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tomers competing in the distribution of such products with any respondent or any other retailer to whom or for whose benefit the payment or other consideration is made.

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
ALHAMBRA MOTOR PARTS ET AL.

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

*Docket 6889. Complaint, Sept. 17, 1957—Decision, Dec. 17, 1965**

Order, following remand, requiring for the second time, a southern California trade association of automotive parts jobbers and its 60 jobber-members to cease illegally inducing and receiving discriminatory price discounts from manufacturers of automotive parts and accessories in violation of Sec. 2(f) of the Clayton Act; the Court of Appeals, Ninth Circuit, 309 F. 2d 213 (1962), 7 S.&D. 550, remanded cease and desist order dated October 28, 1960, 57 F.T.C. 1007, for further findings.

Mr. Hugh B. Helm and Mr. Roy C. Palmer supporting the complaint.

Lyle, Yudelson and Di Giuseppe, by Mr. Harris K. Lyle, of Van Nuys, Calif., for respondents.

SUPPLEMENTAL INITIAL DECISION ON REMAND OF PROCEEDING BY

JOHN LEWIS, HEARING EXAMINER

NOVEMBER 20, 1964

STATEMENT OF PROCEEDINGS

This proceeding is before the hearing examiner for decision on a remand from the United States Court of Appeals, for the Ninth Circuit. The complaint herein, issued September 17, 1957, charged the respondents herein with having violated subsection (f) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, by knowingly inducing and receiving certain discriminations in

*The cease and desist order of December 17, 1965 relating to warehouse distributor discounts was set aside as to Earl Crawford, Lester L. Congdon, Margaret A. Ludwick, Otis M. Ludwick, E. L. Covey, Edward Gaughn, Carl E. Haase and Emma F. Wright by Commission's order dated May 5, 1966.

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price prohibited by subsection (a) of Section 2 of said Act as amended. Following the filing of an answer by respondents and the holding of hearings before Hearing Examiner Earl J. Kolb, to whom this proceeding was then assigned, an initial decision was filed by said examiner on June 22, 1960, in which it was found that respondents had violated the law as charged. By Decision issued October 28, 1960, the Commission adopted the hearing examiner's initial decision and order as its decision and order. Thereafter the matter came before the United States Court of Appeals for the Ninth Circuit on a petition for review filed by respondents. The court of appeals issued its opinion on October 9, 1962, affirming the Commission's Order in part and setting it aside in part, and remanding the cause to the Commission for further proceedings. A Final Decree consistent with said opinion was filed by the court on November 15, 1962.

By Order issued January 17, 1963 [62 F.T.C. 1483], the Commission reopened this proceeding and remanded it to the original hearing examiner for such further proceedings as were required to comply with the opinion and decree of the court of appeals. Due to the illness and subsequent retirement of said hearing examiner, as well as the death of the then senior counsel for respondents, further proceedings were delayed until the substitution of the undersigned hearing examiner on April 7, 1964. Following the convening of a prehearing conference on May 18, 1964, hearings were thereafter held from May 19 to May 26, 1964, in Los Angeles, California, at which evidence was offered by both sides with respect to the issues remanded by the court of appeals.

Following the close of the reception of evidence, proposed findings of fact, conclusions of law and an order were filed by the parties between August 26 and August 28, 1964, and replies to such findings were filed between September 8 and September 15, 1964. Such findings, including supporting memoranda, have been carefully considered by the hearing examiner. Proposed findings not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.¹

The basic issues which were remanded by the court of appeals for further consideration by the Commission were: (1) Whether the "cost-justification defense" is applicable to certain of the price

¹ Proposed Findings Nos. 18, 19, 24 and 33 of complaint counsel are based, in whole or in part, on exhibits which were rejected as unreliable hearsay. While such exhibits were placed in the rejected exhibit file pursuant to Section 3.14(g) of the Commission's Rules of Practice, for consideration by any reviewing authority, the examiner has placed no reliance on said exhibits.

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differentials received by the cooperative corporation, Southern California Jobbers, Inc., in the operation of its warehouse, and (2) whether respondent Southern California Jobbers, Inc., or its jobber members, are the real buyers from the manufacturers which gave the former a price differential. This initial decision will deal only with these issues. The basic facts concerning respondents' business operations and their engagement in commerce, the nature of the discriminations in price involved, the existence of competition with other business entities, and competitive injury are set forth in the original decision filed by the former hearing examiner, and will not be referred to further herein, except as may be necessary to an understanding and resolution of the remanded issues.

After having reviewed the entire record in this proceeding, including the testimony and other evidence received at the earlier hearings, and based on his observation of the witnesses who testified at the hearings following the remand of this proceeding, the undersigned makes the following:²

FINDINGS OF FACT

Industry Distribution Channels

1. This proceeding involves the distribution of automotive parts in the so-called "after market," *i.e.*, the market involving the distribution of automobile parts for replacement and repair purposes following the original factory installation by automobile manufacturers. Such parts are distributed by the manufacturers thereof principally through warehouse distributors (hereinafter referred to as WD's) and jobbers. Some manufacturers sell only to WD's, while others sell to both WD's and jobbers (Tr. 132, 195, 235, 313, 369, 398, 450, 461, 486, 778, 1058, 1059, 1144, 1146, 1241, 1334, 1336, 1383-1384).³ WD's generally limit their sales to automotive parts jobbers (Tr. 652, 670, 717, 1452, 1706, and 1795). The latter re-distribute principally to garages, service stations, fleet owners and car dealers (Tr. 517, 523, 531, 543, 552, 571, 617, 644, 686, 728, 746, 763, 790, 796, 807, and 820).

2. A WD is, in effect, a wholesaler's wholesaler in the sense that jobbers to whom he sells are also wholesale distributors. The

² There was no objection to the undersigned's substitution as hearing examiner, based on the fact that he had not observed the witnesses who had testified prior to his substitution, or for any other reason (Tr. 990). No issue has been raised which requires an evaluation of the credibility of witnesses who testified at the hearings prior to the undersigned's substitution.

³ All references to the transcript are made with the abbreviated symbol "Tr.," followed by the appropriate page or pages. References to exhibits introduced into evidence by complaint counsel are hereinafter abbreviated as CX, followed by the appropriate exhibit number. References to exhibits introduced by respondents are abbreviated as RX, followed by the appropriate exhibit number.

WD is a fairly recent innovation in the automotive parts chain of distribution. In earlier years most manufacturers sold directly to jobbers. However, in time some of the larger jobbers began to redistribute to smaller jobbers, as well as selling directly to garages, fleets and similar retail-type outlets. In recognition of the function they performed in warehousing and redistributing their merchandise, automotive parts manufacturers gave such redistributing jobbers a so-called functional allowance on the portion of their purchases which was resold through other jobbers at wholesale. As the distributional pattern evolved, some of the redistributing jobbers became known as warehouse distributors and limited their sales entirely to jobbers, receiving a functional discount on all purchases made by them (Tr. 314, 332, 450, 490, 778, 783-784, 1512, 1704, 1717, and 1772). Contributing to the rise of the WD in the parts after-market distributional chain were: (a) The "parts explosion" which occurred in the 1950's, resulting in a tremendous increase in the number and variety of parts, and in the number of jobbers handling them, and (b) the wide dispersal of the parts market and the need for greater warehousing and service facilities than the average manufacturer selling a relatively narrow line of products was able to provide (Tr. 1456, 1736).

3. Parts manufacturers generally supply their WD's and jobber customers with copies of their supply catalogs and schedules of their prices, together with periodic changes made therein. The price lists frequently contain suggested resale prices at the various distributional levels. In some instances the manufacturers require that their distributors resell at the suggested resale prices and permit sales only to franchised or approved customers (Tr. 266, 767, 1063, 1162, 1209, 1236, 1241, 1378, 1386, 1409; CX 159-222).

4. Shipments to WD's and direct jobbers located in the Los Angeles area may be made either from the manufacturer's factory or from supplies maintained by the manufacturer in a warehouse in the area. Some manufacturers operate their own warehouse in the area, while others store merchandise in a public or so-called "fee" warehouse, which receives a percentage (usually 5 or 6%) on sales made out of the warehouse by the manufacturer. Sales are made f.o.b. factory or warehouse, depending on the manufacturer involved. However, most manufacturers have a prepaid freight policy on shipments in excess of a designated amount. Generally, WD's order in sufficient amounts to qualify for prepaid freight, while only a portion of the jobbers do (Tr. 168, 209, 250, 253, 281, 325, 370, 399, 459, 466, 487, 775, 803, 816, 823, 1080, 1202, and 1402).

5. In selling to WD's or direct jobbers, parts manufacturers do so through their own sales personnel or through so-called manufacturer's representatives, who are independent entrepreneurs representing several manufacturers in a given area. The salesmen or sales representatives call on their WD and direct jobber customers periodically to (a) promote the sale of their products, (b) check their stocks to see whether they need replenishment or whether there is obsolete merchandise to be returned for credit, (c) check catalogs and price lists to see that they are up-to-date, (d) advise them of new lines or changes in lines by the manufacturer, and (e) advise on technical problems which may have arisen in connection with the installation of particular parts (Tr. 170, 232, 369, 465, 487, 775, 1057-1059, 1145-1147, 1237, 1332, 1335, and 1383). In addition to calling on WD's and direct jobbers, the sales representatives of some manufacturers also make periodic calls on the jobber customers of their WD's. However, they usually call on such indirect customers less frequently and spend less time with them than they do in calling on the jobbers to whom they sell directly (Tr. 1059, 1078, 1147, 1157-1158, 1237, 1275, 1396, 1553, 1605, 1739-1740, 1854).

6. The WD performs a function similar to that performed by the sales personnel of the manufacturer, except that it is performed in greater depth and with greater frequency. As in the case of the manufacturer's representatives, the sales personnel of the WD call on their jobber customers to check their stocks, catalogs and price lists, to take care of their obsolescent merchandise and to take orders for replenishing merchandise or adding to the lines carried by the jobber. However, since the WD stocks a great many lines which may be sold to the jobber, his sales personnel call on the jobbers more frequently and spend more time with them than is economically feasible for the personnel of a manufacturer selling a single line or a limited number of items. Thus, whereas a manufacturer's sales representative may call on jobbers as infrequently as once a year or an average of four times a year, the WD's sales representative will usually visit their customers at least once a month and, in the case of their larger customers, as frequently as once a week. While some manufacturers do call on the jobber customers of their WD customer, as already mentioned such calls are much less frequent and of shorter duration than those of the WD's sales personnel (Tr. 758, 1074, 1157, 1250, 1275, 1396, 1424, 1553, 1598, 1740, 1855, 1916).

7. WD's assist automotive parts manufacturers in the distribution of their merchandise by making it more readily available to

jobbers. Where the manufacturer does not have a local warehouse, the WD affords the manufacturer a storage point from which merchandise may be more quickly delivered on order of the jobbers. Even where a manufacturer does maintain a local warehouse, the WD's warehouse minimizes the storage demands on the manufacturer's warehouse. In either case, by selling to a WD the manufacturer is able to ship in maximum quantities and to look to a single source for payment. This is in contrast to selling through numerous jobbers where the manufacturer is frequently required to break bulk, and to bill and look to a multiplicity of customers for payment (Tr. 416, 1072, 1086, 1089, 1277, 1346, 1367, 1391, 1733, and 1779). In consideration of the sales, warehousing, and credit services performed by them in the redistribution of automotive parts, WD's receive a so-called functional allowance from the manufacturer. This allowance, in most instances, is 20% of the jobber net list price. The jobber usually pays the same price, whether he buys through a WD or directly (Tr. 248, 313, 416, 451, 461, 491, 1067, 1148, 1241, 1345, 1386, 1548).

The SCJ Operation

8. As found in the original initial decision herein, Southern California Jobbers, Inc. (hereinafter referred to as SCJ), is a California membership corporation formed by a number of automotive parts jobbers in Los Angeles County, each of which owns a share of stock in the corporation. As stated in its Articles of Incorporation filed in 1935, the corporation was formed by its members "for the mutual benefit of ourselves and our businesses." Its general purpose was stated to be "to protect the legitimate new automotive parts jobbers of this County against unfair competition," and its specific purposes were stated to be to, (a) "provide a joint buying and pickup service for the shareholders of this corporation, in order that the shareholders might buy such articles as are used in their business to a better mutual advantage," (b) "operate a system of distribution to the individual businesses of the stockholders of this corporation," (c) "operate, purchase and control a delivery system, restricted in its use to stockholders of this corporation," and (d) "operate such facilities as are necessary for the mutual benefit of the stockholders of this corporation at cost, without intention of making a profit to the stockholders out of the operation of this corporation" (CX 2). Among the services to be provided by the corporation for its stockholders, according to the corporation's current by-laws promulgated in 1956, were "the joint buying, assembling and warehousing of automobile parts and

