

Complaint  
IN THE MATTER OF  
AMERICAN MOTORS CORPORATION ET AL.

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

*Docket 7357. Complaint, Jan. 13, 1959—Decision, July 19, 1965\**

Order requiring a major appliance manufacturer and distributor of electric appliances located in Detroit, Mich., to cease discriminating in price among competing customers in violation of Sec. 2(a) of the Clayton Act by granting preferential prices for its household appliances to its merchandising distributors, and from granting preferential prices in the future to any of its customers, unless it satisfies the Commission in advance that all price differentials are cost justified, and notifies all of its customers of such price differentials and its basis.

COMPLAINT

The Federal Trade Commission, having reason to believe that American Motors Corporation and American Motors Sales Corporation have violated, and are now violating, the provisions of subsection (a) Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Section 13), hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent American Motors Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland with its office and principal place of business located at 14250 Plymouth Road, Detroit 32, Michigan.

PAR. 2. Respondent American Motors Sales Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 14250 Plymouth Road, Detroit 32, Michigan.

PAR. 3. Respondent American Motor Sales Corporation is a wholly owned subsidiary of respondent American Motors Corporation.

PAR. 4. Respondent American Motors Corporation is a major manufacturer and distributor in the United States of electric appliances. Included among these electric appliances are refrigerators, ranges, home freezers, automatic washers, clothes dryers and room coolers, some of which this respondent manufactures at its factories located in Detroit, Michigan, and Grand Rapids, Michi-

\*Reported as amended by Commission's order of October 7, 1965.

gan, and some of which this respondent has manufactured for it by other concerns. All these appliances are marketed by said respondent under the trade names "Kelvinator" and "Leonard."

PAR. 5. Respondent American Motors Sales Corporation is engaged in selling the products of respondent American Motors Corporation including those listed in Paragraph Four. In the furtherance of its sales activities respondent American Motors Sales Corporation maintains 16 zone offices located throughout the United States. Said respondent's sales of electric appliances which it acquires from respondent American Motors Corporation for the most part are made to retail dealers who sell to consumers.

The sales activities of respondent American Motors Sales Corporation including the acts and practices hereinafter alleged were and are under the direction, supervision and control of respondent American Motors Corporation. Both said corporations are jointly and severally named as respondents herein.

PAR. 6. In the course and conduct of their business, as aforesaid, respondents American Motors Corporation and American Motors Sales Corporation are now and for many years have been engaged in commerce, as "commerce" is defined in the Clayton Act. Respondents ship or cause to be shipped and transported their electric appliances in a constant current of commerce from the State or States where such products are manufactured, or are temporarily stored in anticipation of sale or shipment, to purchasers located in other States and the District of Columbia for use, consumption, or resale therein.

PAR. 7. In the course and conduct of their business in commerce, as aforesaid, respondents American Motors Corporation and American Motors Sales Corporation have discriminated in price in the sale of electric appliances by selling such products of like grade and quality at different prices to different and competing purchasers.

Included among such sales at discriminatory prices are sales which respondents made to retail dealer-purchasers in which respondents charged substantially lower prices for electric appliances than were charged by respondents to other competing retail dealer-purchasers of such products of like grade and quality.

PAR. 8. As illustrative of the discriminatory pricing practices alleged in Paragraph Seven, respondents during the past several years, including 1956 and 1957, sold electric appliances to certain retail-purchasers including the B. F. Goodrich Company, Akron, Ohio; the Consumers Power Company, Jackson, Michigan; and the Alabama Power Company, Birmingham, Alabama, at prices which

were approximately five percent lower than the prices charged to other retailer-purchasers competing with such favored purchasers in the resale at retail of the respondents' products to the consuming public.

PAR. 9. The effect of said discriminations in price by respondents American Motors Corporation and American Motors Sales Corporation in the sale of electric appliances has been or may be substantially to lessen, injure, destroy, or prevent competition between respondents' retailer-purchasers paying such higher prices and their favored retailer competitors paying such lower prices.

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

*Mr. Thomas A. Muntsinger and Mr. Hans C. Nolde* for the Commission.

*Cross, Wrock, Miller, Vieson & Kelley*, Detroit, Mich., by *Mr. Glen R. Miller and Mr. Forrest A. Hainline* for the respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

SEPTEMBER 3, 1964

The Commission's complaint, issued January 13, 1959, charges the respondents, American Motors Corporation and American Motors Sales Corporation, with discriminating in price in the sale of certain of their products (electric appliances) in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Section 13). Respondents' principal defense is cost justification. A substantial volume of evidence, both in support of and in opposition to the complaint, has been received. Proposed findings and conclusions have been submitted by the parties and argued orally before the hearing examiner. The case is now before the examiner for final consideration. Any proposed findings or conclusions not included herein have been rejected as not material or as not warranted by the evidence.

The case has been beset by delays and other difficulties almost from the beginning. The hearing examiner to whom the case was originally assigned, the late Frank Hier, died in June 1959 and the present examiner was appointed in his stead. There have been several changes in complaint counsel, some five different attorneys having at various times been in charge of the Commission's case. Each change in complaint counsel necessitated extended delay in

order that newly appointed counsel might familiarize himself with the record, particularly respondents' cost study. In addition, respondents' principal witness, the accountant who prepared the cost study, died after his direct examination and before the hearing at which he would have been cross-examined; and another important witness for respondents, the executive who was most familiar with the facts underlying the cost study, became incapacitated by reason of serious illness during the course of the hearings and was therefore unable to testify.

Respondent American Motors Corporation is a Maryland corporation. It is engaged in the manufacture of, among other products, electric appliances for use in the home, such as refrigerators, freezers, air-conditioners, ranges, washers, and dryers. Respondent American Motors Sales Corporation, which is a wholly owned subsidiary of American Motors Corporation, is a Delaware corporation. It is engaged in the sale of the appliances manufactured by its parent corporation, the sales being made to retail dealers, who in turn sell the appliances to the public. The appliances are marketed under the trade names "Kelvinator" and "Leonard." Both corporations have their principal office and place of business at 14250 Plymouth Road, Detroit, Michigan.

There is no issue over the element of interstate commerce. The appliances are sold by respondents throughout the United States.

The case arises out of the fact that in the sale of the appliances respondents sell to one group or class of dealers at uniformly lower prices than those at which they sell to dealers generally.

The dealers receiving the lower price are known as "Merchandising Distributors." Each is a multiple-outlet dealer, having numerous retail stores or outlets. So far as the present record discloses, there are four such purchasers: B. F. Goodrich Company, Akron, Ohio; Alabama Power Company, Birmingham, Alabama; Consumers Power Company, Jackson, Michigan; and Sterchi Brothers Stores, Inc., Knoxville, Tennessee.

All purchasers other than these four are classified by respondents as "Regular Dealers." These are usually single-outlet, independently-owned retail appliance stores.

The lower prices accorded merchandising distributors represent a differential of approximately 3.5 percent. Use of the term "approximately" is necessary because the discount is not absolutely uniform on all products. Rather, there is a specific dollar-and-cents price differential on each model of each product. For example, the refrigerator listed as the first item on Commission Exhibit 1F is sold

to merchandising distributors at \$144.40 and to regular dealers at \$149.45. The price differential of \$5.05 is almost exactly 3.5 percent of the lower price and almost exactly 3.38 percent of the higher price. On other items the percentage differential may vary by a few one-hundredths of 1 percent, but for practical purposes it may be assumed that the percentage differential in favor of merchandising distributors is 3.5 percent.

A former exception as to laundry equipment, such as washers and dryers, should be noted. At the time the complaint was issued, in January 1959, the discount on such equipment was approximately 4.5 percent. However, in the summer of 1959 the discount on laundry equipment was reduced to 3.5 percent, making it uniform with that on other products. This change in policy appears to have been motivated by business reasons and to have had no relation to the pendency of the Commission's complaint. Laundry equipment has always represented only a relatively small portion of respondents' sales volume.

Actually, therefore, what we are now concerned with in this proceeding is a price differential of 3.5 percent.

At the first hearing, on May 3, 1960, a written stipulation of facts entered into between counsel was received in evidence (CX 1A-G). A second stipulation (CX 2) provided simply that any orders entered as to American Motors Sales Corporation might in the discretion of the hearing examiner be made to apply to American Motors Corporation as well. Upon reception in evidence of the two stipulations, the case-in-chief in support of the complaint was rested.

Until the filing by the parties of their proposed findings and conclusions, it was assumed by the hearing examiner that all parties regarded the stipulation of facts as having established a prima facie case in support of the complaint. It is now urged by respondents that on one point, that of competitive injury, the stipulation is deficient and fails to establish a prima facie case.

On this issue the stipulation reads:

All parties to this stipulation further agree that competent and experienced witnesses actively engaged in retailing electric appliances sold to them by respondent corporations, and who are in competition with the retail outlets of the merchandising distributors referred to above, if called upon to testify in this matter would testify substantially as follows:

(a) Twenty-four out of twenty-six of such witnesses would testify that the price differentials referred to in paragraph (12) of this stipulation in many instances exceeded the amount of net profit received by them on sales of such items during the years specified;

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(b) That the witnesses have lost sales of electric appliances of like kind to competitors where the amounts of the differentials in the lower retail prices charged by such competitors were equal to the differentials referred to in paragraph (12) of this stipulation.

(CX 1D-E)

Subparagraph (b) above is without probative value on the issue of competitive injury. It says only that the potential witnesses have lost sales to competitors, presumably merchandising distributors. The statement is completely silent as to the number or frequency of such lost sales, whether they number one or two or many.

No case has come to the examiner's attention in which it has been held, either by the Commission or the courts, that mere loss of an occasional sale—diversion of isolated items of business to a competitor—is sufficient to meet the criterion of competitive injury prescribed by the statute. It is injury, and substantial injury, to competition, or the reasonable probability thereof, with which the statute is concerned, not the loss of a few sales.

On the other hand, subparagraph (a) does in the examiner's opinion establish a prima facie case of competitive injury. The stipulation here in substance is that twenty-four regular dealers would testify that the price differentials in question exceeded in many instances the net profit derived by the dealers from the sale of respondents' products. If this does not establish actual injury to competition, it at least warrants an inference that substantial injury is reasonably probable.

It is therefore concluded that a prima facie case in support of the complaint has been established.

This brings us to respondents' principal defense, cost justification. Respondents urge that the price differentials are warranted by differences in the cost of selling to the two classes of customers. Shortly after the complaint issued, respondents retained the services of the late William J. Warmack to prepare a cost study. Mr. Warmack was a certified public accountant with wide background and experience in Robinson-Patman Act cases. From 1929 to 1946 he was a member of the accounting staff of the Commission. In 1946 he resigned his position with the Commission, and from that time until his death was engaged in the private practice of accounting, specializing in problems in cost accounting arising under the Robinson-Patman Act. He testified as an expert witness in a number of Robinson-Patman Act cases, both before the Commission and in the courts.

The cost study prepared by Mr. Warmack in the present case appears in the record as Respondent Exhibit 1, and his testimony

