

IN THE MATTER OF
PUREX CORPORATION, LTD.

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

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

Before *Mr. John Lewis*, hearing examiner.

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

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

ORDER OF THE COMMISSION

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

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

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

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

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

STATEMENT OF THE CASE

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

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

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

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

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

FINDINGS OF FACT

I. The business of respondent

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

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

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

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

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

II. Background and issues

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

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

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

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

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

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

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

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

III. The legal questions

A. *The question of discrimination*

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

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

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

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

Mr. BOILEAU. * * * Mr. Chairman, for the purpose of clarifying the congressional intent, I have taken this time to get the opinion of the distinguished gentleman from Arkansas as to his understanding of the meaning of the language at the beginning of section 2 (a), page 5, of the bill. * * *

My understanding of that language is that the sellers may not discriminate, but they may, nevertheless, charge different prices in different communities to

