that the Commission should issue its Findings of Fact, Conclusions and Order consistent with said Opinion.

Now therefore, it is hereby ordered, That the initial decision and proposed order of the hearing examiner be and they hereby are set aside in their entirety;

And it is further ordered, That the attached Findings of Fact, Conclusions and Order be and they hereby are entered and issued by the Commission in final disposition of this proceeding.

IN THE MATTER OF

SURPRISE BRASSIERE CO., INC., ET AL.

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

Docket 8584. Complaint, June 28, 1963—Decision, June 15, 1967.

Order requiring a New York City manufacturer of brassieres, girdles and corselettes to cease discriminating among its customers in the payment of promotional allowances in violation of Section 2(d) of the Clayton Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating the provisions of subsection (d) of Section 2 of the Clayton Act (U.S.C., Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Surprise Brassiere Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 102 Madison Avenue, New York City, New York.

Samuel Dosik, an individual, is president of the above corporation and Eugene Newman, an individual, is secretary-treasurer of the same corporation. These individuals formulate, direct and control the policies, acts and practices of the above named corporate respondent.

PAR. 2. Respondents are now, and for many years past have been, engaged in the manufacture, sale and distribution of women's brassieres, girdles and corselettes with an annual gross sales volume of approximately $5,000,000. Respondents have factories located in Woodside and Germantown, New York and in Wharton, New Jersey. Respondents also have a warehouse located at Wharton, New Jersey, from which they make all shipments of their products. The respondents sell these products for resale at retail to many customers, such as department stores, women's specialty shops and dress shops, with places of business located in various cities throughout the United States.

PAR. 3. In the course and conduct of their business, respondents engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, having shipped their products or caused them to be transported from their principal places of business in the States of New York and New Jersey to customers located in the same and in other States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of their business in commerce, respondents paid, or contracted for the payment of something of value to or for the benefit of some of their customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with the handling, offering for sale or sale of products sold to them by said respondents, and such payments, sometimes hereinafter referred to as promotional allowances, were not available on proportionally equal terms to all other customers competing in the distribution of their products.

PAR. 5. During 1961, and for some time prior thereto, respondents offered to their customers a cooperative advertising plan under which they agreed to pay fifty percent of the cost of newspaper advertising which featured their merchandise not to exceed 5% of the customer's total purchases for a year, and the payments were to be made only if the customer conformed to certain conditions specified by respondents.

PAR. 6. Payments made by respondents pursuant to the cooperative advertising plan referred to in Paragraph Five were not made on proportionally equal terms to all of their customers competing in the resale and distribution of respondents' products because the terms and conditions of the agreement were such as to preclude some customers from accepting and enjoying the benefits to be derived from the plan.

Furthermore, payments made by respondents were not made on proportionally equal terms to all respondents' customers competing in the resale and distribution of their products because while the payment of advertising allowances to some customers was made in accordance with the terms of the agreement, other competing customers were provided allowances above and beyond those provided for in the agreement.

PAR. 7. The acts and practices of the respondents, as alleged above, violate subsection (d) of Section 2 of the aforesaid Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Section 13).

Mr. Austin H. Forkner and *Mr. Francis A. O'Brien* supporting the complaint.

Mr. Maxwell E. Lopin, New York, N.Y., for respondents (*Mr. Norman H. Grutman*, New York, N.Y., associated as trial counsel, and *Mr. Herman L. Wasserman*, New York, N.Y., on the briefs).[1]

INITIAL DECISION BY DONALD R. MOORE, HEARING EXAMINER

MAY 27, 1966

CONTENTS

[1] Initially, respondents' counsel was the firm of Lopin & Jacobson, by Milton Jacobson, but Mr. Jacobson died in October 1964 (Tr. 849).

FINDINGS OF FACT—Continued

PRELIMINARY STATEMENT

The complaint in this proceeding was issued by the Federal Trade Commission on June 28, 1963, and was duly served on respondents. By answer filed on August 5, 1963, counsel for respondents noted the death of respondent Samuel Dosik. Pursuant to a stipulation of counsel (Prehearing Conference, December 12, 1963, Tr. 10–11), the complaint was dismissed as to Samuel Dosik by Hearing Examiner Laughlin in an order filed January 29, 1964. Accordingly, unless otherwise indicated, the term "respondents," as used herein, will not include respondent Samuel Dosik, now deceased.

The complaint charges respondents with violation of Section 2(d) of the Clayton Act, as amended by the Robinson-Patman

Act, 15 U.S.C. § 13(d).[2] In substance, the complaint alleges that respondents have failed to make advertising allowances available to all competing customers on proportionally equal terms because (1) the terms and conditions of respondents' cooperative advertising plans precluded some customers from receiving allowances and (2) the advertising allowances granted by respondents to some customers were "above and beyond" the terms of these plans.

Respondents filed answer through counsel on August 5, 1963, admitting certain factual allegations of the complaint, denying any violation of law, and affirmatively alleging (1) that advertising allowances were available to all customers on proportionally equal terms and (2) that the challenged practices "were performed in good faith to meet competition * * *."

After the prehearing conference on December 12, 1963, hearings for the reception of testimony and other evidence in support of the complaint were held in New York, New York, from June 16 to 19, 1964, and in Philadelphia, Pennsylvania, from June 22 to 24, 1964. Because of various exigencies, the hearings were recessed on June 24, 1964. The proceeding remained in suspense for more than a year because of the illness and death of respondents' original attorney (Mr. Jacobson) and the illness of Hearing Examiner Laughlin.

By order of the Director, Hearing Examiners, dated October 27, 1965, the present hearing examiner was designated to complete the proceeding. A conference in the nature of a further prehearing conference was held in Washington, D.C., on November 1, 1965.

Although respondents conceded, in effect, that the original hearing examiner was "unavailable" within the meaning of Section 5(c) of the Administrative Procedure Act (5 U.S.C. § 1004(c)) and Rule 3.21(c) of the Commission's Rules of Practice for Adjudicative Proceedings (Tr. 849–51), they orally presented a motion to void and commence the proceedings *de novo* (Tr. 851–58). Respondents filed a written motion to the same effect on November 5, 1965, and complaint counsel filed answer in opposition on November 12, 1965. For reasons stated on the rec-

[2] Section 2(d) provides "That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

ord on November 18, 1965 (Tr. 1351–68), the examiner denied the motion "without prejudice to the rights of the respondents to request the recall of specific witnesses for such further cross examination or other examination as may be appropriate" (Tr. 1365–66). On December 15, 1965, the respondents withdrew their motion for a trial *de novo,* stating that they were "content for the determination of this case to be made by the Hearing Examiner on the basis of the evidence which he has heard before him by witnesses viva voce, as well as such information or such conclusions as he may derive from an examination of the testimony which was taken before the Hearing Examiner undertook the further processing of this matter" (Tr. 2562).

Meanwhile, hearings were resumed in New York, New York, on November 15, 1965, and the case-in-chief in support of the complaint was rested on November 17, 1965 (Tr. 1155). Defense hearings were then held in New York, New York, November 17–19, 1965; November 29–December 3, 1965; December 6–9, 1965; and on December 15, 1965. Rebuttal hearings followed in New York, New York, on December 16, 1965, and in Philadelphia, Pennsylvania, on December 17, 1965, and the record was closed for the reception of evidence.

In support of their case-in-chief, complaint counsel offered the testimony of two officials of the corporate respondent (Eugene Newman, vice president and secretary, and Cecile Cohen, director of publicity, public relations, and advertising) and of representatives of 19 of respondents' customers located in New Haven and Bridgeport, Connecticut; Newark, New Jersey; and Philadelphia, Pennsylvania, encompassing some 1,142 pages of transcript. In addition, complaint counsel offered 969 exhibits, principally invoices and advertising claims.

In their defense, respondents offered the testimony of five sales representatives or sales officials, together with the testimony of seven competitors, encompassing some 1,315 pages of transcript (Tr. 1251–2566). In addition, respondents offered 32 documentary exhibits.

In rebuttal, complaint counsel offered the testimony of four of respondents' customers, encompassing some 294 pages of transcript (Tr. 2567–2861). Thus, there were 23 days of hearings, resulting in a transcript of 2,861 pages, and approximately 1,000 documentary exhibits.

The holding of hearings in New York and Philadelphia was authorized by Commission order dated March 13, 1964.

At the hearings, testimony and other evidence were offered in support of and in opposition to the allegations of the complaint. Such testimony and evidence were duly recorded and filed in the office of the Commission.

The parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues.

After the presentation of evidence, proposed findings of fact and conclusions of law and a proposed form of order, accompanied by supporting briefs, were filed by counsel supporting the complaint and counsel for respondents. Replies or exceptions also were filed by counsel for both parties.

Proposed findings not adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters.

After carefully reviewing the entire record in this proceeding, together with the proposed findings, conclusions, and order filed by both parties, as well as their respective replies, the hearing examiner finds that this proceeding is in the interest of the public and, on the basis of such review and his observation of those witnesses who testified after he was assigned to the case, makes findings of fact, enters his resulting conclusions, and issues an appropriate order.

By order dated January 4, 1966, the Commission extended to April 18, 1966, the time for filing this initial decision. In essence, that action took account of an extension of time granted the parties, at respondents' request, for filing their proposed findings and related submittals. Initially, the parties were granted until February 17, 1966, for filing their proposals and briefs, with exceptions or replies due on February 28, 1966. Subsequently, on motion of respondents and without objection by complaint counsel, the time for filing proposed findings and supporting briefs was extended to March 3, 1966, and the time for filing reply briefs to March 23, 1966. The additional time was sought by respondents' counsel because of difficulties occasioned by the transit strike in New York City during January 1966, and also personal problems resulting from the illness of his wife. Because of the additional time thus granted the parties, the examiner requested, and was granted by Commission order dated April 14, 1966, an additional extension of time to May 18, 1966, for filing this initial decision. This was later extended to May 27, 1966.

As required by Section 3.21(b)(1) of the Commission's Rules of Practice, the findings of fact include references to principal