1. Respondent Admiral Corporation is a corporation organized and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3800 West Cortland Street, Chicago 47, Ill.

PAR. 2. Respondent is now, and for many years has been, engaged in the business of manufacturing and selling television and radio receiving sets, phonographs and various combinations of the three; appliances, including ranges, refrigerators, deep freezers, air conditioners, dehumidifiers and many other products.

Respondent's gross sales for the year ending December 31, 1956, were in excess of $182,000,000.

PAR. 3. Respondent manufactures the aforesaid products in plants variously located in the States of Illinois and Indiana, from which points the products are shipped to customers located in every State of the United States and the District of Columbia for resale and use within the United States.

Respondent sells its products to distributors and to retailers through wholly owned branches located in many States, other than the States of manufacture, and the District of Columbia. Respondent is, and at all times mentioned herein has been, engaged in interstate commerce in connection with the sale and distribution of its products.

PAR. 4. The respondent, in the course and conduct of its business, has been and is now in competition with other corporations, individuals, partnerships and firms engaged in manufacturing, selling and distributing similar products in commerce between and among the various States of the United States and the District of Columbia.

Many of respondent's purchasers are competitively engaged in the resale of its products at retail in the various cities and areas where said purchasers respectively carry on their businesses. Included among such purchasers are radio, television and appliance stores, furniture, chain and department stores.

PAR. 5. In the course and conduct of its business, as above described, respondent has sold and now sells its products to some of said retail purchasers at higher prices than it has sold and now sells such products of like grade and quality to other retail purchasers who have been and are now competing with the non-favored purchasers in the resale of respondent's products.

PAR. 6. Respondent has effected the higher prices to the non-favored purchasers by various means including higher list prices; by granting said purchasers less favorable discounts or allowances and by basing some discounts upon quantity purchases.

For example, during 1956, in Milwaukee, Wisconsin, respondent classified its retail customers as "dealers"; "M" dealers; "Key" dealers and "A.D." accounts and issued separate price lists to each type dealer. In all instances the prices charged the purchasers in the first three classifications were higher than those charged the "A.D." accounts; the prices charged the purchasers in the first two classifications were higher than those charged the "Key" dealers and generally the prices charged "Dealers" were higher than those charged the "M" dealers.

The list prices charged non-favored purchasers in the various classifications described above have resulted in prices ranging from approximately 1% to 10% higher than those charged favored purchasers. In addition, respondent has granted more favorable discounts or allowances to favored purchasers and as a result, the net prices to nonfavored purchasers have ranged from 1% to more than 16% higher than those charged the favored purchasers.

Respondent employs and has employed the same or similar pricing practices in other trading areas in various sections of the United States.

PAR. 7. The effect of such discriminations in price made by respondent, as alleged, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which the respondent and its purchasers are respectively engaged, or to injure, destroy, or prevent competition with the respondent or its purchasers who receive the benefits of such discriminations.

PAR. 8. The foregoing acts and practices of the respondent, as alleged, violate Section 2(a) of the Clayton Act, as amended (U.S.C., Title 15, Section 13).

COUNT II

PAR. 1. Each of the allegations contained in Paragraphs One through Four, of Count I hereof, are hereby realleged and made part

of this Count as fully and with the same effect as though herein again set forth in full.

PAR. 2. In the course and conduct of its business in interstate commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by said respondent, and such payments, sometimes hereinafter referred to as promotional allowances, were not available on proportionally equal terms to all other customers competing in the distribution of its products.

PAR. 3. Included among and illustrative of, the payments alleged in Paragraph Two were credits, paid by way of allowances, or deductions from invoices, as compensation for respondent's share of the cost of various promotional services or facilities, including newspaper advertising, floor and window displays, furnished by customers, pursuant to agreement with the respondent, in connection with the offering for sale or sale of respondent's products.

PAR. 4. During 1956, and for some time prior thereto, respondent, as alleged in Paragraph Three hereof, offered to pay, and paid, some customers varying percentages of the cost of newspaper ads, furnished by such customers, in promoting the sale of respondent's products. The percentage of the cost, which respondent offered to pay, varied from 50% to 100% in Milwaukee, Wisconsin, and in various sections of the United States.

During the same period of time respondent also offered to pay, and paid, varying amounts to some customers in return for other services and facilities, including floor and window displays, furnished by such customers in promoting the sale of respondent's products.

In some instances the respondent failed to offer such allowances to all competing customers on proportionally equal terms; in some instances respondent failed to offer such allowances on any terms to competitors of the favored customers who received allowances, and in some instances respondent's terms, in connection with said allowances, were such as to preclude competitors of the favored customers from availing themselves of the opportunity to participate in such promotional programs.

PAR. 5. The acts and practices of respondent, as alleged above, violate subsection (d) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Sec. 13).

Mr. Peter J. Dias and *Mr. Francis A. O'Brien* for the Commission.

Pope, Ballard, Uriell, Kennedy, Shepard & Fowle, Chicago, Ill., by *Mr. Melville C. Williams, Mr. William S. Baltz, Mr. John J. Gaskell* and *Mr. Benn E. G. Eilert* for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

SEPTEMBER 11, 1963

General Statement of Case

In this proceeding the complaint charges that respondent has violated Sections 2(a) and 2(d) of the Clayton Act, as amended (15 U.S.C. § 13(a) and (d)). The respondent is a manufacturer of a variety of electrical products, among which are radio and television receiving sets and refrigerators. It is recognized that such products are in general demand, although some brands and certain models are more popular than others with the American consuming public.

It is charged in Count I of the complaint, in substance, that such products of respondent were sold by it in the course of interstate commerce in various trade areas to some of its favored customers competing at retail with other customers of respondent at higher prices than such products of like grade and quality were sold by respondent to such non-favored other customers, whereby respondent has violated Section 2(a). In Count II, the Section 2(d) charge of the complaint, respondent is alleged to have violated said section by having unlawfully paid or granted certain promotional allowances in the course of interstate commerce in various trade areas to some of its customers in connection with their offering for sale or selling respondent's products, which promotional allowances were not made available by respondent on proportionally equal terms to its other customers competing with such favored customers in the sale and distribution of such products.

Both of these charges of the complaint relate to the alleged effect of respondent's practices upon the retail trade, that is, to the effect thereof upon secondary competition. Since the complaint was issued under the Commission's Rules of Practice of May 1957, which did not require a proposed order to be tendered as a part of the complaint, the notice portion of said complaint states that unless respondent shows cause upon hearing, the hearing examiner shall determine the form of the order to be issued.

Respondent, in its answer, admits its corporate character and organization and its competition in interstate commerce with others in the manufacture, sale and distribution in its several lines of manufac-

tured products. Respondent specifically pleads three separate defenses to Count I of the complaint and four separate defenses to Count II thereof. Several of respondent's defenses are affirmative defenses under subsections (a) and (b) of Section 2 of the Clayton Act, as amended. In substance, respondent contends that it has violated neither Section 2(a) nor Section 2(d) as respectively charged in the two counts of the complaint.[1]

More specific references to the issues framed by the complaint and answer will be hereinafter pertinently made in connection with the

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[1] The material provisions of the Clayton Act, as amended, involved herein are the following: "Sec. 2(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *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: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) * * *

(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

findings of fact relating to each count and the respective defenses thereto.

The material evidence in this proceeding primarily relates to those facts and circumstances which concern respondent's dealings with its customers in the three general trade areas of Milwaukee, Wisconsin, Washington, D.C., and New York, New York, during the years 1956 and 1957. The evidence establishes that numerous discriminatory prices and so-called "promotional allowances," as respectively charged in Counts I and II of the complaint, were made in each of such areas to and in favor of certain of respondent's customers who, as retailers, were competitively engaged with other, but non-favored-retailer customers of respondent, in the sale and distribution of certain products in each of respondent's two basic lines of such manufactured electrical products. These two lines are generally classified and described in the trade as "brown goods," that is, television and radio receiving sets, phonographs, and various combinations of such products, and the so-called "white goods," which latter line includes kitchen ranges, refrigerators, deep freezers, air conditioners, and dehumidifiers. In substance, respondent does not now dispute the existence of the facts alleged in the complaint and established by the evidence, but relies upon some of its affirmative defenses in avoidance and exculpation thereof.

It is found herein that the evidence sustains the material allegations of the complaint with respect to each charge. And since it is also found that respondent has failed to maintain any of its several defenses to either of such charges, it is concluded that respondent has violated said Sections 2(a) and 2(d) of the Clayton Act, as amended, as respectively charged in two counts of the complaint and an appropriate cease and desist order is accordingly issued herewith.

History of the Litigation

The complaint herein issued March 26, 1958, and was duly served upon respondent. Pursuant to leave granted, respondent's answer was filed on June 6, 1958. At the time the complaint issued, the Honorable Frank Hier was designated as the hearing examiner to hear and initially determine the case. At hearings held on and between September 2, 1958, and February 13, 1959, in the four cities of Chicago, Illinois, Milwaukee, Wisconsin, Washington, D.C., and New York, New York, the case-in-chief was presented to and heard by him. On said last day the Commission's case-in-chief was rested (R. 1475).[2]

[2] References herein to the transcript of the record are shown as "R.," while references to Commission's or Respondent's exhibits are respectively shown as "CX" or "RX." References to pleadings and other filings are made either by description or date of filing, or both, with more specific references to paragraphs where deemed appropriate.

During the proceedings of February 12, 1959, respondent had moved orally that certain documentary exhibits presented by complaint counsel be stricken from the record and some of these were therefrom ordered stricken. To this action complaint counsel had no objection, but on request they were given 30 days in which to show the relevance of the other exhibits attacked, and Examiner Hier deferred his ruling thereon (R. 1405–10). On March 12, 1959, complaint counsel filed their answer to said oral motion stating their reasons for the propriety of retaining such documents in the record. No ruling was made on this showing by Examiner Hier, which matter was the only one herein pending before him which was in a determinable status at the time of his death on June 10, 1959. This matter therefore subsequently required disposition by the undersigned successor hearing examiner who ruled upon it as hereinafter recited.

Following said hearing of February 13, 1959, however, there were several motions for the issuance of subpoenas duces tecum upon which Examiner Hier did rule. On February 27, 1959, respondent moved for the issuance of a number of such subpoenas for manufacturers of and dealers in various brands of relevant products competing with respondent. Examiner Hier denied this motion in part by a written order dated March 3, 1959. Respondent appealed therefrom to the Commission, which on May 29, 1959, sustained the examiner's ruling (55 F.T.C. 2078). Likewise on an appeal from his later order of April 27, 1959, confirming a verbal order made at a hearing held April 6, 1959, wherein he sustained *in toto* all motions to quash such subpoenas duces tecum, the examiner's ruling was also sustained by the Commission's order and opinion of July 15, 1959 (56 F.T.C. 1627). This, however, was subsequent to Examiner Hier's death. Applications, motions to quash, briefs, orders, and other numerous documents pertaining to such subpoenas duces tecum constitute a substantial part of the docket filings in this case.

A subsequent general, verbal motion renewing respondent's request for such subpoenas duces tecum to be issued was made at the hearing on August 21, 1961. It was objected to by complaint counsel and was denied by the undersigned examiner (R. 3014–15). All the proceedings had with reference to such subpoenas are relevant to certain of respondent's specially pleaded defenses and they are therefore hereinafter discussed in more detail in connection with the specific findings of fact made upon such issues.

As already stated, Hearing Examiner Hier died on June 10, 1959, and thereafter in due course the undersigned examiner, on October 2, 1959, was appointed in his place. Prior to any hearings before the un-

dersigned examiner, respondent on October 5, 1959, filed its motion to strike the testimony of only three witnesses out of a total of 46 who had theretofore testified before Examiner Hier. This motion was premised upon the holding in *Gamble-Skogmo, Inc.* v. *Federal Trade Commission*, 211 F. 2d 106 (C.A. 8, 1954), in order that the successor examiner might see such witnesses and hear their testimony in order to appropriately evaluate their credibility as required by Section 5(c) of the Administrative Procedure Act, 5 U.S.C. 1004(c). On October 9, 1959, complaint counsel filed their answer to said motion, agreeing thereto and also referring to the fact that during a telephone conference between counsel for the parties and the undersigned examiner, counsel all were agreed that there would be no objection made to the undersigned examiner passing upon the testimony and other evidence adduced during the case-in-chief, except as to the testimony of each of the three said witnesses which respondent's counsel desired to be retaken.

The examiner, therefore, on October 12, 1959, issued his order sustaining respondent's motion to strike such evidence (R. 984–1001, 1236–65 and 1340–1404), ordering it and all record made in the transcript directly connected therewith to be physically stricken and expunged from the record, setting aside the rest taken by complaint counsel only insofar as the testimonies of the said three witnesses were concerned, and setting hearings for the retaking of their testimony. These hearings occurred on October 26 and 27, 1959. These three witnesses, who were so recalled, were resworn and were fully examined and cross-examined. They were Victor S. Filler, who testified in Washington, D.C. on October 26 (R. 1495–1521), and Jacob Rothman and Charles W. Berg, who testified in New York on October 27 (R. 1530–86). During the first of such hearings confirming earlier understandings, it was definitely stipulated by counsel that, with the exception of the said three witnesses, the undersigned hearing examiner could pass upon the weight and credibility of all other testimonial evidence in the case taken before Examiner Hier as though the undersigned had heard the same (R. 1491–2).

During the retaking of the testimony of the said three witnesses, respondent requested, and was granted, permission to file reply to the answer of complaint counsel, filed March 12, 1959, setting forth the relevance of certain exhibits (R. 1522–27) under attack, which Examiner Hier had left unruled upon. After this reply was filed, on November 23, 1959, the undersigned examiner, on January 27, 1960, not only passed upon the said deferred ruling of Hearing Examiner Hier, which was pending at the time of his death, but also denied

in toto each of four additional motions of respondent relating to evidence which had been filed on November 30, 1959. Respondent's said oral motion made before Hearing Examiner Hier on February 12, 1959 was denied by the undersigned examiner in his said order of January 27, 1960 except as to certain exhibits which had been stricken by the order of Examiner Hier on February 12, 1959, when the said motion was presented to him (R. 1405-10).

Thereafter, a series of further hearings were held at which evidence pertaining to respondent's defenses was presented on and between February 15, 1960, and April 25, 1962, on which last date respondent rested (R. 3310). Sometime prior to the conclusion of the hearings on August 23, 1961, respondent had requested leave to recall certain witnesses at further hearings to be held in Milwaukee unless this testimony could be stipulated (R. 3210). This request was denied (R. 3210-12), but the examiner permitted an offer of proof by respondent's counsel as to what the proposed recalled witnesses would testify, and upon objection, rejected the offer (R. 3212-19).

At the time respondent rested its defense on April 25, 1962, the hearings were closed conditionally as complaint counsel requested time to elect whether they would present any rebuttal evidence which request was granted (R. 3311). Within the time fixed therefor, counsel, on July 25, 1962, waived the presentation of rebuttal evidence, moved to close the case and to have time fixed for filing proposed findings and answers thereto. Subsequent thereto, and in accordance with the Commission's Rules, the hearing examiner duly fixed the times for the filing of the Proposed Findings of Fact and Conclusions of Law of the respective parties, as well as answers thereto. Due to the preoccupation of Commission's counsel with other pressing official matters, which the Commission had directed them to give priority, such times for filing were delayed on several occasions by various orders until April 11, 1963. In accordance with the Commission's practice, and by the examiner's above-mentioned, conditional order of said date, and also by his request to the Commission for an extension of time to file his initial decision, the hearing examiner finally set the times of filing of the parties' Findings of Fact and Conclusions of Law and Order as of June 17, 1963, and their respective answers thereto as of July 17, 1963. In confirmation of this order, the Commission, on April 19, 1963, extended the time of filing the examiner's initial decision to and including September 17, 1963, as he had requested.

In due course, after the order of April 11, 1963, the parties each filed their proposed Findings, Conclusions and Order, and the respec-

tive Answers to the proposals of the opposition. A further motion was filed July 21, 1963, by respondent to permit the filing of a further brief by it. This was opposed by complaint counsel's objections on July 30, 1963, and the motion was denied by the examiner's order of August 7, 1963.

GENERAL FINDINGS OF FACT

The record is replete with numerous motions, objections, arguments, and rulings, but appropriate references are made herein only to such of those matters which are material to a clear and comprehensive discussion of the entire proceeding. This initial decision has been prepared pursuant to the presently applicable Section 3.21 of the Commission's Rules of Practice for adjudicative procedures effective on and after August 1, 1963, subsection (b) of which specifically requires, among other things, with respect to findings, "specific page references to principal supporting items of evidence in the record." This rule is confirmatory of the Commission's policy declaration in its remand order of June 5, 1963, in Docket No. 7592 [62 F.T.C. 1557], *Ark-La-Tex Warehouse Distributors, Inc., et al.*, premised upon *Alhambra Motor Parts et al.* v. *F.T.C.* (C.A. 9, 1962), 309 F. 2d 213. The record references in a case such as this are, at best, necessarily extensive as the "principal supporting items" in a Robinson-Patman case are usually, and unavoidably, numerous and involved.

Throughout the hearings the parties were accorded, and fully exercised, their rights to examine and cross-examine the witnesses, to present documentary evidence, and to make proper record either at the hearings or by motions or other documents, filed at other times, of their respective positions and reservations on all disputed matters of evidence or procedure.

The record herein consists of a transcript of evidence of 3,312 pages and some 629 documentary exhibits. Many of the latter consisted of numerous pages, each relating to many relevant transactions. Commission's counsel identified 756 exhibits but some 351 of them were subsequently either not offered or were withdrawn or rejected. There were received in evidence 405 of such exhibits. Respondent identified 236 exhibits, of which 224 were received in evidence. Several Commission and respondent's exhibits were placed *in camera*.

Sixty-two witnesses testified in this proceeding, of which number 46 were called on behalf of the Commission. Respondent called 16 witnesses and also recalled as witnesses a number who had previously testified during the case-in-chief. These 62 witnesses consisted chiefly of certain executives and sales personnel of respondent, several ac-

countants, and a substantial number of representatives of retailers in each of the three cities in whose trade areas the discriminations involved herein occurred.

Considering the nature of the case, the record, while somewhat long, has been substantially curtailed as able counsel for the parties during the course of the proceeding stipulated many matters of importance, and agreed that others could be stricken or disregarded. The excellent proposals and briefs of counsel for both parties are well arranged and referenced; and they have been extremely helpful in the review of the record and the preparation of this initial decision. All proposed findings and conclusions of the parties which are not incorporated herein, either verbatim or in substance and effect, are hereby rejected.

The hearing examiner has given full, careful, and impartial consideration to all the testimony, taking into consideration his observation of the appearance, conduct and demeanor of each of the witnesses who appeared before him. All documentary exhibits in the record, the various stipulations of fact, the testimony presented before Hearing Examiner Hier, and those facts alleged in the complaint which are admitted in the answer, also have been duly considered. And all statements, arguments, proposals and briefs of counsel have been closely studied in the light of all the evidence. Upon the whole record, the hearing examiner finds generally that counsel supporting the complaint have fully sustained the burden of proof incumbent upon them, and have established by a preponderance of the reliable, probative and substantial evidence, and the fair and reasonable inferences drawn therefrom, the material allegations of the complaint. Such evidence establishes the specific findings hereinafter made, which findings, together with the conclusions of law applicable thereto, fully warrant the order herewith issued. He further finds generally that the evidence submitted by respondent is insufficient to establish any valid defense to the violations of law charged in the complaint which are established by the evidence. More specifically, upon consideration of the whole record, the hearing examiner makes the following:

Specific Findings of Fact

Nature and Extent of Respondent's Business

With only minor exceptions, the answer admits the allegations of the complaint pertaining to the corporate character and extent of the business of the respondent. Some evidence was adduced in support of certain of such allegations and there is no dispute with reference to

such evidence. From the admissions in the answer of certain allegations of the complaint, and the evidence, the facts relating to these matters are found to be as follows:

Respondent, Admiral Corporation, is, and, at all times material hereto, was, a corporation organized and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3800 West Cortland St., Chicago 47, Illinois. (Complaint, Count I, Paragraph One, admitted in answer Count I, First Defense, Paragraph One; R. 10–12.)

Respondent is now, and for many years has been, engaged in the business of manufacturing and selling television and radio receiving sets, phonographs and various combinations of the three; and appliances, including ranges, refrigerators, deep freezers, air conditioners, and dehumidifiers. Respondent's gross sales for the year ending December 31, 1956 were in excess of $182,000,000. (Complaint, Count I, Paragraph Two, as admitted with qualification in answer, Count I, First Defense, Paragraph Two; R. 1174–75, 2828.)

Respondent has manufactured for many years, and still manufactures, the aforesaid products in plants variously located in Chicago, Galesburg, and Harvard, Illinois, and in Shelbyville, Indiana, from each of which points the particular products made there are shipped to customers located in every state of the United States and the District of Columbia for resale and use within the United States. (Complaint, Count I, First Subparagraph of Paragraph Three, admitted with qualification in Count I, First Defense, Paragraph Three of the answer; R. 10, 11, 74–5.)

Respondent, during 1956 and 1957, had from 11 to 15 wholesale branches located in cities in various areas throughout the country. From these branches respondent sold its products to retailers. This general plan of operation has not been changed except that in 1961 respondent sold two such branches, that in Washington, D.C. and the Oklahoma branch, leaving only nine thereafter still in operation (R. 3013 and 3021). It is therefore found that respondent has sold and still sells its products to distributors and to retailers through wholly-owned branches located in a number of states other than the said two states of manufacture, Illinois and Indiana. Respondent is, and, at all times mentioned herein, has been, engaged in interstate commerce in connection with the sale and distribution of its products.

During the years 1956 and 1957 respondent sold its products to customers located in the three general trade areas of Milwaukee, Washington, D.C., and New York City through its wholly owned branches located in such areas. The first two, respectively, were

located at 2941 North Humboldt Ave., Milwaukee 12, Wisconsin and 2046 West Virginia Ave., N.E., Washington 2, D.C. Although the Washington branch was sold in 1961, as already stated, the Milwaukee and New York branches are still operating. The branch servicing the New York City area, known as the Metropolitan Division of Admiral, maintained its warehouse and principal place of business at 497 New Jersey Railroad Ave., Newark 5, New Jersey. It also maintained a showroom and service department at 625 West 54th St., New York 19, New York, until August 1957. Respondent, Admiral Corporation, is responsible for the acts and practices of its branches despite the fact that its branch managers have been given carte blanche in the determination of prices in their respective areas. (Complaint, Count I, Second Subparagraph of Paragraph Three, admitted by answer, Count I, First Defense, Paragraph Three; CX 208(a), 382, 538A; R. 13, 14, 67–69, 1020–21, 1023, 1025, 1406.)

Many of the purchasers of respondent's products are competitively engaged in the resale of said products at retail in the various cities and areas where said purchasers respectively carry on their businesses. Included among such purchasers are radio, television, and appliance stores, and furniture, chain, and department stores. During the years 1956 and 1957, respondent sold to approximately 300 such retailers in Milwaukee, 150 in Washington, D.C., and 700 in the Metropolitan New York City area (R. 192, 517, 1025–27).

Respondent's said purchasers bought and sold Admiral's complete, or substantially complete, line of products or its products within a specific line or lines. The record is replete with illustrations of retailers in the three trade areas of Milwaukee, Washington, and New York, respectively, who so dealt in Admiral's lines. The evidence specifically refers to 8, 10 and 13 such retailers of Admiral products in Milwaukee, Washington, and New York, respectively. In Milwaukee there were: Schuster Company (R. 358) (CX 237(c), (h), (k), (s)); Samson Enterprise (R. 368); Hack's Furniture and Appliances (R. 380); Triangle T.V. (R. 389); Pasch Radio Supply Company (R. 421, 2314); City Electric and Radio Company (R. 455); Erv's Radio (R. 470, 2427); and ABC Supply Company (R. 482). In Washington there were: Hub Furniture Company (R. 720); Lansburgh's (R. 734(B)); George's Warehouse Supermarts (R. 756); Todd's Television and Appliances Company (R. 802); Dalmo (R. 826); L & F Home Appliance (R. 862); Irving Sales (R. 881); Max Alperstein Department Stores, Inc. (R. 899–900); Hecht Company (R. 935); and Star Radio, T.V. and Appliances (R. 1498). In New York there were: Heins & Bolet (R. 1192); Davega Stores

Corporation (R. 1218); B & G Music Shop (R. 1235); Vim (R. 1272); S. Klein (R. 1309); Weil and Co. (R. 1338); Oscar's Radio Shop, Inc. (R. 1351); Jules Brite Corporation (R. 1376); Harvard Stores, Inc. (R. 1412–3); R. H. Macy and Company (R. 1426–7) (CX 732(a), 733(a)); Friendly Frost Stores (R. 1446); Charles Appliance, Incorporated (R. 1531, 1540–2); and Standard Brand Distributors (R. 1566, 1576).

The stores of the retailers specified in each of the said three trade areas were located in fairly close proximity to each other in such respective areas, and concentrated their selling efforts in the same respective trade areas in their sales of and attempts to sell Admiral products. Representatives of many of these retailers testified that their stores competed with others in the area both generally and in the sale of various Admiral products involved herein. In Milwaukee (R. 317, 366, 379, 388–90, 408–9, 421–2, 455–6, 470–1, 482–3); in Washington (R. 718–9, 734(a), 752–5, 801–2, 933, 825–9, 861–4, 879, 882–4, 899–900, 961, 1495, 1499–1500, 1507); and in New York City (R. 1217, 1266–7, 1447, 1309, 1428, 1192, 1198, 1202–4, 1235, 1530, 1533–4, 1551, 1564, 1337–9, 1350–2, 1374–6, 1379–80, 1565–8, 1411–3).

The Issues and Evidence as to Section 2(a) Violations

The Section 2(a) violations have been charged in Count I of the complaint. Paragraphs Four to Seven, inclusive, thereof state the ultimate facts alleged to constitute respondent's acts which are the basis of this count. For clarity, an analysis of the various specific charging allegations of this Count I and the answer's respective responses thereto are now set forth.

Paragraph Four of Count I alleges:

> The respondent, in the course and conduct of its business, has been and is now in competition with other corporations, individuals, partnerships and firms engaged in manufacturing, selling and distributing similar products in commerce between and among the various states of the United States and the District of Columbia.

Respondent, in Count I, First Defense, Paragraph Four of the answer, substantially admits the foregoing allegations, stating:

> * * * that in the conduct of its business, respondent has been and is now in competition with other corporations that are engaged in manufacturing and selling similar products in commerce between and among the various states of the United States and the District of Columbia; and it has been in competition with corporations, individuals, partnerships and firms that were engaged in distributing similar products in intrastate and interstate commerce and in the District of Columbia.

Respondent, however, in the same paragraph of the answer, denies generally the further allegations of said Paragraph Four of Count I

of the complaint which relates to the essential issue of the retail competition of respondent's purchasers with each other, which allegations are as follows:

> Many of respondent's purchasers are competitively engaged in the resale of its products at retail in the various cities and areas where said purchasers respectively carry on their businesses. Included among such purchasers are radio, television and appliance stores, furniture, chain and department stores.

Nowhere else in the answer are such allegations admitted either expressly or in substance. Hence complaint counsel were required to present, and did present, uncontradicted evidence which established such allegations of Paragraph Four of Count I of the complaint.

It is alleged in Paragraph Five of Count I of the complaint that:

> In the course and conduct of its business, as above described, respondent has sold and now sells its products to some of said retail purchasers at higher prices than it has sold and now sells such products of like grade and quality to other retail purchasers who have been and are now competing with the non-favored purchasers in the resale of respondent's products.

Similarly to its pleading as to Paragraph Four of the complaint, in the answer, Count I, First Defense, Paragraph Five, respondent, while denying generally the allegations of said Paragraph Four of the complaint by a limited admission,

> * * * states that at times in the course and conduct of its business prior to January 1, 1958, respondent has sold some of its products to some retail purchasers at higher prices than it sold products of like grade and quality to other retail purchasers.

Since neither in this part of the answer or elsewhere herein has respondent admitted that it has pursued such conduct after January 1, 1958, the burden fell upon complaint counsel to establish the facts since nowhere in the complaint were the acts of respondent limited to those occurring prior to that date. It is immaterial that in the subsequent proofs of specific acts of respondent, only those occurring in 1956 and 1957 were established.

It is further pleaded in the complaint in Paragraph Six of Count I that:

> Respondent has effected the higher prices to the non-favored purchasers by various means including higher list prices; by granting said purchasers less favorable discounts or allowances and by basing some discounts upon quantity purchases.
>
> For example, during 1956, in Milwaukee, Wisconsin, respondent classified its retail customers as "dealers"; "M" dealers; "Key" dealers and "A.D." accounts and issued separate price lists to each type dealer. In all instances the prices charged the purchasers in the first three classifications were higher than those charged the "A.D." accounts; the prices charged the purchasers in the first two

classifications were higher than those charged the "Key" dealers and generally the prices charged "Dealers" were higher than those charged the "M" dealers.

The list prices charged non-favored purchasers in the various classifications described above have resulted in prices ranging from approximately 1% to 10% higher than those charged favored purchasers. In addition, respondent has granted more favorable discounts or allowances to favored purchasers and as a result, the net prices to non-favored purchasers have ranged from 1% to more than 16% higher than those charged the favored purchasers.

Respondent employs and has employed the same or similar pricing practices in other trading areas in various sections of the United States.

Respondent, in the answer, Count I, First Defense, Paragraph Six, while denying generally the allegations of said Paragraph Six of the complaint,

* * * states that it has charged higher prices to some retail purchasers than to others and has granted lesser discounts or allowances to some purchasers than to others, some of which discounts and allowances were based on quantity purchases; and that in Milwaukee, Wisconsin during 1956, respondent classified retailers purchasing from it as "dealers", "M dealers", "Key dealers" and "AD accounts" and issued different price lists to some of said dealers; and that similar classifications of retail customers were made by respondent in some other trading areas of the United States.

This, again, was a limited admission and, as above noted with respect to preceding paragraphs of the complaint, left complaint counsel the burden of proving the unadmitted allegations of Paragraph Six thereof.

Complaint counsel did present substantial evidence which has proved all the material allegations of said Paragraphs Five and Six of Count I of the complaint. Thus all the material allegations of Count I have been proved and are found to be true.

Respondent, in its Proposed Finding 4, refers to facts respecting its competition with other manufacturers. Complaint counsel are in substantial accord therewith in their Eleventh Proposed Finding. The parties, however, are not in accord with respect to the legal conclusions to be drawn therefrom. Respondent's Proposed Finding 4 states, and the examiner finds, that:

Respondent has been, and is, in competition with others, some of which manufacture, some of which sell, and some of which manufacture and sell the same products in interstate commerce. Respondent has about 40 manufacturing competitors of radios and televisions, of which about 10 or 12 do 90% of the business (R. 2828, 2842). Respondent also has about 12 competitors in the manufacture of appliances or "white" goods (R. 2828). Respondent's products are not what are known in the industry as "demand" items, that is, those consumers request by name, such as Zenith and RCA brands in televisions and Frigidaire and General Electric in white goods, but are what are known as "push" items, that is, they require sales effort by the dealer.

Certain customers of respondent in each of the three city trade areas involved herein so testified (R. 931; R. 1518; R. 1750–7; R. 1816–7; 1827; R. 1850, 1851; R. 2429–30; R. 2698, 2699).

Out of the evidence relating to Admiral's products not being in the first line of customer demand and the necessity of "pushing" Admiral's products by the merchants who handle them in conjunction with other competitive, like products of other manufacturers', respondent urges that, as a matter of law, Admiral's products cannot constitute "a line of commerce" as that phrase is used in Section 2(a), the true line of commerce being all brands of radios, televisions, phonographs, and "white" goods sold throughout the country. (Respondent's Brief, pp. 2, 83 and 84.) This contention is opposed by complaint counsel (answer to respondent's Proposed Findings, etc., pp. 1 and 2). The examiner agrees with complaint counsel and rejects this most unusual contention as unreasonable and without any authoritative precedent. No supporting authority has been cited nor has the examiner's own research revealed any which could support respondent's contention.

On principle, it does not seem that "push" items should be treated differently than "demand" items as a matter of law, and certainly respondent's contention would permit each manufacturer or supplier to violate Section 2(a) of the Robinson-Patman Act at will. In the case of televisions, for instance, retailers handle several different makes. The result would be to let each manufacturer or distributor arbitrarily classify its customers and fix discriminating prices to them either as between or within the classifications so fixed. Such a construction would shortly completely erode the true meaning and effectiveness of Section 2(a). Neither the Commission nor the courts have ever considered violations of Section 2(a) in any other light than as between a particular seller, whether manufacturer or distributor, and its buyer. The clear intent of Section 2(a) is to prevent any single manufacturer, dealer, or distributor of a product from granting pricing favors to one customer over another. The basic purposes of the Robinson-Patman amendments to the Clayton Act were to protect each business against unfair price advantages granted to its competitors by suppliers. This is particularly applicable to large concerns with massive buying power gaining any undue price advantages over their smaller competitors.

As already stated, respondent has set out three separate defenses to Count I of the complaint. The foregoing analysis of the ultimate facts pleaded in Count I demonstrates that while certain of such alleged facts are admitted by respondents in its answer, others are

denied generally in respondent's First Separate Defense thereto. Therefore, the complaint counsel were obliged to present, and, as already stated, did present substantial proof of such allegations of the complaint. Since respondent, however, has not submitted proposed findings of fact in opposition to those proposed by complaint counsel upon the Section 2(a) count of the complaint, reference to such facts as hereinafter found will be substantially abbreviated. Before making such findings, however, the other separate defenses of respondent will be disposed of.

The Second Separate Defense is that Count I of the complaint is moot because, "As of December 31, 1957, for business reasons not connected with the then pending investigation which lead to the filing of this complaint, respondent ceased to sell its products to retailers and has no intention of resuming such sales." Originally it was the position of respondent that each of its branches were operated "exactly as an independent distributor. The only difference is that, we, the parent company, own the stock of that branch." (R. 67–8, 73). Subsequently, however, on January 1, 1959, the three branches of Admiral in Milwaukee, Washington, D.C., and New York became a part of the parent organization as divisions thereof. The defense of mootness was therefore withdrawn by respondent's counsel (R. 1020–22). It has been subsequently contended, however, that due to the sale of the Washington branch, evidence pertaining to respondent's acts and practices in that particular branch became moot (Respondent's Proposed Findings 65–7; Brief pp. 50, 86–7). This fact, however, does not constitute a defense to Count I of the complaint because even if the respondent no longer has a Washington branch, it still continues actively in business, it maintains some nine other branches and there has been neither plea nor proof of the complete abandonment by respondent of the type of practices complained of which occurred in the Washington branch office during the time it was in operation, as well as in the Milwaukee and New York Metropolitan Area branch during 1956 and 1957.

Respondent's separate Third Defense consists of five distinctly pleaded but allegedly co-related defenses. All are claimed to have justified the differences in the prices charged by respondent to its retail customers in competition with each other. The first such defense (a) is the orthodox defense of cost justification, based upon differences of sale and delivery resulting from different methods or quantities, under Section 2(a). The second such defense (b) is that the price differentials resulted from respondent giving a lower price to a purchaser in good faith in order to meet an equally low price of

a competitor. The third such defense (c) is that the differential resulted from price changes in response to changing market conditions, particularly sales in good faith in discontinuance of the business in the goods concerned. The fourth such defense (d) is that the price differential resulted from special low prices being offered to all dealers in competition with each other for periods of time. The fifth such defense (e) is that the price differential did not injure the public interest.

The second defense (b) that respondent lowered its prices to any purchaser in good faith in order to meet an equally low price of competitors is not sustained by any evidence. Respondent sought to elicit information relative to this defense from its competitors by requesting the issuance of subpoenas duces tecum. Further, in connection therewith, as already stated, Examiner Hier finally denied the application on the grounds there was no specific request covering particular competitive situations. His ruling was sustained by the Commission and a subsequent general renewal of the motion was denied by the undersigned examiner as already stated, and will be more fully discussed hereinafter in relation to the Second Count of the complaint.

There was no evidence to sustain the third defense (c) as there is no evidence that Admiral ever discontinued its business in any of the products it manufactured. It is true that it changed models from time to time, but that clearly is not a discontinuance of business in the basic types of the goods concerned.

The fifth such defense (e) that the price differential did not injure the public interest has no merit. There is no requirement in the provisions of the Clayton Act as amended by the Robinson-Patman Act that a finding be made that the proceeding is brought in the public interest. (*Webb-Crawford Co. et al.* v. *F.T.C.* (C.C.A. 5, 1940) 109 F. 2d 268–269, *cert. den.* (1940) 310 U.S. 638. See also construction prior to Robinson-Patman amendments that public interest is conclusively presumed "and needs to be neither alleged nor proved." *Standard Oil Co. of New Jersey et al.* v. *F.T.C.* (C.C.A. 3, 1922), 282 F. 81, dissenting and concurring opinion, p. 91. Case affirmed sub nom. *Sinclair Refining Co. et al.* v. *F.T.C.* (1923) 261 U.S. 403). Even where the words "to the public interest" occur in the Federal Trade Commission Act, no specific finding is required, it being only necessary that this inchoate element relating to jurisdiction be inherently present as a conclusion of law from the evidence in the case (*F.T.C.* v. *Raladam Co.* (1931) 283 U.S. 643, 648–9). Any proceeding brought by a public prosecutor or agency by its very nature is not brought to

protect private interest, but is brought in a public capacity for the purpose of protecting the public; and the charges in the complaint herein partake of that character. Certainly the history and language of the Robinson-Patman amendments of the Clayton Act manifest a clear purpose on the part of Congress not to protect competitors, but to protect competition so that individual businesses may not be destroyed by practices forbidden by the Act. The evidence in this case hereinafter found manifestly shows that the general practices of respondent tended to be unfairly injurious to, and destructive of, its smaller customers because of the preferences granted by respondent to its larger customers who competed with them. This certainly establishes general elements of public interest in this case beyond any question.

The fourth such defense (d) in the Third Separate Defense will be hereinafter considered in connection with respondent's cost justification defense (a) therein, with which latter defense substantially all of respondent's evidence is concerned.

The evidence clearly establishes numerous violations by respondent of Section 2(a) of the Clayton Act as amended. The evidence of numerous specific violations relates to transactions which took place during the years 1956 and 1957 in the three trade areas of Milwaukee, Washington and Metropolitan New York. While by and large the same general types of preferences in prices and arbitrary classifications of customers obtained in each of the three areas, the evidence naturally differs somewhat in respect to each area. Most of the Commission's evidence relates to the New York City area where respondent's pricing changes and readjustments apparently occurred with much greater frequency than they did in the other two trade areas.

Therefore, in order that the proof as to violations in each of the areas may be separately determined in this initial decision, the specific facts in each of these areas are separately found and stated in connection with the several general, ultimate findings of fact to which all of them relate. This is of importance primarily because the respondent's defense of cost justification was developed solely with respect to the New York area, although as hereinafter more fully discussed, some effort has been made by respondent to apply extensive cost justification accounting evidence to the price differentials between various customers in the New York area, also to the price differentials which have existed between various customers in each of the other two areas. The separation between the three areas is also maintained herein because of respondent's claim that the practices followed in its Washington branch in 1956 and 1957 have become moot by reason

of the sale of respondent's branch in that area in 1961 as hereinbefore found.

During the years 1956 and 1957, respondent classified its retail customers in each of the three trade areas and issued price lists to said customers according to the categories in which it had placed them. The prices, for identical goods appearing on the respective price lists, differed substantially. Many of the respondent's purchasers, located in the said trade areas, who were classified in less favorable categories, and were charged higher prices, were competitively engaged in the resale at retail of the respondent's products with purchasers classified in the more favorable categories paying the lesser prices.

The price differences, ranging from approximately 1% to more than 10%, varied by product and models within a product line. Included among the prices established by said price lists were some which provided for a reduction in unit price based upon an increase in the quantity of units purchased. Similarly, respondent, at various times, instituted programs whereby purchasers of specified large quantities were granted discounts referred to as "promotional allowances," for the purpose of reducing the purchasers' unit price. In many instances said price reductions were not offered to all competitors of the purchaser so favored and in other instances said competitors could not avail themselves of the reduced prices because of the large quantities to be bought.

The evidence with respect to the classifications and price differences in the three areas involved is very extensive and, even briefly stated, has required an eight-page appendix "A" in the proposed findings of complaint counsel to comprehensively narrate them. Since respondent has offered no substantial proposed findings in opposition to those presented by complaint counsel, reference to all of such evidence will not be made at length herein but only sufficient references to illustrative comparisons are herein stated and found.

In Milwaukee, as admitted by respondent in its answer with respect to the year 1956, the television customers were classified and issued different price lists. The evidence shows that three large retailers, Schuster, Samson and Hack's, were the only accounts classified "AD" among respondent's 300 retailer customer in said area. These three accounts paid the lowest prices provided in respondent's lowest price list. This was true whether they purchased in quantity or by single units. The other dealers were respectively scaled down in classification based on the amount of business done with Admiral as "Key" dealers, "M" dealers and simply "dealers." One illustration, out of

many shown in the record, will suffice to explain the price advantage granted to the higher classifications respectively over those lower than themselves in the said dealer classification of respondent. TV model #T323A1 carried a price to the "AD" dealers of $136.75, to the "Key" dealers $143.20, to the "M" dealers $145.00 and to the "D" dealers $148.70 (R. 192, 207–8; CX 208a-d). The percentages of difference as to this particular TV model, regardless of quantity purchased, favored the "AD" dealers 4.5%, 5.8% and 8.3% respectively, over the "Key," "M" and "D" customers. The advantage of those in the other classifications of accounts over those lower in the scale is self-evident.

Similarly, the "AD" accounts were given the most favorable prices in connection with the sales of phonograph and hi-fi sets and combinations thereof (R. 218–9, 300–2, 304; CX 221a–223(a)–(b), 224(a), 225(a), 227, 345(a)–(b), 347–59, 352–4). Similar preferences in price in favor of the higher bracket classifications of customers applied with respect to ranges (CX 228a–c; R. 224), refrigerators (CX 229a–e; R. 226) and freezers (CX 231–233, 234; R. 275–7). Air conditioners were sold generally on quantity basis regardless of purchasers in amounts of one–two; three–five; six–24; and 25 or more. But a price differential of 8.6% was the advantage the customers buying 25 or more units had over the customers of one or two units.

Two basic pricing schemes were used by the Washington division. Certain single lot prices, six to 12 items, 12 to 23 items, and 24 or more items, resulted in lower prices for larger quantities respectively. Most of respondent's products in Washington, however, were sold during 1956 and 1957 in accordance with arbitrary price categories determined by Leo Lessey, general manager of the Washington division, as well as by irregular prices fixed from time to time by various salesmen (R. 565, 665). Different quoted price lists were so used with different customers who did not know that their prices were different than those of other competing dealers or that there were different price classifications (R. 538, 664, 878, 882, 902). A primary promotional activity in Washington was an annual open house held on June 15 whereat respondent evaluated all the dealers in the area on the basis of the volume of their purchases. As a result of this practice, there were six basic price classifications: "accommodations"; categories 1, 2, 3; "special"; and George's (R. 515, 516, 543, 565, 665). Once a dealer had received his price classification based on the size of his initial quantity purchase, he continued to receive that price no matter what quantity of products he subsequently purchased (R. 517, 532, 564, 573, 579, 584, 590, 665). The percentage spread of the

most favored customer, George's, was 2.3%, 3.5%, 4.5%, 5.7% and 6.7%, respectively, over the other five classifications paying Admiral higher prices. Illustrative of such prices are those of TV model #T102 (CX 401–4), refrigerator model #D1150 (CX 447–51) and freezer model #11U70 (CX 460–4).

In the Metropolitan New York area respondent maintained three specific price categories prior to June 1, 1957, classified as "Agency," "Franchise" and "AAA" (R. 1027). As of that date, however, the "Agency" category was dropped and dealers theretofore so classified were placed in the "Franchise" category (R. 1028). The "Agency" dealers had been charged the highest prices by respondent. They were dealers who did not sign a franchise or who merely engaged in "pick up" purchase for a customer of theirs who wanted a particular model (R. 1027). The "Franchise" dealers, of course, had signed franchises at new merchandise shows conducted by respondent and these constituted the largest number of respondent's dealers in this area (R. 1027–8). To qualify in this class of dealers, a customer had to make a substantial specified initial purchase of televisions and radios. Such "Franchise" dealers could also qualify for the "AAA" price if they purchased a carload of televisions and radios or "white" goods; but subsequently such a dealer was not entitled to the carload prices unless he bought a complete carload (R. 1029–31).

The "AAA" dealers in New York were large purchasers that normally bought products by the carload and generally received them on direct shipment from respondent's factories. There were only about 15 dealers in this classification, including the Devega, Vim and Friendly Frost stores (R. 1030, 1218, 1283–4). This class of dealers received the lowest prices irrespective of whether they bought by the carload or but one or a few individual items. Even within this class, Vim received certain advantages over the other "AAA" dealers. Illustrative of this, Vim's price paid on March 21, 1956 for TV model #T18A1 was $90 as against the "AAA" price of $94, the "Franchise" price of $112, and the "Agency" price of $115. (CX 538(a), (b), 541 and 544). From the foregoing figures, it is clearly shown that substantial percentage advantages were enjoyed by each class over the others with Vim obtaining an even greater advantage.

These differences in price applied similarly during 1956 and 1957 with respect to other products—radios and phonographs (R. 1055; CX 576, 577, 579, 580, 581ab) and refrigerators and freezers (R. 1055–6; CX 606, 607, 611, 620, 622, 624, 657, 659). And commencing in January 1957, Admiral's air conditioner prices, which had pre-

viously been the same for all buyers (R. 1055–6), were fixed into four different categories based on quantities purchased, ranging from the lowest price to "AAA" dealers on up through "Carload" (or 65 units), "Split-Car" (33 units) and "Less than Split-Car" (any quantity less than 33 units) (R. 1122; CX 664–5).

In addition to the said price differences, which were inherent in Admiral's basic pricing structure, respondent also granted price concessions, in the guise of "promotional allowances," to some purchasers. For example, during 1956 and 1957, in each of the trade areas involved, respondent inaugurated its "GOYA" ("Get Out Your Ammunition," CX 141A) "promotional allowance" program whereby a dealer received a discount in the form of a flat sum reduction from the face of the invoice for purchasing a carload or one-half carload of specified Admiral merchandise (R. 94–7, 168–73; CX 78, 141(a), (b), 144(a), (b), (146)). Initially, and generally, "GOYA" pertained only to the purchase of a carload of appliances, that is, "white" goods, although later the promotion was expanded to apply to televisions, which latter practice was referred to as a "Split" (R. 94, 167–8, 171; CX 78, 144(a), (b)). Other variations of the "GOYA" program such as Bonus GOYA and PAR were also employed by respondent during 1956 and 1957 (R. 172–3; CX 146, 212(a), (b), 124, 130(a), (b)).

On June 28, 1956, respondent amended its "GOYA" program and provided $1200 and $1000 allowances respectively on carload purchases consisting of 75 pieces (CX 144(a), (b)). Although the program specified certain promotional services to be performed by the purchaser, none were required and the purchaser so favored received the allowances and treated them as price reductions which amounted to $16 and $13.33 per unit respectively.

The foregoing actual price concessions, however named or disguised, were either not offered, or were not functionally available, to all competing purchasers.

In Milwaukee, officials of respondent, in their testimony, agreed that the term "promotional allowance" as it appeared on invoices was a fictional statement to cover up price reductions. This was done so that the general price structure could be maintained since in this type of industry if prices are once broken they can never be restored (Raymond Hebenstreit, Vice President and General Manager of respondent's Milwaukee Division, R. 198–9, and Milton C. Akers, its General Sales Manager in this area, R. 228, 287; CX 254–5). The three "AAA" dealers, Samson, Schuster and Hack's, received allowances under the "GOYA" and similar programs and treated them as price reductions

(R. 286, 323, 358, 368–70, 374, 376, 381–3; CX 185(a)-(d), 186, 187(a)-(c), 246(a)-(d), 248(a)-(b); see also CX 237(c)-(f), (h)-(j)).

In Washington, D.C., "window and floor displays" and other "promotional allowances" required no services of the purchasers and were therefore treated as price reductions (R. 523–5). A $1,200 "promotional allowance" under the "GOYA" program was offered certain large dealers who were purchasing in carload quantities (R. 519, and see for example: George's—R. 650, 654, 657, 761, 770–2, 801; CX 517a–c, e). Other carload quantity deals with reduced prices were also offered to Hub (R. 726) and Todd's (R. 803). Todd's elected to use a number of its carload purchase price allowances for promotional purposes (R. 699–701, 805, 807, 815–7; CX 518, 528–30, 533–5). This was also true with respect to George's (R. 654, 575, 770–2, 801).

In the large Metropolitan New York City area, "GOYA" and similar carload promotional deals were offered to the large retailers, such as, Klein, Vim, Devega, Friendly Frost, and Macy. No services were required of them (R. 1032–6, 1282, 1313, 1434 and 1449–50). No services were required where these promotional allowances were granted in large quantity purchases and were, therefore, actually price reductions (R. 1175).

In all of the said three trade areas there is evidence that these large deals, while in some instances, were offered to small purchasers, were in fact not functionally available because of the financial inability of such small dealers to buy in carload quantities. This was true in Milwaukee (R. 395–7, 425–6, 458–9, 473–4 and 485–7); in Washington (R. 867–8, 876, 890, 968–70 and 980); and in New York (R. 1343 and 1418). It is also true that in Washington (R. 834–7, 903–6, 1501) and in New York (R. 1199, 1417, 1538 and 1575) that "GOYA" and other carload quantity discount allowances were not made to small dealers.

Counsel has cited *F.T.C.* v. *Morton Salt Company* (1948, 334 U.S., 42–3, 49), which holds that although discounts may be theoretically available to all purchasers, where they are not functionally available it is contrary to the intent of the Robinson-Patman Act that large buyers could thus obtain competitive advantages over small buyers. They have also cited a number of other cases, the latest of which is *Mueller Company*, Docket No. 7514, p. 7, mimeograph copy, January 12, 1962. The principle involved in these cases is applicable here and as counsel urge, if anything, more persuasive because in many instances the large, favored purchasers were given large quantity reduced prices even when they purchased in small amounts.

In the sales to purchasers of identical products, respondent charged said purchasers, in the various trade areas, prices consistent with the customer classifications reflected in the price lists hereinbefore referred to and granted certain purchasers the discounts also hereinbefore referred to. The price differences among competing purchasers in the respective trade areas, resulting from the foregoing pricing practices, were substantial.

Some detailed reference has already been made to the substantial percentage differences among the various classes of competing purchasers in the three trade areas involved herein. Complaint counsel in appendix "B" to their proposed findings have listed a substantial number of examples of differences in prices between the various classes of customers so arbitrarly made by respondent in each of the three areas. These specific instances cover televisions, radios, refrigerators, freezers, dehumidifiers, and ranges in the Milwaukee area where price differences percentage-wise and dollar-wise are extremely great. This is also true of the specific illustrations cited with respect to the same products in Washington, D.C. and in the New York areas. Said appendix "B" contains over 100 specific examples which show differences in prices between the favored and non-favored customers of as much as $41.05 on televisions (CX 366-k) with a percentage difference of 22.6% involved, and a difference of $46.30 on a refrigerator with a 13.7% involved (CX 237-g).

Respondent, in many instances, has charged competing purchasers in the same customer categories, prices which differed substantially for identical goods, purchased at or about the same time.

For example, in the New York area among its "AAA" customers: television model #T23A2TV sold to Klein on September 5, 1956 for $134 which is $21.50 or 15% more than Vim purchased the same item on the same date at $112.50 (RX 216-Z-5; CX 732-Z-5); radios and phonographs on May 10, 1957 (RX 206-a; CX 733a) Devega paid for model 215 $23.95 which was $1 or 3.8% more than Vim paid for the same model, $22.95; and on freezers on October 8, 1957 Devega for model #11U50P paid $169 which is $19 or 11.3% more than Vim paid for such model on October 31, 1957 of $150 (RX 208 and CX 735).

In summation, respondent's products of like grade and quality were sold to competing purchasers at different prices in each of the respective areas at or about the same time and such products were sold to said purchasers for use, consumption, or resale within the United States or a territory thereof or the District of Columbia.

As will subsequently be discussed herein in connection with respondent's defense of cost justification, differences in prices between various customers or classes of customers cease to be de minimus and become important only when differences involved are substantial in the light of the particular product and competitive situation involved. It is a classic truism that a one cent difference in the price of a railroad locomotive is of no importance but such a difference is vital if the product is a pack of chewing gum. It is the percentage of difference involved in the particular competitive area as applied to the particular product which determines the substantiality of price discrimination. This difference is probably sharpened where a line of goods consists of "push" items which are sold in competition with better known products of like character and of substantially the same grade and quality as in the case at bar where Admiral's customers dealt also in many other manufacturers' television and radio receiving sets and other products. The evidence of many dealers does not reveal Admiral to have been the only product line sold by any retailers.

There is a considerable amount of testimony in this record that competition at the retail level in each of the three trade areas in the sale of respondent's products was extremely keen and rough and that price was the most important factor in connection with the retail sale of Admiral products in competition with competing goods of other manufacturers. (In Milwaukee, R. 394, 409, 423–4, 457, 472–3 and 485: in Washington, R. 831, 866, 885, 902, 965 and 1503: and in New York City, R. 1196, 1235, 1353, 1380, 1415, 1536–7 and 1571.) In the New York City area, Samuel Schwartzstein, the very competent general manager of respondent, admitted that the retail market in his area was extremely price sensitive and conscious (R. 1164). There is abundent evidence that small price differences at retail of as little as $.15, $.25, $.50 and $1.00 will switch a sale to another dealer. This is true with respect to television sets (R. 1334, 1538, 1584) and with respect to radios, $.15 and $.25 retail price differences will also switch a sale (R. 888).

These conditions required non-favored retailers to work on very low percentage of mark up of their cost of Admiral products in order to meet their price competition (R. 832, 867, 888, 966–8, 1503, 1198, 1353–6, 1381–3, 1416, 1535 and 1570). In one New York case, this mark up was only a $1.00 mark up on portable phonographs (R. 1559–60). In the several market areas competitive conditions were such that mark ups, however small, were frequently reduced by non-favored customers of respondent in order to make sales (R. 965, 968, 1355, 1381, 1416–7, 1503 and 1517); and in one instance, the mark up to make a sale went down from 13% to 3% (R. 1381).

Non-favored retailers who paid respondent much higher prices than did their competitors had very low net profit returns on the products here in question and in some cases they even sustained losses during the years 1956 and 1957. These low net profits ranged from 7.5% down to as little as .2% (R. 391–2, 422, 456, 827, 863, 900, 1194, 1214–5, 1352, 1368 and 1462–3). There was some testimony that such retailers sustained losses on the sale of certain products with the amount unspecified (R. 863, 962), while some retailers testified to losses on such products ranging from 1% to 3% (R. 1413, 1462–3).

It is therefore found from this evidence that the charging of substantially higher prices by respondent to some of its retail customers who compete with other customers of respondent favored by lower prices has been the continual general practice of respondent, although subject to numerous changes and variations. Such price differences have and are discriminatory to such a great extent that they have had, in many instances, the actual effect of substantially lessening, injuring, or preventing competition by the said non-favored retailers with the favored retailers to which respondent sells its products in the various trade areas; and it is not only reasonably possible, but is reasonably probable, that such price differences may have such effects in the future unless respondent is restrained from engaging in such practices.

Respondent has contended, in its Proposed Finding 49 and conclusion 7 (see Respondent's Brief, pp. 39, 84–85), that there is no evidence that any of respondent's customers had knowledge of any of the price discrimination involved herein. There is abundant evidence, however, from which it is inferred that the smaller dealers knew they were being undercut by larger dealers but in any event it is immaterial in this proceeding whether any customer of respondent knew of its price discriminations in favor of such customers' competitors. The act was designed to protect competition and not competitors. The only reference to knowledge is the phrase "knowing receipt" of such price discriminations in Section 2(a). This applies only to buyers (80 Cong. Rec. 6350–1, 6428 (1936)). This proceeding is not brought against any buyer or buyers but only against the respondent seller.

It is therefore concluded that the evidence definitely establishes that respondent has violated Section 2(a) as charged in the complaint; and a cease and desist order must issue against it unless a showing has been made that in its pricing practices respondent's price differentials between its competing customers have been cost justified under the authority of the first proviso of said Section 2(a) and as pleaded in Paragraph Ten (a) of the Third Defense in the answer.

Respondent's Cost Justification Defense Not Sustained By the Evidence

It is basic that a respondent who seeks to justify price differentials among its customers has the burden of proving such justification. (*F.T.C.* v. *Morton Salt Company*, *supra*, 334 U.S. at pp. 44–5) The Commission has sustained its burden of proving a prima facie case of Section 2(a) violations by establishing that substantial price differentials were made by respondent among its various customers for sales of goods in the same grade and quality in the three trade areas involved herein. Respondent has never precisely conceded that such price differentials existed and objects to complaint counsel's proposed findings thereon. It contends, together with other arguments, that such price differences as may have been established are too insignificant to support the complaint.

Respondent's evidence of matters pertaining to its cost justification defense constitutes most of the record made by it. An extensive cost study covering the 1956–1957 situation in the Metropolitan New York area was made by accountants of S. D. Leidesdorf, Certified Public Accountants, with offices in New York, Chicago, St. Louis, Greenville, S.C. and Charlotte, N.C. This firm had been employed generally as the accounting firm of respondent corporation and had not been employed merely for the purpose of preparing its cost accounting in this proceeding. The four professional witnesses on this defense are, one of the partners of S. D. Leidesdorf, William E. Arnstein (R. 3058–72, 3073–8, 3079–81, 3084–8, 3089–91, 3094–3108, 3111–7, 3120–3, 3128–32, 3138–61), and three of its other accountants, Herman Burstein (R. 1972–90, 2868–94, 3048–58, 3072–3, 3078–9, 3081–4, 3088–9, 3091–2, 3108–10, 3117–20, 3123–8, 3132–3, 3161–77, 3245–97, 3306–8), Steven Reiss (R. 1990–2003, 2911–20), and Emmet Patrick O'Sullivan (R. 2894–2911). These latter three worked under Arnstein's direction.

As to the pricing practices of respondent in the other two trade areas under consideration, respondent's evidence relative to Milwaukee was presented in that city on July 6 and 7, 1960 (R. 2312–2501). Respondent's evidence as to the Washington trade area was presented in that city on September 19, 1960 (R. 2502–96). These portions of the evidence largely consisted of the testimony of a number of retail dealers in those places who were recalled to testify further with respect to matters respondent deemed material to its defense. In New York, a number of retail customers of respondent were also recalled for further examination. The accountants also testified in New York, but by far the largest part of the testimony taken there was that of Samuel Schwartzstein, the respondent's general manager and former

sales manager in the area. He testified at length, both on direct and cross-examination, explaining the elements claimed to constitute the prices of respondent's numerous sales to the customers theretofore selected by complaint counsel as representative in that area. As respondent's counsel have aptly suggested, most of the hearings in New York were concerned with the correction of certain errors in the computation of "net prices" made by the Commission's accountant since the extensive evidence of Schwartzstein is largely of such corrective character (R. 1875–1959, 2014–40, 2073–2129, 2131–85, 2205–37, 2722–2825, 2920–70 and 3007–32). Numerous stipulations of counsel also were made in connection with Schwartzstein's testimony on these matters. (For example, R. 2185–90, 2191–2205 and 2808–25)

With respect to the cost justification of the price differentials clearly demonstrated to have been allowed by respondent in the Milwaukee and Washington trade areas, no cost study thereof was made by respondent although a number of comparative price tabulations for these areas are in evidence (RX 226–235). The reason therefor, as stated by its counsel, appears to have been the great expense involved in causing such cost studies to be made. In connection with such counsel's attempt to apply the principles used in the New York cost study to the other two areas, by means of an allegedly professional opinion of witness Arnstein, it was stated by counsel (R. 3150),

> I am not attempting to get the same benefits we would obtain by making a cost study in either Milwaukee or Washington. The cost of one of these things is great. This one [covering the New York trade area for 1956 and 1957] has run in the nature [sic] of $80,000 to date [August 22, 1961]. We can't afford to do that for both Milwaukee and Washington. So all I am expecting to get out of this [witness' answer to a hypothetical question as to whether results would be approximately the same in Milwaukee and Washington if such cost justification studies were to be made] is that you will find cost savings of this kind inherent in Milwaukee and Washington because of the identities of operations in those two cities with New York as disclosed in the record. We are not going to get any definite figure from this witness. He is a good accountant. He is not going to make a statement with a definite figure. I am not trying to get a definite figure. You can rely on the fact that it is impossible.

The foregoing statement arose upon objection being made by complaint counsel to the hypothetical inquiry posed to the witness Arnstein which was as follows:

> Assume that Washington and Milwaukee branches in 1956 and 1957 distributed the same Admiral products as did the [Metropolitan New York] Division during that period of time . . . and that they always sold to retailers as did the Metropolitan Division; also assume that in Washington and Milwaukee some retailers were larger than others and received lower prices as did some retailers in the Metropolitan Division and that some of the larger dealers only purchased

direct carloads. With these assumptions, what, in your opinion, would a cost study, made like that prepared for the Metropolitan Division, disclose with respect to Washington and Milwaukee in selling the larger dealers as [compared to] selling the smaller dealers? (R. 3145-6)

Objection to this question was sustained on many grounds, among them that the witness had not made such a study and that his answer would be a pure conclusion premised on many infinitesimal unstated matters, and such answer would foreclose any proper or effective cross-examination (R. 3146-50). An offer of proof was then permitted to be made to which objection was similarly sustained (R. 3153). In short, considering the infinite detail which the Commission has now indicated is required in the presentation and consideration of evidence in Robinson-Patman cases, *Ark-La-Tex Warehouse Distributors, Inc. et al.*, Docket No. 7592, *supra*, there can be no question as to the impropriety of this proffered opinion evidence. This type of case cannot be tried upon an expert opinion as to what a study would show even generally when the study document itself has never been prepared and the data whereon it would necessarily be premised have not been stated, studied and analyzed.

It is, therefore, necessarily found that the respondent has wholly failed to establish its cost justification defense to the Commission's case-in-chief insofar as the Milwaukee and Washington trade areas are concerned. It would seem to be entirely proper for the examiner therefore to stop at this point and give no consideration to any of the cost justification evidence pertaining to the New York Metropolitan area since the proof of discrimination in any one of the three areas would be adequate to sustain the cease and desist order requested by complaint counsel. Since counsel for both parties have discussed respondent's extensive and well-arranged cost study so exhaustively in their briefs, however, some consideration thereof is deemed appropriate.

With respect to respondent's cost justification of price differentials in the Metropolitan New York area, the basic contention between complaint counsel and respondent arises from respondent's use of average prices in its cost study. Complaint counsel hold to the doctrine that the averaging concept of prices used by respondent is not applicable in this proceeding. Respondent contends that since complaint counsel has selected a number of specific instances of compared prices as the foundation of its case rather than a broad price study of all sales to all customers in 1956 and 1957 in the several areas involved, it is appropriate for respondent to make its own selection of its prices on various products to the same customers during such

period. Respondent argues that under the facts of this case only a weighted average method of measuring price discrimination is meaningful in ascertaining probable injury to competition.

It is also urged in effect by respondent that many of the illustrations of comparative prices, which complaint counsel have set up as proof of violation of Section 2(a), are not proper measures of price discrimination because in numerous instances the net price per model cannot be accurately determined for comparative purposes since in each of numerous instances many of the articles were bought in combinations of various models at a total price which was less than the sum of the then current prices of each model if such models had been bought separately. It is therefore insisted that the price of a model bought by itself was determined by the buyer. Respondent reasons that if its customer did not wish to buy the combination he could purchase a single item and pay a higher price for it whereby such buyer's lack of merchandising skill was the real reason his larger competitors were able to outsell him. In substance, respondent advances the bizarre doctrine that a small retailer, who is either unwilling or unable to buy a large line of models offered in combination, himself causes the price discrimination rather than the respondent who made such combination offers. Respondent also contends that these combination offers were small enough so that even the non-"AAA" customers had the financial ability to buy them. Some of them may have been able to buy the combinations, or some of them, but whether they were offered or not, or accepted or not, each particular buyer had the right to buy or not as he chose. In the examiner's opinion, respondent's reasoning in support of this doctrine is specious, untenable, and unfair. Respondent seller is the offeror and it cannot shift to the buyer the burden of meeting price competition on any one article by forcing a combination offer upon the buyer of many other articles which the buyer either does not desire or cannot purchase.

It has been recognized by the highest authority that the Commission in presenting a Section 2(a) case is justified in using a few illustrations. "* * * [S]ampling has long been a recognized technique in price discrimination cases". *U.S.* v. *Borden Company*, *supra*, 370 U.S. at page 466, footnote 6. This does not mean that cost justification is only necessary as to the sales upon which the prima facie case of the Commission has been premised, id. None of the respondent's accountants who testified was willing to state that the methods they used in the cost justification study were those customarily used in cost accounting. The averaging concept used in this case was one determined

upon by the chief defense counsel and not by the accountants. It was his contention that the system of arriving at cost defenses was "The result of my own ingenuity. This is a legal question and I object to your asking * * * [Accountant Burstein] * * * any questions as to what he thinks about it." Objection being overruled, the witness Burstein answered, "We were guided here by counsel and we accepted his interpretation." He had previously testified that in preparing cost data he did not "devise this system of arriving at these cost differences" (R. 3056–7). On a later occasion he further testified as follows:

Q. Do I understand that you and the Leidesdorf firm approved this computation of price differences, is that correct?

A. I am afraid I will have to ask for an explanation of what you mean by the word "approved." Do you mean from the mathematical approach?

Q. The method, the approach.

A. Frankly, I don't know how to answer that. Here we have been following the instruction of Mr. Williams [respondent's counsel] as to what is a legally correct method of obtaining the price difference under Robinson-Patman.

Mr. Williams: I will take full responsibility for the method. This is what we have to argue about. It is not really an accounting question. * * *

Q. Do I understand that your work consisted solely of checking Mr. Williams' mathematics?

A. Yes. * * * Excuse me, yes, plus making additions which he requested us to do which he had not previously done himself. * * *

Q. Again, basically or solely, your only connection with these tabulations, [respondent's exhibits] 237 through 242, was purely mathematical, is that correct?

A. That's right.

Hearing Examiner Laughlin: In other words, you didn't evolve the theory but you followed Mr. Williams' premise?

The Witness: Yes. (R. 3268–70) (See also R. 3276–8 to the same effect.)

The respondent's cost study's value certainly rests fundamentally on whether its counsel has selected a proper legal basis therefor. This determination was not left to the accountants themselves and nowhere in their evidence did they purport to determine its correctness as a matter of cost accounting practices. In fact, there is no evidence that any of these accountants were ever before engaged in any cost justification study under the requirements of the Robinson-Patman Act amendments to the Clayton Act. This is not to say that they were not well qualified in their field, but is merely indicative of their lack of acquaintance with the particular principles of accounting which have been developed in this type of litigation. Of course it is an appropriate function of counsel to outline the problems which he desires his accountants to determine through any cost study made by them, although, in this case, they were merely left the mechanical

function of computing and checking figures in addition to making certain time and motion studies involving expenses allegedly incurred "in the cost of * * * sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered" as authorized in the first proviso of Section 2(a).

The respondent, in adopting the averaging principle, relies chiefly upon *Sylvania Electric Products, Inc.*, 51 F.T.C. 282 (1954) wherein the Commission held it proper to use a "weighted average" price in determining the amount of the differential to be cost justified. The Sylvania case as discussed in complaint counsel's proposed findings, appendix "C," page 2, and their answer to respondent's proposed findings, page 12, clearly involved but one area of competition—Sylvania's own distributors and Philco to whom price advantages were granted. Also, Sylvania products, some 600 models of radio tubes for replacement purposes, were of such character that Sylvania's customers were obliged to carry the entire line. On this point, Chairman Howrey, in his learned concurring opinion, says, "Thus we are confronted with a unique marketing situation—one where volume and demand are not affected by such normal competitive factors as price, consumer preference or profit margins." The Commission has rejected the averaging concept in *Thompson Products*, 55 F.T.C. 1252, 1264–5, 1276–7 (1959). The Commission, in distinguishing the Sylvania case, in sustaining the hearing examiner in his ruling on this point, among other reasons, emphasized the general competitive situation obtaining which is analogous to that of Admiral's customers herein:

> 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. (id., p. 1277)

Other authorities have recognized the peculiar characteristics of Sylvania's pricing system.

> The Commission's conclusion flowed from the realization that the challenged price differential was commercially significant not in terms of individual items sold by Sylvania, but rather in terms of its price policy in distributing an entire product line through two separate channels of distribution. (Frederick M. Rowe, *Cost Justification of Price Differentials Under the Robinson-Patman Act*, 59 Col. L. R. 584, 590 (April 1959). See also Herbert F. Taggert, *Cost Justification*, p. 380).

In *Reid* v. *Harper & Brothers*, (CA 2, 1956) 235 F. 2d. 420, 422, in referring to the Federal Trade Commission's authorization of the use of aggregate cost differences to justify price differentials, citing

the Sylvania case, the Court stated that this method was permissable where there was "absent a showing that the lack of uniformity of the price spread had any competitive significance." In the case at bar, however, there was intensely sharp competition in the sale of respondent's products at retail and while the price differences were very small compared to those in numerous cases cited by respondent, it is clear from the evidence in the case that the difference of a dollar or a few dollars meant the loss of a customer when the price of a radio or television is involved.

In respondent's cost justification study, there has been some attempt to determine aggregate cost differences between various classes of customers. But it is not cost differences but price differences which are vital. Respondent's study was not premised on all of the many millions of dollars worth of annual business done by it in the Metropolitan New York area, but was limited to only a part of the sales to those 13 customers which had been selected by the Federal Trade Commission and shown in its tabulations in evidence to illustrate and establish various price discriminations whereon this Section 2(a) count is premised. Aggregate price differences cannot be determined from this limited number of customers and sales as against the total number of the many hundreds of customers and thousands of sales which respondent had during 1956 and 1957 in this area.

Respondent cannot cost justify its price differences between its various customers by averaging these few examples out of its innumerable transactions. The evidence indicates that orders of respondent's customers were never even substantially identical but varied between customers and also varied from time to time with each customer. This is particularly true where respondent made so many different types of combination offers to its customers. For respondent's cost justification to be fairly accurate, it must be assumed that the Commission's tabulated sales for the 15 regular and five "AAA" dealers in New York were representative of all sales to these classes of dealers and that the mix or percentage of each model of the total would be the same for both classes of dealers. Complaint counsel argue that respondent's selections of such a small segment of its overall operations both in its number of dealers and its dollar volume are too limited to furnish a valid sampling since hundreds of other regular dealers and some 36 "AAA" dealers are not truly represented by the limited sales to those few dealers which were selected by complaint counsel to establish the case-in-chief. The examiner concurs in this and, while recognizing the burden which a complete cost justification entails upon respondent, also considers that the exceedingly

irregular and frequently changed price patterns followed by respondent are largely the cause of its difficulties in this respect. If this was due to any specific competitive situations in the New York Metropolitan area among Admiral and its rival manufacturers of televisions and other products involved herein, respondent has not established that fact by competent evidence, and mere general competitive situations are immaterial in this proceeding as hereinafter more fully discussed in connection with the defense to Section 2(d). As already stated in *U.S. v. Borden Company, supra*, 370 U.S. at page 466, footnote 6, the court emphasized that defendant's "cost justifications were not limited to the Government's sample stores." The court quoted with approval from *Champion Spark Plug Co.* 50 F.T.C. 30, 43 (1953) as follows (id. 470) : "A cost justification based on the difference between an estimated average cost of selling to one or two large customers and an average cost of selling to all other customers cannot be accepted as a defense to a charge of price discrimination." And in the further course of the opinion the court held that "The burden was upon the profferor of the classification to negate this possibility [of improper allocation of cost to some buyers] and this burden has not been met here." (id. 471).

Another reason why an average cost cannot be shown by respondent is that its prices were never uniform as its salesmen were free to make special pricing deals to any customers and did make such deals. And even within the arbitrary classifications in respondent's various price lists there were substantial variations in price ranging from 1% to 10% for identical items.

It would serve no useful purpose to discuss the numerous other contentions and supporting arguments of opposing counsel or to refer specifically to any of the numerous items in respondent's cost justification study since such study is admittedly premised upon a very small sampling of its total business in the Metropolitan New York area. Such discussion here would only unduly lengthen this decision. It is therefore concluded that respondent has failed to maintain its cost justification defense.

In respondent's third separate defense, one of its subordinated defenses (d) is that its price differentials resulted from special low prices being offered to all dealers in competition with each other for periods of time. This defense has not been maintained. There is substantial dispute as to whether all dealers were offered special low prices. Furthermore, in any event, these special low price offers were not just on individual items but were made in connection with the combination offers as hereinbefore discussed. Whether any of the

small dealers or all of them were financially able to accept the combination offers is immaterial, for, as already stated, respondent cannot force its dealers to obtain lower prices by making combination offers which they do not desire to accept.

Section 2(d) Defenses Not Proved

In Paragraph Two of Count II of the Complaint it is charged that in the course and conduct of its business in interstate commerce respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by the respondent and that such payments usually referred to as promotional allowances were not available on proportionally equal terms to all other customers competing in the distribution of its products. In Paragraph Five of said Count II it is stated as a legal conclusion that these acts and practices of respondent violated Section 2(d) of the Clayton Act, as amended.

In Paragraphs Three and Four of said Count II of the complaint more specific reference is made to certain types of allowances or deductions from cost, including newspaper advertising and floor and window displays, and it is further alleged that in some instances the respondent failed to offer such allowances to all competing customers on proportionally equal terms, that in other instances it failed to offer such allowances on any terms to non-favored competitors and in some instances the terms of respondent's allowances were such as to preclude competitors of favored customers from availing themselves of the opportunity to participate in such promotional programs.

Respondent has pleaded four defenses in the answer to Count II of the complaint. In its First Defense thereto, while admitting that in some instances it paid to some retail customers allowances or deductions as compensation for promotional services or facilities, respondent denies any discrimination among its customers in connection therewith.

As its second defense, respondent alleges that said Count II of the complaint is moot because on December 31, 1957, for business reasons not connected with the complaint, respondent ceased to sell its products to retailers and has no intention of resuming such sales. In its third defense, respondent states conditionally that if, as claimed in Count II of the complaint, it made any payment or contract to pay something of value to any retail customer which was not available on proportionally equal terms to retail competitors of such customer,

such act was performed in good faith to meet equal payments or contracts to pay made by a competitor of respondent. As a fourth defense to said Count II, respondent alleges in substance that it "did not injure the public interest."

In its proposed findings with respect to the evidence pertaining to Section 2(d), however, respondent has waived all of its four defenses except that of meeting competition. On page 40 of its findings, it states, "Respondent does not dispute that the evidence establishes it did not make cooperative advertising allowances available on proportionally equal terms to all customers of the Milwaukee, New York, and Washington branches competing in the distribution of Respondent's products. Instead, it has based its defense on meeting competition under Section 2(b)."

The foregoing admission by respondent obviates the necessity of reciting at length herein any of the very substantial evidence in the record sustaining the allegations of Count II of the complaint. That this evidence is quite extensive fully appears from the exceedingly numerous correct record references on pages 21 to 33, inclusive, of the proposed findings of complaint counsel as well as in their separate filing entitled "In Camera Material Supporting the 17th Proposed Finding," which document includes two tabulations and two pages of other record references.

The examiner therefore makes the following specific findings of fact with reference to the Section 2(d) violations:

In order to promote the resale of its products, and in the course and conduct of its business in commerce, respondent, by way of credit memorandum or deductions from invoices, has, for many years, and specifically during the years 1956 and 1957, made payments to or for the benefit of some of its customers, in various competitive areas, as compensation for various promotional services or facilities, furnished by said customers, pursuant to agreement with the respondent, in connection with the offering for sale or sale of respondent's products.

Respondent distributes its cooperative advertising manual to each of its wholly owned branches, and the cooperative advertising policies of the respective branches are purportedly guided by that manual. Neither the respondent nor its branches distribute the manual or any printed matter relative to the procedures or terms and conditions for obtaining promotional allowances to their retail customers, and in fact it was not respondent's policy or practice to notify all customers of the amounts available to them.

During 1956 and 1957, respondent granted such allowances, in return for a variety of promotional services, furnished by certain cus-

tomers located in the respective trade areas hereinbefore mentioned but failed to offer or grant such allowances on proportionally equal, or any, terms to all competition of the favored customers.

During the years 1956 and 1957, while favored customers received allowances for promotional services furnished Admiral in connection with the resale of its products, non-favored competitors of said customers were purchasing goods of like grade and quality, at or about the same time as the favored customers.

As already stated by the above admission of respondent, it definitely is relying upon its third or "meeting competition" defense and has abandoned its three other defenses to said Count II of the complaint. But inasmuch as it apparently still insists, as its second defense to Count II, that the issues as to the situation in Washington, D.C. are moot because pendente lite it has sold its branch in that city (respondent's brief, pp. 50, 86–7, 89–90), the undersigned examiner specifically holds that such defense has not been maintained for the same reasons as those stated with reference to the like defense to Count I of the complaint. For brevity, such reasons there given will not be repeated here.

Similarly, as to the fourth defense of Count II, the alleged lack of public interest, it is held such defense has not been maintained for the same reasons that the like defense of Count I has been rejected, and they will not be repeated here. In summary, each of the three defenses to Count II of the complaint, general denial, mootness, and lack of public interest are each found and are hereby held not to have been maintained.

The main thrust of respondent's third defense to Count II is that the rulings made denying respondent's applications for subpoenas duces tecum for its competing manufacturers and dealers whose products are also sold in the Milwaukee, Washington, and New York trade areas in competition with the respondent's products constitutes prejudicial and basic error which requires a dismissal upon three grounds: (1) the documents sought to be obtained for respondent's said competitors were relevant and necessary to its respective defenses of meeting competition both under Section 2(a) and 2(d); (2) it is now problematic, after the passage of time since 1956 and 1957, whether the documents sought by these subpoenas are still in existence; and (3) the evidence as to the meeting competition issues is old, being limited to evidence occurring in the years 1956 and 1957, a defense somewhat akin to laches in equity.

In opposition to these contentions of respondent, complaint counsel urges, in substance, that the rulings denying respondent's motion for

subpoenas were correct since such motions lacked specificity and were not followed through by further proceedings in response to said rulings; and respondent's claim that due to the lapse of time, it is probable that respondent's competitors' records have been destroyed is purely conjectural. They further contend, in substance, that the passage of time does not destroy the value of the evidence submitted concerning respondent's practices in 1956 and 1957.

Determination of these matters requires a detailed study of the history of respondent's application for such subpoenas duces tecum. On March 3, 1959, Examiner Hier issued an order granting in part and denying in part a prior motion of respondent for the issuance of a number of subpoenas duces tecum to competitors engaged in the manufacture and sale or sale of other brands of the lines of products involved in this proceeding in the three trade areas in question. That motion was dated February 27, 1959 and filed March 2, 1959. It consisted of three distinct parts and the persons subpoenaed and the specifications of the documents requested were respectively set forth in the three separate parts, each relating to one of the said three trade areas of Milwaukee, Washington, and New York. In his order of March 3, Examiner Hier granted such parts of the motion as related to the Section 2(a) charge in Count I of the complaint but denied it as to the Section 2(d) charge in Count II of the complaint. He did this on the then controlling authority of the Commission's opinion in Docket No. 6212, *Henry Rosenfeld, Inc. et al.*, June 21, 1956, subsequently reported in 52 F.T.C. 1535, in which the Commission held "that Section 2(b) could not constitute a substantive defense to a charge of violation of Section 2(d) of the amended Clayton Act." Upon appeal from this ruling, the Commission adhered to its former holding and sustained the examiner on May 29, 1959 that the meeting competition "defense afforded in subsection (b) of Section 2 * * * does not extend to other proceedings involving proved charges of violation of Section 2(d)."

In his ruling of March 3, Examiner Hier granted the motion for subpoenas insofar as they dealt with proposed defenses to Section 2(a). These subpoenas were duly served upon the respondent's named witnesses, all of whom, except two of the 26, filed motions to quash or limit such subpoenas within the time fixed for their appearance. In his order of April 7, 1959, Examiner Hier correctly recited that these subpoenas had been issued on request of respondent to produce evidence in support of the pleaded defense that its lower price to certain customers "was made in good faith to meet an equally low price of a competitor"; that these subpoenas were unusually broad in scope

but were issued on the ground that they "had apparent or at least sufficient relevance"; further ruled that the concerns subpoenaed in their motions to quash or limit the subpoenas based the same on the grounds of irrelevancy or unreasonableness of scope. In his analysis of the propriety of issuing said subpoenas, the examiner sustained the motions opposing such subpoenas on the ground that "Section 2(b) reads in the singular; it is concerned with individual competitive situations, particular prices on particular sales by particular competitors at particular times on specified products—not with meeting with competition in general." In support of this construction of Section 2(b), he very correctly cited *U.S.* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 753; *Standard Oil Co. of Indiana* v. *F.T.C.* (1951) 340 U.S. 231, (245–6); *F.T.C.* v. *C. E. Niehoff and Company*, 241 F. 2d 37; and ***Standard Motor Products*, *Inc.*** (1954), 50 F.T.C. 624 (626–7). (This principle has recently been reaffirmed in *Tri-Valley Packing Association*, Docket No. 7225 and 7496, May 10, 1962, mimeographed copy of Opinion, pp. 6–7.) Examiner Hier thereupon ruled in substance that respondent could not conduct a fishing expedition and knew, or should know, the specific situations which caused it "in good faith to meet a equally low price of a competitor." He further ruled that "if respondent's counsel will present new subpoenas narrowed and defined as indicated, consideration of their issuance will be given," and sustained all motions to quash subpoenas duces tecum. Respondent prosecuted their appeal to the Commission from this order on May 25, 1959 within time granted by the Commission. Complaint counsel filed their answer in opposition to the respondent's appeal and as already recited on July 15, 1959 the Commission, after the death of Examiner Hier, issued its order denying such appeal together with its extensive opinion referring to the foregoing facts and sustaining Examiner Hier's ruling upon the ground of the authority cited by him as well as upon another so-called "Moog issue" (*Moog Industries, Inc.* v. *F.T.C.*, 355 U.S. 411) relating to the Commission's discretion, to determine the effective date of any order which might be issued. In particular the Commission held,

> The specifications * * * [of the subpoenas] * * * failed to describe with reasonable particularity the documents sought. Any subpoena duces tecum based upon such specifications would be entirely unreasonable in scope in that documents sought are related to competition generally and are not identified with specific offers by respondent's competitors to customers to whom respondent gave the lower prices which are the basis for the price discrimination charges in the complaint.

More than two years afterward, on August 21, 1961, respondent orally renewed its motion for the issuance of such subpoenas duces

tecum to competitors for the purported purpose of establishing its meeting competition defense both to the 2(a) and 2(d) charges. This was done briefly and without specific supplementation of any alleged specific competitive situations or other pertinent information. The undersigned examiner therefore summarily denied this renewed motion on said date of August 21, 1961 (R. 3014–5). From this ruling no appeal was taken. Shortly thereafter it was held in *Exquisite Form Brassiere, Inc.* v. *F.T.C.* (CA DC, Nov. 22, 1961), 301 F. 2d 499, cert. den. 369 U.S. 888 (July 12, 1962) that the Section 2(b) meeting competition defense was available in a Section 2(d) case. This decision referred specifically to the Commission's earlier rulings in *Henry Rosenfeld, Inc., supra, J. H. Filbert, Inc.*, 54 F.T.C. 359 (1957) and the Commission's said ruling of 1959 in the case here at bar, *Admiral Corporation*, 55 F.T.C. 2078, each of which was adversely criticized (301 F. 2d 505–6). It also disagreed with the Commission's like ruling in *Shulton, Inc.* A subsequent court decision in this latter case, *Shulton, Inc.* v. *F.T.C.* (CA 7, May 10, 1962), 305 F. 2d 36, followed the judicial ruling in *Exquisite Form Brassiere, Inc., supra.* It is therefore now well settled that the defense of meeting competition is available in a Section 2(d) case.

Subsequent to these judicial decisions, respondent made no further requests for a reversal of the former orders on which no appeal had been taken, although final hearings herein were held on April 25, 1962 and the record was not closed for the reception of further evidence until July 24, 1962, 12 days after the Supreme Court had finally ruled on July 12, 1962 by denying certiorari in *Exquisite Form Brassiere, supra.*

The issuance of subpoenas by hearing examiners is provided for by Section 6(c) of the Administrative Procedure Act, 5 U.S.C. § 1005(c), which pertinently provides "Agency subpenas authorized by law shall be issued by any party upon request and as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought . . . ." At the time respondent filed its motions in the spring of 1959, the Commission's rule relevant to subpoenas was Section 3.17(b) of its May 1957 Rules which provided "*Subpoenas duces tecum.* Application for issuance of a subpoena requiring a witness to appear before a designated hearing examiner at a specified time and place and produce specified documents shall be made in writing to the hearing examiner or to the Commission, and shall specify as exactly as possible the documents to be produced, showing their general relevancy and reasonable scope. * * *"

The subsequent rules of 1960, Section 415(b) is identical therewith. This latter rule was in effect from July 21, 1961 until August 1, 1963 and therefore procedures thereunder were available to the respondent at all times after the decision of the Court of Appeals in *Exquisite Form Brassiere, supra*, on December 22, 1961. During these eight months before the record was closed, respondent failed to renew its motion for subpoenas under the new and binding interpretation in *Exquisite Form Brassiere, supra*, which would have required the issuance of such subpoenas if substantially specific and relevant to individual competitive situations. It is contended by counsel supporting the complaint, since respondent made no such motion, it cannot now urge the failure to issue catch-all and insufficient subpoenas back in 1959 as justification either for dismissal or for reopening of the case. Respondent's position in this respect is chiefly that, since the evidence solely pertains to alleged price discrimination in 1956 and 1957, it is doubtful if respondent's competitors would have preserved any of the documents sought by the respondent in its motion for subpoenas filed in the early part of 1959. Of course, the specific character of the documents sought to be requested under a Section 2(b) defense insofar as a Section 2(a) charge is concerned is identical with that which would be requisite in a defense to a Section 2(d) charge. The respondent therefore slumbered for many months during which time, had it chosen to do so, it could have moved again with proper showing for a reconsideration of earlier motions on the grounds of *Exquisite Form Brassiere, supra*. The examiner therefore concurs with counsel supporting the complaint that respondent is not serious in its contention and finds that, in any event, it has waived its right to complain that such subpoenas have not been issued. Certainly within the record there is utterly nothing from which it can be fairly inferred that respondent ever attempted to meet a specific competitive situation under its defense of meeting competition to the Section 2(d) charge any more than it would to such defense to the Section 2(a) charge. To the contrary, the record broadly indicates that the various broad advertising programs and the general promotional allowances made thereunder during the course of the same, which programs changed many times during the years 1956 and 1957, were directed to general competition rather than any specific competitive situation.

It may well be said that the evidence in this case is somewhat stale since it concerns matters which occurred now some six to seven years ago. As already stated, delays in this case cannot be attributed to any fault of the parties or their counsel or of the hearing examiner, but is a result of the then approved general practice of hearings at intervals,

the very heavy case loads of the Commission and of this examiner during the period here in question and the length of time respondent required to complete its cost justification studies. Many cases of this type of course have lasted much longer in litigation before the Commission as well as before the courts than has the case at bar. Nevertheless, since the respondent has not even pleaded, let alone produced evidence, upon a defense of abandonment of such of its practices as have been established by the evidence, the examiner has been duty bound to make findings of fact upon the record made. The respondent's defense of meeting competition is without merit.

Upon the findings hereinbefore made, although for clarity conclusions have been stated as to each of the Counts of the complaint, by way of summarization the hearing examiner now makes the following:

Conclusions of Law

1. The Federal Trade Commission has jurisdiction of the person of respondent and of the subject matter of each of the Counts of the complaint in this proceeding.

2. The respondent's acts and practices, as charged in Counts I and II of the complaint, and as hereinabove found, are in violation of Sections 2(a) and 2(d) of the Clayton Act, as amended, and respondent has failed to sustain its burden of proof upon the various defenses which it has pleaded and presented herein.

The proposed order of complaint counsel is in accord with law and practice, and correctly premised upon the foregoing findings and conclusions and it is therefore adopted and entered herein as follows:

ORDER

It is ordered, That respondent Admiral Corporation, a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the sale of its products, in commerce, as commerce is defined in the Clayton Act, as amended, do forthwith cease and desist from:

1. Discriminating, directly or indirectly in the price of said products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale and distribution of respondent's products.

2. Paying, or contracting to pay, or granting or contracting to grant, or allowing anything of value, including checks and

credits, to or for the benefit of any customer as compensation or in consideration of any newspaper, radio, catalog or sign advertising, or for salesmen's incentives, floor and window displays, or other services or facilities furnished by or through said customer in connection with the sale or offering for sale of respondent's products, unless such payments, credits or allowances are available on proportionally equal terms to all other customers competing in the distribution of said products.

Opinion of the Commission

This matter is before the Commission for consideration of an appeal by the respondent from an initial decision in which the hearing examiner finds that it violated Sections 2(a) and 2(d) of the amended Clayton Act in the sale of electrical products, including television and radio receiving sets, refrigerators and freezers. The initial decision contains an order which, if sustained by the Commission, would require the respondent to cease and desist from the acts which the examiner found to be unlawful.

The complaint, served on or about April 16, 1958, contains two separate counts. In Count I respondent is alleged to have violated Section 2(a) of the amended Clayton Act by discriminating in price between and among its retailer customers, charging some nonfavored customers prices which ranged from a low of 1 percent to as much as 16 percent higher than those charged certain competing favored purchasers. The complaint utilizes respondent's pricing in Milwaukee, Wisconsin, as an "example" but alleges that similar pricing practices are employed in other trading areas.

In Count II it is alleged that the respondent violated Section 2(d) of the amended Clayton Act by offering and paying discriminatory advertising and promotional allowances to competing retailers in Milwaukee and in various unnamed sections of the country.

The respondent's answer denied that it had violated the law and affirmatively alleged, *inter alia*, that its lower prices to some customers were justified by a savings in the cost of selling or delivering to such customers and that the lower prices and higher promotional payments afforded to some customers constituted good faith attempts to meet the prices and allowances of competitors.

Complaint counsel utilized the trade areas of Milwaukee, Wisconsin, Washington, D.C., and New York City, New York, to illustrate the nature of respondent's dealings with its retailer customers, which are charged to be unlawful. The base period covered by the evidence en-

compasses the years 1956 and 1957. The actual trial of the matter commenced September 2, 1958, and continued thereafter by intervals until respondent rested its defense on April 25, 1962. Simultaneous filings of proposed findings, conclusions and orders were made on April 11, 1963.

The trial of this proceeding was marked by the accidental death of the original hearing examiner on June 10, 1959. At this juncture complaint counsel had rested the case-in-chief, but respondent had not commenced presentation of its defense. A new examiner was appointed on October 2, 1959, and respondent, on October 5, 1959, filed a motion to strike the testimony of only three witnesses out of the total of forty-six who had theretofore testified before the original examiner. This motion was not opposed by complaint counsel and the three witnesses were recalled and were again fully examined and cross-examined. Their previous testimony was ordered physically stricken from the record. Both parties agreed that there would be no objection made to the replacement examiner passing upon the other testimony and evidence adduced as part of the case-in-chief.

The hearing examiner filed his initial decision September 11, 1963, and, as aforestated, found that both counts of the complaint had been sustained and that respondent had in fact violated Sections 2(a) and 2(d) of the amended Clayton Act. Respondent filed its appeal brief December 2, 1963, and complaint counsel's answering brief was filed February 17, 1964. Respondent filed a reply brief February 28, 1964. The Commission heard oral argument on March 12, 1964, and reargument on December 15, 1964.

The 2(d) Charge

In its proposed finding numbered 68 submitted to the hearing examiner, respondent stated:

> Respondent does not dispute that the evidence establishes it did not make cooperative advertising allowances available on proportionally equal terms to all customers of the Milwaukee, New York, and Washington branches competing in the distribution of Respondent's products. Instead, it has based its defense on meeting competition under Section 2(b).

The hearing examiner, in reliance upon this admission, found the respondent in violation, holding that respondent had been afforded the opportunity to secure and offer evidence in support of its meeting competition defense but that it had failed to avail itself of this opportunity. We cannot agree that the respondent was afforded a proper and adequate opportunity to present its defense.

The trial of this matter found the law in a state of transition. When this proceeding commenced it was the Commission's legal view that "* * * Section 2(b) cannot constitute a substantive defense to a charge of violation of Section 2(d) of the amended Clayton Act. * * *" The quoted ruling had been made June 21, 1956, in *Henry Rosenfeld, Inc.*, 52 F.T.C. 1535. However, as we pointed out above, the respondent's answer advanced as an affirmative defense that the discriminatory advertising and/or promotional allowances granted by it to certain customers were granted to meet competition. To secure evidence in support of its 2(b) defense, the respondent moved the hearing examiner to issue subpoenas duces tecum to its competitors. The subpoenas called for documents relevant to respondent's defense to both the 2(a) charge and to the 2(d) charge. On March 3, 1959, the hearing examiner granted such parts of the motion as related to the Section 2(a) charge but denied it as to the defensive evidence responsive to the 2(d) charge. This ruling was appealed to the Commission, which by order of May 29, 1959, denied the appeal, holding "* * * the defense afforded in subsection (b) of Section 2 to the proceedings there designated does not extend to other proceedings involving proved charges of violation of Section 2(d)." (55 F.T.C. 2078, 2079.)

The subpoenas which had been previously issued contained specifications calling for only such information as would be relevant to a 2(b) defense to the price discrimination charge. With two exceptions the recipients of the subpoenas filed motions to quash or limit their scope. On April 7, 1959, the hearing examiner ruled in effect that the subpoenas were too broad and constituted a "fishing expedition" into the records of respondent's competitors. He advised the respondent to present new subpoenas, narrowed and defined as indicated in the examiner's opinion. The respondent subsequently appealed this ruling to the Commission, which upheld the hearing examiner, holding that the specifications of the subpoenas "* * * failed to describe with reasonable particularity the documents sought. Any subpoena duces tecum based upon such specifications would be entirely unreasonable in scope in that documents sought are related to competition generally and are not identified with specific offers by respondent's competitors to customers to whom respondent gave the lower prices which are the basis for the price discrimination charges in the complaint. * * *" (56 F.T.C. 1627, 1629.)

On August 21, 1961, respondent orally moved the hearing examiner for the issuance of subpoenas duces tecum to competitors for the purported purpose of establishing a 2(b) defense to both the 2(a) and

the 2(d) charges. Since respondent supplied no new details or other pertinent information in support of the motion, it was denied by the hearing examiner on August 21, 1961. Respondent took no appeal from this denial.

On November 22, 1961, the Court of Appeals for the District of Columbia Circuit held in *Exquisite Form Brassiere, Inc.* v. *Federal Trade Commission*, 301 F. 2d 499, that the Commission's view as expressed in the *Henry Rosenfeld* case and in its 1959 interlocutory opinion in this case was "untenable". The court stated that it agreed with the views of the United States District Court for the Southern District of Florida which had held in *Delmar Construction Co.* v. *Westinghouse Electric Corp.*, on February 24, 1961, that ". . . because of the close interrelation of § 2(d) and § 2(e), it is both logical and reasonable to likewise recognize such [meeting competition] defense in cases arising under § 2(d). * * *" (1961 Trade Cases, ¶ 69947.)

The Commission's petition for certiorari in the *Exquisite Form* case was denied May 21, 1962 (309 U.S. 888). Shortly thereafter, the Commission reversed the position it had taken in *Henry Rosenfeld* and in its rulings herein respecting respondent's applications for subpoenas calling for information relevant to a 2(b) defense to the 2(d) charge. Since the effect of the rulings in this matter was to deny respondent the opportunity to secure and offer defensive material, now deemed relevant and material, dismissal of the 2(d) charge is required unless the error was corrected or the inhibitory effect of the ruling erased while the proceeding was still in the hearing stage.

The hearing examiner holds that the respondent was given every opportunity to apply for new subpoenas subsequent to the denial of the writ for certiorari in the *Exquisite Form* case, for the record was not closed for the reception of evidence until July 24, 1962. This was approximately six weeks after the Supreme Court's denial of certiorari in the *Exquisite Form* case and followed by twelve days the ruling in *Shulton, Inc.* v. *Federal Trade Commission*, 305 F. 2d 36 (7th Cir. 1962), which likewise held the 2(b) defense applicable in a 2(d) proceeding. But respondent contends that the Commission did not indicate its intention of following the rule of law announced by the District of Columbia and Seventh Circuits until November 10, 1962, when it remanded the *Max Factor & Co.* proceeding, Docket 7717, to the hearing examiner for the taking of evidence offered to show that the respondent in that 2(d) proceeding had granted discriminatory promotional payments to meet the similar payments of a competitor.

Respondent claims, in this connection, that any attempt on its part to acquire evidence in support of a 2(b) defense to the 2(d) charge would have been futile until the *Max Factor* decision, and moreover, at this late date issuance of the requested subpoenas would in all likelihood be unproductive for:

Documents have a way of becoming lost in four years and memories deteriorate. Documents are frequently destroyed in the ordinary course of business as they lose their value with advancing age. The personnel of corporations change and the destruction of documents may not even be known to present company employees. New subpoenas today are far from being the equivalent of the same subpoenas in 1959; and there is now no way by which respondent can be restored to the position it occupied before the wrongful denial of its rights.

While this argument is not persuasive to the Commission, it cannot be denied that the respondent has been disadvantaged by the delay. The documentary evidence adduced by complaint counsel in support of their case was fresh and they had the advantage of testimony concerning events in their witnesses' very immediate past. The hearing examiner's ruling would force respondent to rebuttal with dated evidence of less reliability. Respondent's ability to defend with evidence of comparable probity and reliability has been harmed therefore through no fault of its own. This is a very close question but on these facts it is our conclusion that equity decrees dismissal.

But this leaves the problem unsettled, for insofar as this record reveals, respondent may be to this day continuing to grant discriminatory cooperative advertising payments in the several trade areas considered. Whether these discriminations are legally justified or unlawful has not been determined. In situations of this type, remand to the hearing examiner for perfection of the record will usually be ordered but in this case such a course would not be appropriate. Instead, we have instituted an investigation to determine whether a new complaint dealing with current practices is required by the public interest.

The Price Discrimination Charge

The basic difference between the parties is not whether a price difference exists, for this is conceded, but concerns the measure of the disparity as to both individual items and over-all volume of business. Resolution of the questions is complicated by the wide range of products covered by the proof and respondent's constantly changing and inconsistently applied pricing policy. In Section 2(a) litigation, inferences are permissible and even necessary with respect to elements such as competitive effects, for the statute itself requires a prognostication of the likely results of price discrimination. But as to the

existence of the discrimination itself, definitive findings of fact are required, for certainly this is a factor which should be measured.

To prove his case, complaint counsel introduced evidence as to the prices charged to a selected group of dealers located in three cities: New York City, New York, Milwaukee, Wisconsin, and Washington, D.C. Within each city a sample of customers, some allegedly favored and some allegedly unfavored, were selected for detailed analysis. All invoices showing sales to the selected dealers for the years 1956 and 1957 were secured, but instead of placing the invoices in evidence, the significant information was copied from the invoices and submitted in evidence in tabulation form. Within each city separate tabulations were prepared for the four broad categories of respondent's products considered by the case, that is, television, radios and phonographs, refrigerators and freezers, and air conditioners.[1]

Originally complaint counsel had a subpoena served upon respondent which called for the production of all invoices for all dealers in the three cities of Milwaukee, Washington and New York for the two-year period 1956 and 1957. When informed by respondent that full compliance with this specification would result in the production of an unwieldy amount of material, complaint counsel modified the request and selected a few dealers in each city. The basis of the selection is not disclosed in the record. Respondent then supplied complaint counsel with all 1956 and 1957 invoices to the dealers selected. The tabulations were prepared by a Commission accountant from the invoices supplied. The accountant did not tabulate all of the invoices but utilized only what he considered to be reasonably contemporaneous sales of the same models. In other words, he would not tabulate an invoice which indicated a sale too far in point of time from other sales of the same model to be considered competitive. Invoices evidencing sales of items purchased by only one dealer were also not tabulated. Where there was more than one invoice for the same item to the same customer on a particular date, only one of the invoices would be tabulated and a note entered on the tabulation indicating that there were additional invoices at the same price. In some instances a notation upon an invoice would indicate that an allowance, discount or deal of some type was applicable and in such instances recourse was had to credit memoranda, sales bulletins and "deal" announcements so that the appropriate net price could be listed on the tabulation. In those instances where the invoice indicated a "deal"

[1] Respondent claims the tabulations are in error in several respects and it placed into evidence photostat copies of the same tabulations with complaint counsel's alleged errors crossed through and corrected figures inserted.

but the accountant, with the aid of extrinsic materials was unable to determine its exact nature, the tabulation contains the full invoice price with a notation that a deal was operative with respect thereto. From the foregoing it can be seen that the net prices listed on the tabulation represent the conclusions of the accountant. The parties are in agreement that certain of the net prices contained on the tabulations require adjustment but there is disagreement as to others.

A basic dispute between the parties is the proper way to measure the size or extent of the price discrimination. It is complaint counsel's theory (adopted by the hearing examiner) that the discrimination can be illustrated by "examples" which compare the prices charged to competing customers on single sales. Some 100 examples or comparisons were taken from the 6,000 sales listed in the basic invoice tabulations and offered as illustrative of the unlawful discriminations charged.[2] Complaint counsel pleads: "If any Commission cases involving violation of the Clayton Act, as amended, have been decided by the Commission and confirmed by the courts on anything more than an *example* of the violations charged, they are in the distinct minority and complaint counsel cannot recall one at this time."

It is true "that sampling has long been a recognized technique in price discrimination cases" (*United States* v. *The Borden Company*, 370 U.S. 460, 466, n. 6 (1962)), and complaint counsel is quite correct in stating that a prima facie case of price discrimination is ordinarily established by introducing evidence consisting of merely examples or samples of a seller's pricing program. But certainly where single sales are selected to illustrate a seller's pricing practices with respect to particular customers to whom many sales are being continuously made, there must be some showing that the sales selected as examples were typical and fairly representative of the other sales so that it can be determined whether any customers were in fact either the victims or the recipients of legally cognizable price discriminations. Complaint counsel have not only failed to make this showing with respect to their 100 "examples," but respondent has attempted to rebut any

[2] In addition to the one hundred examples, the hearing examiner based his affirmative finding of price discrimination upon price lists introduced by complaint counsel which show that respondent's pricing program entailed a division of customers into several price categories. But the hearing examiner's reliance upon them as evidence of price discrimination is in error. Price lists have utility in a Robinson-Patman record when there is a showing that the prices contained thereon are actually followed and sales are consummated at those prices. Price lists standing alone do not constitute evidence of sale and Section 2(a) is concerned only with discriminatory sales and not with offers or intentions. In addition to the dearth of evidence in this record that the price lists relied upon were actually followed, there is a showing that the net prices to the various customers were so complicated and modified by a confusing welter of deals and discounts as to make respondent's price lists almost useless.

inference that they are typical by selecting from the 6,000 transactions some sixty examples which show that the same customers which complaint counsel allege were the victims of respondent's price discriminations actually paid lower prices than their allegedly favored competitors. To illustrate, complaint counsel's 100 "examples" include the following transactions in Milwaukee where Samson, Hack's and Schuster were the favored customers in the purchase of television sets and ABC Supply, Triangle TV, and City Electric were the unfavored customers:

Customer	Model No.	Date of invoice	Price	Dollar difference	Percent difference
Hack's	CS23A1	2-16-56	175.00		
ABC Supply	CS23A1	2-16-56	194.00	19.00	9.8
Samson	CS23A12	8-29-56	174.55		
Triangle TV	CS23A12	9-21-56	190.00	15.45	8.1
Schuster	CS323B26	11-7-56	234.95		
City Electric	CS323B26	11-16-56	259.95	25.00	9.6

Respondent's "examples" include the following transactions:

Customer	Model No.	Date of invoice	Price	Dollar difference	Percent difference
Hack's	CS323A16	1-16-57	208.60		
ABC Supply	CS323A16	1-16-57	199.58	−9.02	−4.5
Samson	CS323B2	2-11-57	223.55		
ABC Supply	CS323B2	1-16-57	203.35	−20.20	−9.9
Schuster	CS23A11	11-6-56	174.60		
Triangle TV	CS23A11	11-29-56	167.50	−7.10	−4.2

Under the circumstances we think that respondent is justified in claiming that its 60 selected examples tend to offset complaint counsel's examples. Certainly, complaint counsel's "examples" are not truly representative of the prices charged different purchasers. We hold therefore that the examiner erred in finding on the basis of the selected transactions that respondent unlawfully discriminated in price in favor of certain customers.

While there can be no doubt that respondent did in fact discriminate in price in favor of certain dealers, as stated above the chief problem created by the unorthodox pricing practices involved in this proceeding is how to measure the discrimination. No clear pattern of preferential treatment emerges from an examination of isolated

transactions.[3] Nor does a showing of discrimination in the sale of one article of merchandise (such as a certain model television set) necessarily create an inference of competitive injury when there is evidence that the customer paying the higher price purchased another article in the same general line (a different model television set) at a lower price than the favored customer in the first transaction. This does not mean, however, that a seller whose prices to one or more customers are generally lower than prices charged others may escape liability under Section 2(a) by occasionally discriminating in favor of the purchaser who normally pays the higher price. But in any case in which a seller engages in such a practice, the amount or percentage of the differentials and the significance thereof must be known as a predicate for determining whether injury is likely to result.

It seems clear from the record that the individual products in each of the various lines or groups sold by respondent are so dissimilar that any computation of the average difference in price between "favored" and "nonfavored" customers on all items within a particular classification or group would be virtually meaningless. We are fully aware, in this connection, that in each of the various product lines there are individual products for which consumer demand is far greater than for others and that a price difference on one product would have far greater competitive significance than a price difference on another.[4] For example, the price of an extremely popular model television set may be 10% lower to customer A than to customer B, whereas B may pay 15% less than A for a very expensive, slow-moving model. Although A may thereby be given a decided advantage over B, an average of the price differences on these two products would not necessarily reflect the true competitive situation and may, in fact, show B to be the favored customer.[5]

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[3] The tabulations include only those transactions showing discrimination in the sale of products of like grade and quality within brief periods of time arbitrarily selected by the accountant who prepared the tabulations.

[4] It will be noted that in an attempt to distinguish the facts of this case from *Sylvania Electric Products, Inc.*, 51 F.T.C. 282 (1954), complaint counsel argue "* * * it is apparent that while an averaging concept may have been acceptable in Sylvania, that case does not dictate that an averaging concept is acceptable in all instances. It is obvious from this record that it is not mandatory that an Admiral dealer carry every model in every product line and it is also obvious that, unlike Sylvania, price, consumer preference and profit margins are extremely important."

[5] Averaging of the prices of products within a group or category of goods would be permissible only if the products within the group are reasonably homogeneous, are customarily sold as a line, and are not resold or marketed in a sufficiently divergent manner. See *Sylvania, supra*, wherein it was held that the nature of the products was such that the injury was caused by the average price difference on the entire line rather than by the differential on individual products within the line.

In a case such as this, a prediction as to the effect of the price discriminations can be made only by ascertaining the competitive significance of the differential on each product within the various product lines. As indicated above, a price discrimination on one product need not necessarily be offset by a price discrimination on another, even though the latter is of the same or greater magnitude. It is only through information as to the relative importance of the discriminations to the buyer that we can determine whether one buyer is clearly favored over another when both are the recipients of lower discriminatory prices. We are of the opinion however that the record here does not provide an adequate basis for making such a determination. As complaint counsel themselves point out "The record in this case discloses the wide difference in prices of the respective models involved in the various product lines and no probative evidence as to the rate of turnover or other marketing factors of one model vs. another." It is precisely this type of information which is needed when there is a showing that the seller has not consistently discriminated in favor of the same purchaser or purchasers. Consequently, we cannot find from the evidence before us that respondent's discriminations will have the prescribed effect on competition at the buyer level.

There are other questions raised in respondent's brief but in view of the disposition we propose to make of this proceeding it is unnecessary to resolve them.

Respondent's appeal is granted. The hearing examiner's initial decision will be vacated and set aside and the complaint will be dismissed.

Commissioner Dixon and Commissioner MacIntyre did not concur.

Final Order

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission having rendered its decision granting the appeal:

It is ordered, That the initial decision of the hearing examiner be, and it hereby is, vacated and set aside.

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

Commissioner Dixon and Commissioner MacIntyre not concurring.