

IN THE MATTER OF  
C. E. NIEHOFF & CO.

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

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

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

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

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

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

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

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

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

The pleadings therefore raise the following issues:

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## Decision

1. Do those who purchase from respondent at different prices compete with each other in the resale thereof?
2. If such competition is wholly or partially in intrastate commerce, is jurisdiction defeated?
3. Do the price differentials at which respondent's products are sold by it have any or all of the prescribed competitive effects on either line of commerce?
4. Are these price differentials made in good faith to meet the equally low prices of one or more of respondent's competitors within the meaning of Section 2 (b) of the Clayton Act?
5. Are these price differentials cost justified under the first proviso of Section 2 (a) of the Clayton Act?

The facts are found as follows:

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

2. In 1949, respondent's sales volume in all products amounted to \$2,086,499—90 percent of which was in its ignition line; 2 percent, in its testing equipment; 3-6 percent, in its hydraulic line; and 2 percent, in rebuilt items. These products reach the user through the usual distributive hierarchy—respondent to jobber, jobber to dealer, dealer to consumer, except the testing equipment, which stops with the dealer, who is the user. Respondent suggests resale prices for each distributive level and the record shows these are generally maintained. These prices result from varying discounts of 33 $\frac{1}{3}$ -40 percent to dealer, and 50-60 percent off list to jobber from respondent's list prices and are illustrated as follows:

## IGNITION LINE 1949

<i>Part</i>	<i>List</i>	<i>Dealer</i>	<i>Jobber</i>
AL83 -----	\$5.10	\$3.06	\$2.04
DR70 -----	4.00	2.40	1.60
FF.142 -----	3.20	2.13	1.52

## Decision

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## HYDRAULIC BRAKE LINE 1948

<i>Part</i>	<i>List</i>	<i>Dealer</i>	<i>Jobber</i>
K3615 -----	\$2.20	\$1.54	.88
3707 -----	1.00	.70	.40

## TESTING EQUIPMENT 1949

<i>Part</i>	<i>List and dealer</i>	<i>Jobber</i>
T-8 -----	\$12.00	\$9.00
T-3 -----	3.90	2.95

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

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

*Respondent's customer classification*

Classification <sup>1</sup>	Basis	Buying Price	Number	Annual volume percent of Reso.'s total sales	Average Annual Purchases
Jobber (J)-----	Annual purchases up to \$1,200.	Jobber—no discount.---	299	7.5	\$524
Jobber with Agreement (JA).	Annual purchases more than \$1,200 up to \$3,600.	Jobber plus volume rebate 5% on 1200-2400, 7% on 2400-3600, 10% on 3600-plus (not on brake parts).	228	18.79	1,719
Distributor (D)-----	Annual purchases over \$3,600 plus buying entire line.	Jobber plus straight 10% all products.	241	25.5	2,241
Distributor with agreement <sup>2</sup> (DA).	Annual purchases <sup>3</sup> over \$6,000 plus buying entire line.	Distributor's plus volume rebate of 5% on 6000-8400, 6% on 8400-12,000, 7% on 12,000 plus all products.	98	47.5	10,128

<sup>1</sup> In 1950 designations were changed by respondent as follows: Jobber (J) became distributor (D); Jobber with agreement (JA) became distributor with agreement (DA); Distributor (D) became discount distributor (DD); and distributor with agreement (DA) became warehouse distributor (DW); basis and buying prices remained same for each class.

<sup>2</sup> Includes Cotton States, Inc., the only buying group to whom respondent sells.

<sup>3</sup> Discounts in this bracket do not apply on purchases of service stocks, equipment and brake fluid.

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

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

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

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

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

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

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

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

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

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

<sup>3</sup> Tr. 518-9, 537-9, 542-3.

<sup>4</sup> Cx. 47A-E.

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

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

Year	Volume	Gross margin	Net profit
		<i>Percent</i>	<i>Percent</i>
1938.....	\$148,000	14.1	0.75
1939.....	184,000	15.6	3.5
1940.....	194,000	17.2	1.5
1941.....	252,000	18.5	2.25
1942.....	230,000	24.3	1.25
1943.....	314,000	25.3	2.00
1944.....	387,000	25.7	2.6
1945.....	513,000	21.2	2.2
1946 <sup>1</sup> .....	978,000	25.5	4.8
1947.....	757,000	24.8	1.7
1948.....	525,000	29.9	.6
1949.....	477,000	26.3	3.9 net loss
1950.....	636,000	27.5	1.00

<sup>1</sup> This was an abnormal year, "Once in a lifetime you get a year like that," Tr. 791.

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

<sup>6</sup> Tr. 1352.

