

1234

Complaint

repossessed,⁴ or because the witnesses were permitted to "trade-in" their old machines in exchange for the newer models. However, the record is devoid of other evidence showing the usual and customary price of the newer machines, and there is no persuasive evidence from which we may make a finding that the discounts granted were greatly inflated or were fictitious. Under these circumstances, the examiner's conclusion that respondent misrepresented the usual sales price of its products cannot be affirmed.

For the aforementioned reasons, an order will issue vacating the initial decision of the examiner and dismissing the complaint.

ORDER VACATING INITIAL DECISION AND DISMISSING COMPLAINT

This matter having been heard by the Commission upon the appeal of the respondent from the initial decision of the hearing examiner, dated April 16, 1964, and upon briefs in support thereof and in opposition thereto, and the Commission having concluded for the reasons stated in the accompanying opinion that the evidence of record is insufficient to prove the allegations of the complaint:

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

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

 IN THE MATTER OF

FALSTAFF BREWING CORPORATION ET AL.

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

Docket 8618. Complaint, Feb. 20, 1964—Decision, Dec. 3, 1964

Order requiring three brewers and their trade association to cease carrying out any planned common course of action to fix and maintain the price of beer, including keg beer, and that said trade association be dissolved.

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

⁴It appears that the White machines which the witnesses purchased had not been repossessed. In most cases, the attachments had not been unwrapped. In addition, the conditional sales contracts indicated that these machines were new, and the purchasers received a manufacturer's guarantee. However, there is some indication that the machines had been used for demonstration purposes by respondent's salesmen and thus in this sense were not completely unused.

Trade Commission having reason to believe that the party respondents named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating Section 5 of the Federal Trade Commission Act (U.S.C., Title 15, Section 45) and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Falstaff Brewing Corporation is a corporation organized, existing 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 5050 Oakland Avenue, St. Louis 10, Missouri. Respondent owns and operates a total of eight breweries in the cities of St. Louis, Missouri, Omaha, Nebraska, New Orleans, Louisiana, San Jose, California, Fort Wayne, Indiana, Galveston, Texas, and El Paso, Texas. Under the trade name "Falstaff," it markets the products of these breweries in approximately twenty-five States. In 1960, respondent achieved gross sales of approximately \$160,000,000, and ranked as the third largest brewer in the nation.

Respondent Jackson Brewing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Louisiana with its principal office and place of business located at 620 Decatur Street, New Orleans, Louisiana. Under the trade name "Jax," respondent sells its beer manufactured in New Orleans throughout a nine State area in the nation's South and Southwest. In 1962, respondent's gross dollar volume of sales exceeded \$35,000,000.

Respondent Dixie Brewing Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Louisiana. Respondent owns and operates a brewery located at 2401 Tulane Avenue, New Orleans, Louisiana. Under the trade name "Dixie," it sells its beer in the States of Louisiana, Mississippi and Alabama. In 1962, respondent's gross dollar volume of sales exceeded \$4,300,000.

Respondent New Orleans Brewers Association, hereinafter referred to as respondent NOBA, is an unincorporated trade association maintaining an office at 2401 Tulane Avenue, New Orleans, Louisiana. Organized in the late thirties, respondent NOBA is financed by assessments made on the monthly sales of its brewery members. Respondent NOBA's membership, once numbering seven brewers, is presently limited to the aforementioned respondent manufacturers. During the period from 1939 to 1962, the American Brewing Company, a corporation that maintained offices at 717 Bienville Street, New Orleans,

Louisiana, was a member of respondent NOBA. The sole officer of respondent NOBA is respondent Elitha Kelly.

Respondent Elitha Kelly is a resident of the State of Louisiana with a residence at 884 Pontalba Street, New Orleans, Louisiana, and as Secretary of respondent NOBA is named herein as a respondent.

All of the respondents named herein, other than respondent NOBA, are collectively referred to hereinafter as "respondent manufacturers." Each of said respondent manufacturers is a member of respondent NOBA, and has for a number of years, through such membership and otherwise, directly or indirectly, participated in the cooperative and collective action of all those named herein as respondents in formulating, engaging in and making effective the methods, acts, practices and policies which are alleged herein to be unlawful.

PAR. 2. Respondent manufacturers are engaged in the manufacture, sale and distribution of beer. Each of the respondent manufacturers maintain, and at all times mentioned herein have maintained, a substantial and continuous course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act, between and among the various States of the United States.

Respondent NOBA has been and now is engaged in aiding respondent manufacturers in carrying out the unlawful methods, acts and practices as alleged herein, which directly and substantially have affected and now affect competition between and among said respondent manufacturers.

PAR. 3. Respondent manufacturers have been and now are in competition with each other, and with others, in the manufacture, sale and distribution of beer to purchasers thereof, except insofar as actual and potential competition has been hindered, lessened, restrained, suppressed or eliminated by the unlawful and unfair methods, acts and practices hereinafter alleged.

PAR. 4. Respondent manufacturers, acting between and among themselves, and with American Brewing Company, a recently liquidated corporation, and others, and through and by means of respondent NOBA, for many years last past, and particularly since approximately 1941, and continuing to the present time, have maintained, and now maintain and have in effect, an understanding, agreement, combination and conspiracy to pursue, and they have pursued, a planned common course of action between and among themselves to adopt and adhere to certain practices and policies to hinder, lessen, restrict, restrain, suppress and eliminate competition in the manufacture, sale and distribution of beer in the course of the aforesaid commerce.

PAR. 5. Pursuant to and in furtherance of said understanding, agree-

ment, combination, conspiracy and planned common course of action, respondent manufacturers, acting between and among themselves and with others, and through and by means of respondent NOBA, for many years last past, and continuing to the present time, in connection with the sale and distribution of beer, have done and performed, *inter alia*, the following:

- (1) Fixed and maintained prices, terms and conditions of sale.
- (2) Agreed to adopt, and have adopted, maintained and continued in effect, a common plan or policy concerning rebates, refunds, discounts and exchanges.
- (3) Agreed to adopt, and have adopted, maintained and continued in effect, common policies concerning the provision of services to customers.
- (4) Agreed to refrain, and have refrained from soliciting the keg beer trade of each other's customers.

PAR. 6. The acts and practices of the respondents, as herein alleged, have had and do have the effect of hindering, lessening, restricting, restraining and eliminating competition among the respondents in the manufacture, sale and distribution of beer; are all to the prejudice of customers of respondents and to the public; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Eugene Kaplan, Mr. Robert E. Liedquist and Mr. Anthony J. DePhillips supporting the complaint.

Mr. James S. McClellan of *Willson, Cunningham & McClellan*, St. Louis, Mo., counsel for respondent Falstaff Brewing Corporation.

Mr. M. Truman Woodward, Jr., of *Milling, Saal, Saunders, Benson & Woodward*, New Orleans, La., counsel for respondent Jackson Brewing Company.

Mr. Arthur A. de la Houssaye, New Orleans, La., counsel for respondents Dixie Brewing Company, Inc., New Orleans Brewers Association, and its members, and *Elitha Kelly*, as secretary of the New Orleans Brewers Association.

INITIAL DECISION BY ELDON P. SCHRUP, HEARING EXAMINER

OCTOBER 23, 1964

STATEMENT OF PROCEEDINGS

The Federal Trade Commission on February 20, 1964, issued its complaint charging the above-named respondents with violation of

Section 5 of the Federal Trade Commission Act in the sale and distribution of beer in the course of interstate commerce. The alleged competitive respondent manufacturers are charged in the complaint to have acted with each other and through and by means of the respondent brewers association pursuant to an understanding, agreement, combination, conspiracy and planned common course of action which, *inter alia*, effected the following:

- (1) Fixed and maintained prices, terms and conditions of sale.
- (2) Agreed to adopt, and have adopted, maintained and continued in effect, a common plan or policy concerning rebates, refunds, discounts and exchanges.
- (3) Agreed to adopt, and have adopted, maintained and continued in effect, common policies concerning the provision of services to customers.
- (4) Agreed to refrain, and have refrained from soliciting the keg beer trade of each other's customers.

The complaint charges the said acts and practices of the respondents to have had and now have the effect of hindering, lessening, restricting, restraining and eliminating competition among the respondents in the manufacture, sale and distribution of beer; to be to the prejudice of customers of the respondents and to the public; and to constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Pursuant to Section 3.8 of the Federal Trade Commission Rules of Practice for Adjudicative Proceedings, a prehearing conference was held herein on June 25, 1964, following the filing of respondents' answers to the complaint. During the course of this conference, respondents proposed the filing with the Commission of a motion to reopen consent procedure, and with the assent of complaint counsel the prehearing conference was adjourned pending Commission action on such motion. Respondents' motion and an answer by complaint counsel joining in respondents' motion were filed July 6, 1964. Order by the Commission denying respondents' motion to reopen consent procedure issued July 20, 1964. The Commission order, in denying respondents' proposed disposition, added that respondents had further failed to show wherein the filing of an amended admission answer or submission of the case to the hearing examiner on a stipulation of facts and agreed order, as expressly provided by Section 2.4(d) of the Rules of Practice, would not constitute an appropriate disposition of this proceeding.

Under date of September 15, 1964, respondents and complaint coun-

sel entered into an "Agreement Containing Stipulation of Facts and Agreed Order" and subsequently submitted the same to the hearing examiner as provided by Section 2.4(d) of the Rules of Practice. The stipulated facts corresponded with the factual allegations of the complaint served on the respondents, and the agreed order to be entered herein followed in substance the form of order proposed as appropriate in the attached notice to the complaint. The agreement between the parties provided that the record on which the decisions of the hearing examiner and the Federal Trade Commission were to be based shall consist solely of the complaint and said agreement, and respondents waived:

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

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

(c) all rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.

Order directing the filing of record herein of the foregoing "Agreement Containing Stipulation of Facts and Agreed Order" and closing the record in this proceeding issued October 9, 1964. Based on the foregoing agreed record, the following Findings of Fact and Conclusions therefrom are made, and the following Order is issued.

FINDINGS OF FACT

1. Respondent Falstaff Brewing Corporation is a corporation organized, existing 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 5050 Oakland Avenue, St. Louis 10, Missouri. Respondent owns and operates a total of eight breweries in the cities of St. Louis, Missouri, Omaha, Nebraska, New Orleans, Louisiana, San Jose, California, Fort Wayne, Indiana, Galveston, Texas, and El Paso, Texas. Under the trade name "Falstaff," it markets the products of these breweries in approximately twenty-five States. In 1960, respondent achieved gross sales of approximately \$160,000,000, and ranked as the third largest brewer in the nation.¹

2. Respondent Jackson Brewing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Louisiana with its principal office and place of business located at 620 Decatur Street, New Orleans, Louisiana. Under the trade name "Jax," respondent sells its beer manufactured in New

¹ Paragraph A of Stipulation of Facts, page 2 of Agreement Containing Stipulation of Facts and Agreed Order.

