

respondent's competitors. It cannot reasonably be inferred from the evidence of record that these instances of off-list pricing have the adverse competitive effect proscribed by the statute. In addition, the evidence does not sustain an inference of predatory intent on the part of respondent in its sales at less than list price, as urged by counsel supporting the complaint. Moreover, with respect to evidence of general price concessions by respondent, we agree with the examiner's holding that "the mere fact of price concessions obviously is meaningless unless such concessions are related to specific transactions" and that such evidence is lacking in this record.

In our review of this record, we have noted that the evidence relates to sales made by respondent between the years 1955 and 1958, principally in 1955 and 1956. Under these circumstances, the Commission is of the opinion that remand of this proceeding for reception of additional evidence is not warranted.

It is, therefore, ordered, That the appeal of counsel supporting the complaint be, and it hereby is, denied.

It is further 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 MacIntyre not concurring and Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

PONCA WHOLESALE MERCANTILE COMPANY

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

Docket 7864. Complaint, Apr. 18, 1960—Decision, Feb. 24, 1964

Order dismissing—for the reason that respondent wholesaler's challenged cigarette sales in the Roswell and Albuquerque, N. Mex., markets were within the "meeting competition" sanction of Sec. 2(b) of the Clayton Act—complaint charging discrimination in price among competing retailer purchasers, in violation of Sec. 2(a) of the Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated the provisions of subsection (a) of Section 2 of the Clayton Act (U.S.C.A.

Complaint

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Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Ponca Wholesale Mercantile Company, sometimes hereinafter referred to as Ponca, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 400 South Lincoln Street, Amarillo, Texas.

PAR. 2. Ponca is a wholesale house which sells and distributes a line of cigarettes, cigars, tobacco, candy, school supplies and sundry items to various types of retail business concerns. In 1958 its total sales amounted to approximately \$30,000,000.

PAR. 3. During the period from January 1, 1958, to the present, respondent, from its main office located in Amarillo, Texas, directed and controlled the operations of its approximately 30 wholesale branches located in various cities in the western part of the State of Texas and in the States of New Mexico, Colorado and Arizona. In the course of its business, as aforesaid, Ponca purchased products from sellers located throughout the United States and resold such products to its customers. After purchasing products from various sellers, respondent caused such products to be transported from the places of business of said sellers to respondent's own various places of business, or to the places of business of respondent's customers, which were located in States other than the States in which the shipments of such products originated. In many instances where deliveries of such products were made to respondent's own places of business, respondent, from its main office in Amarillo, Texas, sold, or caused such products to be sold, to customers located in the States of Texas, New Mexico, Colorado, and Arizona. In many additional instances where deliveries of such shipments were made to respondent's own places of business, respondent sold and transported such products, or caused such products, when sold, to be transported from its places of business located in various States to the places of business of its customers located in various other States of the United States. In the aforesaid manner and method, respondent is now, and has been at all times referred to herein, engaged in a constant stream of trade and commerce, as "commerce" is defined in the amended Clayton Act, in said products between and among the various States of the United States.

Such products are, and have been, sold by Ponca to its customers, including chain grocery stores, independent grocery stores and drug stores, for use or resale in the various States of the United States.

PAR. 4. Ponca, in the course and conduct of its business, is now, and has been at all times referred to herein, in substantial competition with other wholesalers engaged in the sale and distribution of products of like grade and quality.

PAR. 5. In the course and conduct of its business, since January 1, 1958, and continuing to the present, Ponca has discriminated in price between different purchasers of its products of like grade and quality by selling such products to some of its customers at higher prices than to other of its customers.

A typical example of such discriminations occurred during the month of March 1958. During that month, Ponca sold cigarettes to a substantial number of non-preferred purchasers at the following invoice prices, plus tax:

<i>Cigarette type</i>	<i>Invoice price (per carton)</i>
Regular size—non-filter.....	\$2. 26
Large size—non-filter.....	2. 35
Large size—filter.....	2. 37

During the same period, respondent sold cigarettes of like grade and quality to a preferred customer, Safeway Stores, Inc., on the basis of the following invoice prices, plus tax:

<i>Cigarette type</i>	<i>Invoice price (per carton)</i>
Regular size—non-filter.....	\$2. 19
Large size—non-filter.....	2. 29
Large size—filter.....	2. 31

PAR. 6. The effect of such discriminations in price, as alleged in paragraph Five herein, may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which Ponca and its wholesale competitors are engaged, or in the line of commerce in which the retail customers of Ponca are engaged, or to injure, destroy or prevent competition with Ponca or with the customers of Ponca receiving the preferred prices.

PAR. 7. The foregoing alleged discriminations in price by respondent Ponca Wholesale Mercantile Company are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

Mr. Ross D. Young and *Mr. Ernest D. Oakland*, supporting the complaint.

Mr. W. M. Sutton and *Mr. H. A. Berry* of *Underwood, Wilson, Sutton, Heare & Berry*, Amarillo, Tex., for respondent.

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INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

MARCH 29, 1963

Introductory Statement

Ponca Wholesale Mercantile Company, a corporation, hereinafter called Ponca or respondent, as the case may be, is charged with violating the provisions of subsection (a) of Section 2 of the Clayton Act, (U.S.C.A. Title 15, Sec. 13) as amended by the Robinson-Patman Act, by discriminating in price between different purchasers of products sold by it.

Respondent filed an answer, including a plea to the jurisdiction of the Commission, denying that the acts and practices complained of were "in commerce", as required by the Act, and denied generally the material allegations of the complaint. In the alternative, respondent pleaded that, should it be found that respondent unlawfully discriminated in price, as alleged, that the lower prices charged by respondent to any of its customers were made in good faith to meet an equally low price of a competitor as provided by subsection (b) of Section 2 of said Act.

At the close of the Commission's case-in-chief, respondent renewed its motion to dismiss on the grounds of lack of jurisdiction of the Commission. The motion was denied. Respondent then offered evidence in its own behalf and, following the close of all of the evidence, renewed its motion to dismiss on the grounds that the proof affirmatively showed lack of jurisdiction of the Federal Trade Commission. Specifically, respondent says that, since the proof offered by Commission counsel to support the allegations of the complaint was limited to sales and delivery of merchandise by Ponca to customers solely within the State of New Mexico, no jurisdiction of the Commission has been shown; that, under the Act, one or more sales at the alleged discriminatory prices must be made in interstate commerce before there can be a violation of the Clayton Act, as amended by the Robinson-Patman Act, regardless of whether respondent might otherwise be engaged in interstate commerce.

Counsel have filed proposed findings of fact, conclusions of law, order, briefs, and oral argument had thereon. Subsequently, the record was reopened to receive into the record certain material evidence which occurred since the original closing of the record herein. By stipulation, this new evidence was in affidavit form and the record again closed. The matter is now before the hearing examiner for Initial Decision. All proposed findings of fact and conclusions of law not found or concluded herein are rejected. Upon the basis of the

entire record, the hearing examiner makes the following findings of fact and conclusions of law and issues the order hereinafter set forth:

FINDINGS OF FACT

1. Ponca Wholesale Mercantile Company,¹ respondent herein, is a corporation, incorporated under the laws of the State of Texas, with its office and principal place of business located at 400 South Lincoln Street, Amarillo, Texas. Ponca is now and for several years previous to the issuance of the complaint herein has been engaged in the sale and distribution, at the wholesale level, of cigarettes, cigars, tobacco, candy, school supplies and sundry items to retail business concerns, including individually owned and operated retail stores, such as the corner grocery or drug store, as well as large chain retail grocery and drug stores. In addition to its main office and warehouse in Amarillo, Ponca also maintains separate branch warehouses in various cities in west Texas and New Mexico from which it sells and distributes merchandise at wholesale, including cigarettes and candy, to retail stores in the cities and towns where such branch warehouses of Ponca are located and to other retail stores and establishments within an approximate 50-mile radius of the particular branch warehouse. In New Mexico, Ponca maintains branch warehouses in the following ten cities and towns: Alamogordo, Albuquerque, Carlsbad, Clovis, Farmington, Gallup, Hobbs, Las Cruces, Roswell and Tucumcari.

2. The principal books and records of Ponca are maintained in its main office in Amarillo, Texas. Inventory records of the various branch warehouses of Ponca are sent from such branches to the main office in Amarillo at regular intervals. The branch warehouses mail to the principal office in Amarillo daily reports showing the sales receipts and the amount of money that is deposited by the branch warehouse in the local bank. A list of accounts receivable are mailed regularly by the branch warehouses to the main office in Amarillo.

3. Ponca's over-all total sales for 1960 exceeded \$41,000,000. Sales in 1959 were approximately \$37,000,000, and in 1958, approximately \$32,000,000. Thus, Ponca's total sales are substantial.

4. The complaint alleges, among other things, that, a typical example of Ponca's price discriminations occurred during the month of March, 1958. During that month, the complaint alleges, Ponca sold

¹ Ponca Wholesale Mercantile Company of Arizona and Ponca Wholesale Mercantile Company of Colorado are separate corporations, 100 per cent owned by Ponca, each maintaining its own separate warehouses and branches in Arizona and Colorado, respectively. Each sells cigarettes, cigars, tobacco, and other merchandise to retail stores within the trade area of their respective warehouses, but neither is involved in this proceeding.

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cigarettes to a substantial number of non-preferred purchasers at the following invoice prices, plus tax:

<i>Cigarette type</i>	<i>Invoice price (per carton)</i>
Regular size—non-filter	\$2.26
Large size—non-filter	2.35
Large size—filter	2.37

During the same period, respondent sold cigarettes of like grade and quality to a preferred customer, Safeway Stores, Inc., on the basis of the following invoice price, plus tax:

<i>Cigarette type</i>	<i>Invoice price (per carton)</i>
Regular size—non-filter	\$2.19
Large size—non-filter	2.29
Large size—filter	2.31

The complaint further alleged that: "the effect of such discriminations in price * * * may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which the retail customers of Ponca are engaged, or to injure, destroy or prevent competition with Ponca or with the customers of Ponca receiving the preferred prices."

5. The testimony offered by counsel supporting the complaint with respect to the prices charged by Ponca for any product sold by it to different customers was limited solely to cigarettes and five-cent candy bars. These were sales by Ponca within the State of New Mexico. The evidence with respect to differentials in price on candy bars was further limited to sales to customers located in the City of Albuquerque and immediately adjacent thereto. Thus, all of the evidence offered to substantiate alleged discriminatory prices related to sales of cigarettes and candy to Ponca customers within the State of New Mexico.

6. The record contains many statements and references by various witnesses to "direct" buyers of cigarettes and candy. A "direct" buyer of cigarettes or candy is one who purchases cigarettes or candy direct from the manufacturer as opposed to one who purchases from a source other than the manufacturer, such as from a wholesale distributor or jobber. According to the evidence, the principal customers of cigarette manufacturers are wholesale tobacco distributors, wholesale grocers, cooperatives, retail grocery chains, retail drug chains and Government accounts. The cigarette manufacturers do not sell to the individually owned and operated corner drugstore or grocery store. These stores generally obtain their stock of cigarettes from a wholesale tobacco distributor, such as Ponca. Each cigarette manufacturer sells its particular brand or brands of cigarettes at a uniform price to both the wholesale tobacco distributor and the retail chain purchaser. This means that the wholesale tobacco distrib-

