

It is ordered, That the initial decision be modified by striking the last sentence of the fourth full paragraph on page 61 and the fifth full paragraph on page 61.

It is further ordered, That the initial decision be modified by striking the order on page 61 and substituting therefor the following:

It is ordered, That respondent Montgomery Ward & Co., Incorporated, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of any articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing, directly or by implication that any of respondent's merchandise is guaranteed unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

It is further ordered, That the hearing examiner's initial decision, as modified by this order and the accompanying opinion be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the respondent shall within sixty (60) days after service upon it 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 the order to cease and desist set forth herein.

Commissioners Elman and Reilly dissented and have filed dissenting opinions.

IN THE MATTER OF

NATIONAL DAIRY PRODUCTS CORPORATION

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

Docket 7018. Complaint, Dec. 31, 1957—Decision, July 28, 1966

Order requiring a company engaged in processing and distributing dairy and food products with headquarters in New York City, to cease discriminating in prices and promotional allowances between competing retailers handling the product line of its Sealtest Foods Division, in violation of Secs. 2(a) and 2(d) of the Clayton Act.

Complaint

70 F.T.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that National Dairy Products Corporation has violated and is now violating the provisions of subsections (a) and (d) of Section 2 of the Clayton Act (U.S.C., Title 15, Section 13), hereby issues its complaint charging as follows:

COUNT I

Charging violation of subsection (a) of Section 2 of the Clayton Act, the Commission alleges:

PARAGRAPH 1. Respondent named herein is National Dairy Products Corporation. Respondent is a corporation organized and existing under and by virtue of the laws of the State of Delaware. Respondent's principal office and place of business is located at 260 Madison Avenue, New York City, New York.

PAR. 2. Respondent is extensively engaged in the business of purchasing, manufacturing, processing, distributing, and selling dairy and allied products in various States of the United States and in the District of Columbia.

Since respondent's incorporation on December 8, 1923, it has acquired the entire stock or control of assets of numerous concerns. Respondent, formerly a holding company, in 1956 carried forward a program of integration and corporate simplification, taking over properties and assets of more than forty principal domestic subsidiaries and continuing their operations as divisions. Respondent has also caused a number of its subsidiaries to be merged with one another. As of December 31, 1956, respondent held 100% of the voting stock in its remaining subsidiaries, being about forty in number. Respondent's program of integrating its subsidiaries is now wholly or substantially completed.

Respondent conducts its business through its divisions and subsidiaries. Through its Sealtest division, respondent sells milk, vitamin D milk, homogenized milk, concentrated fresh milk, chocolate milk, buttermilk, cream, butter, eggs, cottage cheese, special milks, and other dairy products to homes, restaurants, stores, hospitals, hotels, and institutions in States in the Eastern, Midwestern, and Southern parts of the United States, including the District of Columbia. Respondent has numerous ice cream brands sold sectionally in various parts of about 33 States and in the District of Columbia, primarily in the Eastern part of the United States.

Respondent is the largest distributor and seller of dairy products in the United States. Respondent's net sales for 1956 were \$1,352,878,027.00.

PAR. 3. Respondent sells dairy products of like grade and quality to a large number of purchasers located in many States of the United States, particularly in those of the East, South, and Midwest, and in the District of Columbia for use, consumption, or resale therein.

Respondent maintains and operates a large number of receiving stations, manufacturing, and processing plants and distribution depots located in or near the cities, towns, and places where it sells its said products. The bulk of respondent's said products are delivered to its customers in its own trucks.

PAR 4. In the course and conduct of its business respondent is now and for many years past has been shipping dairy products from the State or States where such products are manufactured, processed, or stored in anticipation of sale and 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 in a constant current of commerce as "commerce" is defined in the Clayton Act. Respondent also sells its said products in commerce as "commerce" is defined in the Clayton Act to purchasers located in the same states where such products are manufactured, processed, or stored in anticipation of sale.

Included among respondent's plants and facilities for the manufacture, processing, and sale of dairy products, respondent owns and operates a manufacturing and processing plant located in the city of Toledo, Ohio, where it manufactures and processes substantial quantities of its dairy products which respondent sells in Ohio and Michigan. Other substantial quantities of said products are manufactured and processed in other States by other divisions, plants, or subsidiaries of respondent, which respondent ships or causes to be shipped to respondent's Toledo, Ohio, plant for subsequent distribution and sale. Some of such products are shipped in packages ready for sale and others are shipped in bulk and are further processed in respondent's Toledo plant for subsequent sale. Raw milk is purchased by respondent from farmers and dairymen located both in Ohio and in other States, including Michigan, which is shipped and transported to respondent's Toledo, Ohio, plant where it is processed and subsequently sold to purchasers located in Ohio and Michigan. Respondent owns or op-

erates a depot and sales office in Monroe, Michigan, to which its said products are transported or caused to be transported by respondent from its Toledo, Ohio, plant for subsequent sale in Michigan. Respondent transports, or causes to be transported, substantial quantities of its said products in respondent's own trucks from respondent's Toledo, Ohio, plant into Michigan which respondent sells and delivers to customers located in Michigan. In other instances respondent sells its said dairy products to distributors who transport said products from Toledo, Ohio, to various cities, towns, and places in Michigan, principally nearby to Monroe, Michigan, who sell the same to customers in those areas. Respondent has been and is engaged in a constant and uninterrupted trade in its said products in interstate commerce in sales of its dairy products in the States of Ohio and Michigan, as herein alleged.

PAR. 5. The bulk of respondent's wholesale business is done with retailers such as stores, restaurants, hotels, and other businesses and establishments which resell to consumers.

Respondent, in the sale of its said products to retailers and consumers, is in substantial competition with other manufacturers, processors, distributors, and sellers of dairy products. Many of respondent's retailer-customers as herein described are in substantial competition with one another in the resale of respondent's said products to consumers.

PAR. 6. In the course and conduct of its business in commerce, respondent has discriminated in price in the sale of dairy products by selling such products of like grade and quality at different prices to different and competing purchasers.

Included among such sales at discriminatory prices were sales of milk and other dairy products by respondent, particularly those made by and through its Sealtest division, in the cities of Toledo, Ohio, and Monroe, Michigan, and in nearby cities, towns, and places in Ohio and Michigan.

One of the methods and plans used by respondent to effect and carry out such discrimination in price is a quantity discount or rebate schedule or system applicable to its retailer-customers located or doing business in the areas of Ohio and Michigan hereinbefore described, which respondent formulated and put into effect on or about November 1, 1954, and which with certain changes therein, is still in force and effect.

Respondent's quantity discount and rebate plan is applied to the monthly purchases by its retailer-customers of respondent's

79

Complaint

dairy products computed in points including all kinds of fluid milk and buttermilk, half and half, whipping cream, coffee cream, sour cream, and cottage cheese. Each fluid milk product and cottage cheese is assigned a given number of points, as follows:

1 quart milk (all kinds)	1 point
1 " half and half	2 points
1 " whipping cream	8 "
1 " coffee cream	4 "
1 " sour cream	4 "
1 " buttermilk	1 point
5 pound carton cottage cheese	5 points

Respondent's monthly quantity discount and rebate schedule as amended and effective in 1956, based upon respondent's point system and showing the average number of retailer-customers in each discount bracket and the percentages of discounts or rebates received for the months of March, August, and November 1956, is as follows:

Points	No. of Customers		Percent
0 to 699	Toledo, Ohio	414	None
	Monroe, Mich.	109	
700 to 999	Toledo, Ohio	64	2%
	Monroe, Mich.	7	
1000 to 1499	Toledo, Ohio	59	3%
	Monroe, Mich.	12	
1500 to 1999	Toledo, Ohio	28	4%
	Monroe, Mich.	9	
2000 to 2999	Toledo, Ohio	17	5%
	Monroe, Mich.	8	
3000 to 4999	Toledo, Ohio	10	6%
	Monroe, Mich.	9	
5000 to 6999	Toledo, Ohio	3	7%
	Monroe, Mich.	1	
7000 to 9999	Toledo, Ohio	1	8%
	Monroe, Mich.	None	
10000 to 14,999	Toledo, Ohio	3	9%
	Monroe, Mich.	None	
15000 to 24,999	Toledo, Ohio	13	10%
	Monroe, Mich.	2	
25000 to 39,999	Toledo, Ohio	1	11%
	Monroe, Mich.	None	
40000 and over	Toledo, Ohio	9	12%
	Monroe, Mich.	4	
Total number of customers		783	

Respondent's sales of its products in Toledo, Ohio, and Monroe, Michigan, including sales made in nearby cities and towns amounted to \$8,605,115.31 for the year 1956. Many of respondent's retailer-customers in these areas were large chain stores

and other stores having a common ownership or control, including voluntary associations or groups of stores having a central buying office. In the quantity discount schedule hereinabove set forth, such customers are shown as a unit, regardless of the number of individual stores involved for the reason that respondent in computing the volume of monthly purchases of such customers pays or credits its monthly quantity discount or rebate according to the rate applicable to the aggregate purchases of all stores in the chain or central buying group without regard to the monthly volumes of purchases of such individual stores. If purchases by such customers are paid for in cash respondent rebates the discount at the end of each month by check. In the case of credit sales the discount is credited on the monthly bills. Many of the individual stores in Michigan belonging to a chain and sold respondent's dairy products by respondent's independent distributors are paid the discount or rebate applicable to the aggregate purchases of all the stores of the chain. Respondent accomplishes this by requiring its independent distributors to pay 7% of the discount and respondent pays the balance of 5% of the maximum discount to the chain's headquarters. All of the large chain stores and central buying groups are paid the maximum discount or rebate by respondent on purchases made by all their stores located in Toledo, Ohio, and Monroe, Michigan, and elsewhere.

The more numerous of respondent's retailer-customers are those who receive no discounts or rebates under respondent's monthly quantity discount and rebate plan and those customers whose purchases fall within the smaller discount and rebate brackets under said plan. These are the small, usually independent retailer-customers who compete with the large chain and central buying groups which respondent's discount and rebate system is principally designed to favor and whose volume of purchases in most instances falls within the highest brackets of said quantity discount schedule.

PAR. 7. The effect of said discrimination in price by respondent in the sale of dairy products has been or may be substantially to lessen, injure, destroy, or prevent competition:

(a) Between respondent and its competitors in the sale and distribution of dairy products;

(b) Between retailer-purchasers of said products receiving such discounts and rebates computed by the percentages of each bracket of said quantity discount and rebate schedule and competing retailer-purchasers receiving none;

Complaint

(c) Between retailer-purchasers of said products receiving such discounts and rebates computed by the percentages of higher brackets of said quantity discount and rebate schedule and competing retailer-purchasers receiving such discounts and rebates computed by the percentages of lower brackets.

PAR. 8. The discriminations in price as herein alleged are in violation of subsection (a) of Section 2 of the Clayton Act.

COUNT II

Charging violation of subsection (d) of Section 2 of the Clayton Act, the Commission alleges:

PAR. 9. Paragraphs One through Five of Count I hereof 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. 10. In the course and conduct of its business in commerce, as aforesaid, respondent 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 furnished or agreed to be furnished by or through such customers in connection with the handling, sale, or offering for sale of respondent's dairy products and respondent has not made or contracted to make such payments, allowances, or consideration available on proportionally equal terms to all of its other customers competing in the sale and distribution of such products.

Included among such discriminatory and disproportionate allowances respondent has paid and allowed advertising and promotional allowances in connection with the resale of its said products to some of its customers while not offering such payments and allowances to other competing customers. As illustrative of such practices, respondent has paid certain amounts of money to selected customers, principally to large grocery store chains on openings of new stores, special advertising events, and other advertising campaigns where such advertising includes Sealtest products. Many of respondent's dairy products are sold to the public under the trade name "Sealtest." In such instances the advertising copy is prepared and paid for by the customer at the local newspaper rate, sometimes at discounts, and respondent pays said favored customer on the basis of national line rates, which are much higher than the local or discount rates which the advertiser is required to pay to the newspaper. Respondent has not offered such allowances and payments to many of its custom-