

Complaint

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It is further ordered, That respondents Peter Pan Yarn Corp. and King Arthur Yarn Corp., corporations, and their officers, and Morris Batansky, individually and as an officer of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of yarn or any other textile products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the character or amount of constituent fibers contained in yarn or any other textile products in advertisements or on invoices or shipping memoranda applicable thereto or in any other manner.

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
BEATRICE FOODS CO., INC., ET AL.

ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SECS. 2(a) AND 2(d) OF THE CLAYTON ACT

Docket 7599. Complaint, Sept. 28, 1959—Decision, July 29, 1965

Order adopting in part the findings of fact in the initial decision of the hearing examiner and dismissing the complaint which charged a major dairy products company with headquarters in Chicago, Ill., with granting discriminatory discounts to certain retail grocery stores and discriminatory promotional allowances to others.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondents Beatrice Foods Co., Inc., and Eskay Dairy Company, Inc., have violated and are now violating the provisions of subsections (a) and (d) of Section 2 of the Clayton Act, as amended (15 U.S.C., Sec. 13), hereby issues its complaint, charging as follows:

COUNT I

PARAGRAPH 1. Respondent Beatrice Foods Co., Inc., hereinafter referred to as "Beatrice," is a corporation organized and existing under the laws of the State of Delaware with its principal office

and place of business located at 120 South LaSalle Street, Chicago, Illinois.

PAR. 2. Respondent Eskay Dairy Company, Inc., hereinafter referred to as "Eskay," is a corporation organized and existing under the laws of the State of Indiana with its principal office and place of business located at 1501 Fairfield Street, Fort Wayne, Indiana.

PAR. 3. Respondent Beatrice is a holding and operating company having on April 1, 1958, a 100% voting power in approximately twenty-eight subsidiary corporations. Beatrice conducts a diversified dairy business, including virtually all branches thereof. In their respective trading areas, said respondent conducts its business by and through its subsidiaries. Its principal divisions are creamery butter, ice cream, milk, produce, cold storage, and frozen food. Beatrice's chief trade name is "Meadow Gold."

Respondent Beatrice has 115 plants for the manufacturing and processing of butter, ice cream, ice cream mixes, dried butter milk, powdered milk, and fluid milk, located in thirty States and the District of Columbia. Sales branches are maintained by Beatrice at its manufacturing plants and in addition Beatrice has 200 selling branches in thirty-one States.

Beatrice's consolidated net sales for the fiscal year ending February 28, 1959, were \$385,449,644.

PAR. 4. Respondent Eskay became a wholly owned subsidiary of respondent Beatrice on or about April 22, 1955. By agreement entered into on that date by and between the holders and owners of all of the capital shares of Eskay and respondent Beatrice, all of the capital shares of Eskay were exchanged for a specified number of the capital shares of Beatrice; and, thereafter, upon the exchange of such shares respondent Beatrice obtained complete control over the operations of respondent Eskay.

Respondent Eskay prior to the above exchange of all of its capital shares for Beatrice shares, and at the present time, is engaged in the manufacturing, processing and sale of fluid milk and other dairy products at Fort Wayne, Indiana, and in other cities, towns and places located in the State of Indiana.

The sales and other activities of respondent Eskay, including the acts and practices hereinafter to be alleged, were and are under the direction, supervision and control of respondent Beatrice; and both said corporations are jointly and severally named as respondents herein.

PAR. 5. In addition to the manufacturing and sales activities of respondent Beatrice which it carries on through its wholly owned

subsidiary Eskay in the Fort Wayne, Indiana, trading area, respondent Beatrice owns, maintains and operates a plant for the manufacturing, processing and sale of fluid milk and other dairy products at New Castle, Indiana, with branches in several cities in Indiana, including Richmond, Indiana. Respondent Beatrice also owns, maintains, and operates plants at New Bremen, Ohio, with branches in St. Marys, Ohio, and in other cities and places in the State of Ohio.

Respondents Beatrice and Eskay sell fluid milk and other dairy products of like grade and quality to a large number of purchasers located in the States of Indiana and Ohio for use, consumption, or resale therein. Respondent Beatrice, and through its subsidiaries, sells fluid milk and other dairy products of like grade and quality to a large number of purchasers located in many other States of the United States and in the District of Columbia for use, consumption or resale therein.

PAR. 6. In the course and conduct of their business, respondents Beatrice and Eskay are now and for many years last past have been transporting fluid milk and other dairy products, or causing the same to be transported, from dairy farms and other points of origin to respondents' processing and manufacturing plants located in other States of the United States and in other places under the jurisdiction of the United States, including the District of Columbia.

Respondents are now and for many years past have been transporting fluid milk and other dairy products or causing the same to be transported from the State or States where such products are processed, manufactured or stored in anticipation of sale or shipment to purchasers located in other States of the United States and in other places under the jurisdiction of the United States, including the District of Columbia.

Respondents also sell and distribute their said fluid milk and other dairy products to purchasers located in the same States where such products are processed, manufactured or stored in anticipation of sale.

Among other things, respondent Eskay acquires substantial quantities of raw milk from dairy farms located in the State of Ohio which it processes and sells to purchasers in Indiana. Said respondent also receives dairy products through inter-company transfer and shipment from plants and facilities owned by respondent Beatrice in States other than Indiana which it resells to purchasers in Indiana. Respondent Beatrice's New Bremen, Ohio, plant receives substantial quantities of raw milk from dairy farms located in the State of Indiana which said respondent processes

at its New Bremen plant and transports, or causes the same to be transported, to respondent Beatrice's New Castle, Indiana, plant for the purpose of sale to purchasers located in Indiana. Respondent Beatrice receives substantial quantities of processed bottled milk at its plant in New Bremen, Ohio, which is transported from its New Castle, Indiana, plant for sale in Ohio. Also respondent Beatrice's New Bremen, Ohio, plant transports or causes to be transported substantial quantities of fluid milk processed from raw milk obtained from dairy farms in Indiana to respondent's St. Marys, Ohio, branch for resale to purchasers buying from said branch.

Respondent Beatrice and all of its subsidiaries are engaged in interstate commerce. All of the matters and things, including the acts and practices, sales and distribution by respondents of their said fluid milk and other dairy products, as hereinbefore alleged, were performed and done in a constant current of commerce, as "commerce" is defined in the Clayton Act.

PAR. 7. Respondents Beatrice and Eskay sell fluid milk and other dairy products to distributors, retailers and consumers.

Respondents' distributors resell to retailers and consumers to the extent that such purchasers do not buy directly from respondents. In many instances respondents' distributors act as their agents in making sales and deliveries to retailer-purchasers to the extent that such distributors pay or allow discounts and rebates on sales to such customers on behalf of respondents for which said distributors are reimbursed by respondents.

Many of respondents' retailer-purchasers located in Indiana, in Ohio, and in other States and places where respondent Beatrice, and through its subsidiaries, does business were and are in substantial competition with one another.

Respondents Beatrice and Eskay, in the sale of fluid milk and other dairy products to retailers and consumers, were and are in substantial competition with other manufacturers, processors, distributors and sellers of said products in the States of Indiana and Ohio. Respondent Beatrice and its other subsidiaries are in like competition in other states and areas where they do business.

PAR. 8. In the course and conduct of their business in commerce, respondents have discriminated in price in the sale of fluid milk and other dairy products by selling such products of like grade and quality at different prices to different purchasers at the same level of trade.

Included in, but not limited to, the discriminations in price, as above alleged, respondents Beatrice and Eskay have discriminated in price in the sale of said products to retailers located in Fort

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Wayne, New Castle, and Richmond, Indiana, and in other cities, towns and places in the State of Indiana served by respondents' plants located in Fort Wayne and New Castle, Indiana, by charging many retailer-purchasers of respondents' said products substantially higher prices than other retailer-purchasers of respondents buying said products of like grade and quality, many of whom are competing purchasers.

Respondent Beatrice has discriminated in price in the sale of fluid milk and other dairy products in New Bremen and St. Marys, Ohio, and in other cities, towns and places served by said plants by charging many of its retailer-purchasers higher prices for respondent's said products than respondent charged to other retailer-purchasers in said area, many of whom are competing purchasers.

Respondent Beatrice and respondent Eskay have discriminated in price in the sale of said products to retailer-purchasers located in Fort Wayne, New Castle, and Richmond, Indiana, and in other cities, towns, and places in the State of Indiana and to retailers located in New Bremen and St. Marys, Ohio, and in other cities, towns, and places in the State of Ohio, and between favored retailers located in each of the said cities, towns and places and unfavored retailers located in each of the others.

PAR. 9. The effect of such discriminations in price by respondents Beatrice and Eskay in the sale of fluid milk and other dairy products has been or may be substantially to lessen, injure, destroy or prevent competition:

1. Between respondents and their competitors in the manufacturing, processing, sale and distribution of such products.
2. Between retailers paying higher prices and competing retailers paying lower prices for respondents' said products.

PAR. 10. The discriminations in price, as herein alleged, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

COUNT II

PAR. 11. Paragraphs One through Seven of Count I are hereby set forth by reference and made a part of this Count as fully and with the same effect as if quoted herein verbatim.

PAR. 12. In the course and conduct of its business in commerce, as aforesaid, respondent Beatrice has paid, or contracted for the payment of, money, goods, or other things of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities, including advertising services or facilities, furnished or agreed to be furnished by or through such

customers in connection with the handling, sale, or offering for sale of respondent's milk and other dairy products and respondent has not made or contracted to make such payments, allowances, or considerations available on proportionally equal terms to all of its other customers competing in the sale and distribution of such products.

Included in, but not limited to, the practices, as herein above alleged, respondent Beatrice paid for the newspaper advertising of its said products by some of its retailer-customers located in St. Marys, Ohio, and said respondent did not offer or make available on proportionally equal terms such payments and allowances to all other competing customers of respondent doing business in St. Marys, Ohio.

PAR. 13. The acts and practices alleged in Paragraphs Eleven and Twelve are in violation of subsection (d) of Section 2 of the aforesaid Clayton Act, as amended.

Mr. William H. Smith for the Commission.

Winston, Strawn, Smith & Patterson, by *Mr. Thomas A. Reynolds* and *Mr. Edward L. Foote*, and *Mr. John P. Fox*, Chicago, Ill. for respondents.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

SEPTEMBER 15, 1964

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PRELIMINARY CONSIDERATIONS

The complaint herein issued on September 28, 1959, charges violations of section 2(a) and (d) of the Clayton Act involving the granting of discriminatory discounts and the granting of discriminatory advertising allowances in the sale of respondents' products, inclusive of fluid milk and other dairy items or by-products.

The respondent Eskay Dairy Company, Inc., in the within matter, is included as a wholly owned subsidiary of respondent Beatrice Foods Co., Inc. The former, however, was dissolved on or about February 28, 1959, prior to the date the complaint was filed, and has not been in existence as a corporation or legal entity since that date. Complaint counsel, however, asserts that the respondent Beatrice Foods Co., Inc., is entirely responsible for the acts of Eskay because of the corporate relationship therewith followed by the integration of Eskay into Beatrice as a division thereof. (Tr. 934-35.)

Following the initial termination of complaint counsel's prima facie case, respondents on August 13, 1962, made motions to dismiss claiming an insufficiency of evidence and also to strike certain evidence which did not appear to be relevant to the actual charges being pressed by complaint counsel. Since there seemed to be some question concerning what charges complaint counsel was pressing, the hearing examiner issued an order on June 25, 1963, directing counsel in support of the complaint to submit a categorical allocation¹ of the evidence relied upon by complaint counsel to prove the competitive effect (prohibited by the statute) resulting from the discriminations in price by respondents as shown by the record. On September 4, 1963, complaint counsel complied with the hearing examiner's order by filing a document entitled "Response of Counsel in Support of Complaint to Order of Hearing Examiner of June 25, 1963."

Specifically, complaint counsel's allocation identifying exhibits and other evidence relied upon, which he proposes to have incorporated by reference into the findings² is as follows:

In compliance with the directive of the Hearing Examiner, above stated, counsel in support of the complaint herewith submits an allocation of the evidence together with such other facts and circumstances as in complaint counsel's opinion support the allegations of price discrimination as alleged in the complaint and the adverse competitive effects of such discrimination as follows:

I

Respondent discriminated in price between competing wholesale customers in the sale of fluid and milk products:

A. By selling such products of like grade and quality to Marsh Food Liners, Inc. of Yorktown, Indiana, at substantially lower prices than to competing wholesale customers in St. Marys, Ohio.

¹ See complaint counsel's categorical allocation of evidence at pp. 292-300 hereof.

² This allocation is included in the initial decision for the reasons hereinafter set forth. It is, however, not included in the initial decision as a finding.