even though the complaints were issued more than two years ago, the Commission deems the latter procedure, that of withdrawing the complaints rather than issuing amended complaints, more appropriate. In view of the posture of these matters before the hearing examiners, issuance of amended complaints would, in practical effect, be tantamount to issuance of completely new complaints. In these circumstances the more orderly procedure is to withdraw the original complaints, without prejudice to the issuance of new, expanded complaints if found to be warranted. Accordingly,

It is ordered, That the complaints in the above-captioned proceedings be, and they hereby are, withdrawn.

It is further ordered, That the motions of complaint counsel to amend the present complaints be, and they hereby are, dismissed as moot.

IN THE MATTER OF

THE QUAKER OATS COMPANY

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

Docket 8112. Complaint, Sept. 14, 1960—Decision, Nov. 18, 1964

Order setting aside initial decision and dismissing for lack of showing of injury to competition and for failure of proof, respectively, charges of price discrimination and selling below cost on the part of a major producer of oat flour, among other food products.

AMENDED AND SUPPLEMENTAL COMPLAINT

The Federal Trade Commission, having reason to believe that the respondent named in the caption hereof, and more particularly designated and described hereinafter, has violated and is now violating the provisions of Section 2(a) of the Clayton Act (U.S.C., Title 15, Section 13), as amended, and Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its amended and supplemental complaint, stating its charges with respect thereto as follows:

COUNT I

Alleging violation of Section 2(a) of the Clayton Act, as amended:

PARAGRAPH 1. Respondent, The Quaker Oats Company, sometimes hereinafter referred to as respondent Quaker, is a corporation orga-

nized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located in the Merchandise Mart Plaza, Chicago 54, Illinois.

PAR. 2. Respondent Quaker for many years has been and is now engaged in the business of the production and processing, sale and distribution of various food products, including cereals, pancake, bread and cake mixes, macaroni products, corn meal, and flour, including oat flour. Said respondent is also engaged in the production, sale and distribution of chemical products, pet foods, and livestock and poultry feeds.

Respondent Quaker has plants located in some 28 cities in 20 States throughout the United States.

Oat flour is produced by said respondent at its plant in Cedar Rapids, Iowa. Said respondent sells oat flour in bulk quantities to large industrial users for processing into various food products, including cereals and baby foods.

Quaker's sales of rolled oats have, in the past several years, amounted to approximately 75% or more of the total industry sales of such product.

Said respondent's sales of all products have exceeded $300,000,000 annually since 1957, and its sales of oat flour exceeded $1,000,000 during 1959.

PAR. 3. Respondent Quaker, in the course and conduct of its said business has been, and is now, engaged in commerce, as "commerce" is defined in the Clayton Act, in that it has sold and distributed, and is now selling and distributing, its products to purchasers thereof located in States other than the State of origin of shipments and has, either directly or indirectly, caused such products, when sold, to be shipped and transported from the State of origin to purchasers located in other States. There is now, and has been, a constant course and flow of trade and commerce in such products between said respondent in the State of origin and purchasers thereof located in other States.

PAR. 4. In the course and conduct of its said business in commerce, respondent Quaker has sold, and now sells, its products to purchasers thereof, some of whom have been and are in competition with each other, and with customers of competitors of respondent, in the resale and distribution of such products.

Respondent Quaker has been and is now in competition with other corporations, partnerships and individuals in the course and conduct of its said business in commerce.

PAR. 5. Respondent Quaker has been, since about 1955, and is now,

discriminating in price between different purchasers of its oat flour by selling such product to some purchasers at prices substantially higher than the prices at which respondent sells such product of like grade and quality to other purchasers, some of whom are in competition with each other in the processing and sale of products containing oat flour, or products composed in substantial part of oat flour.

Said respondent does not maintain a formal list of prices applicable to the sale and offering for sale of oat flour. Instead respondent submits prices to purchasers in response to requests for bids by such purchasers, or respondent solicits business on an offer and acceptance basis.

As illustrative of respondent's discriminatory prices, sales of such product have been made by respondent to some purchasers at prices ranging from 1% to 5% or more higher than those prices allowed to other purchasers, some of whom are in competition with the nonfavored purchasers in the processing and resale of such product, or of products containing substantial amounts of said product. Such discriminatory prices have amounted to as much as 24 cents per hundred weight above the prices charged by said respondent to other purchasers of oat flour of the same grade and quality.

Differentials in the price of oat flour in amounts ranging from 5 cents to 10 cents per hundred weight are substantial enough to cause a purchaser to buy from the supplier quoting such lower price or differential.

PAR. 6. The effect of the discriminations in price, as alleged in Paragraph Five herein, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which the respondent and the purchasers receiving the preferential prices are engaged, or to prevent, injure or destroy competition between respondent and its competitors and between and among purchasers of such product from respondent. In addition, such practices have a dangerous tendency to hinder competition or to create or further a monopoly in respondent in the manufacture, sale and distribution of rolled oat products.

PAR. 7. The discriminations in price, as hereinbefore alleged, are in violation of the provisions of Section 2(a) of the Clayton Act, as amended.

COUNT II

Alleging violation of Section 5 of the Federal Trade Commission Act:

PARAGRAPH 1. Paragraphs One through Four of Count I hereof are incorporated by reference and made a part of the allegations of

Count II herein, except that in Paragraph Three of Count I reference to the Clayton Act is eliminated and reference to the Federal Trade Commission Act is substituted therefor.

PAR. 2. In the course and conduct of its business in commerce, respondent has, from time to time since 1956, sold or offered for sale its oat flour to certain customers at prices below cost or otherwise unreasonably low, with the intent, purpose and effect of injuring, restraining, suppressing and lessening competition in the sale of oat flour and rolled oat products.

For example, in March 1956 respondent sold 20,000 hundred weight of oat flour to one customer at a price of approximately 30 cents per hundred weight below cost.

As another example, respondent, in August 1956, sold 600 hundred weight of oat flour to another customer at a price of approximately 10 cents per hundred weight below cost and in July 1957 respondent also sold 600 hundred weight of oat flour to this customer at prices which were approximately 10 cents per hundred weight below cost. There are other instances during the years 1956 and 1957 of sales of oat flour by respondent at prices that were below cost or otherwise unreasonably low.

PAR. 3. The result and effect of the sale of oat flour by respondent to purchasers thereof at prices below cost, or otherwise unreasonably low, has been and is now to suppress, lessen and eliminate competition between respondent and its competitors and between the customers of respondent who are in competition with each other in the resale of products containing substantial quantities of oat flour.

PAR. 4. The acts and practices of respondent, as alleged herein, are to the injury and prejudice of the public, have a tendency to and have actually hindered, suppressed, lessened and eliminated competition in the sale and distribution in commerce of oat flour and products containing substantial quantities of oat flour, and have a tendency to hinder competition or to create or further a monopoly in respondent in the manufacture, sale and distribution of rolled oat products. Said acts and practices constitute unfair methods of competition, or unfair or deceptive acts or practices in commerce within the meaning of Section 5 of the Federal Trade Commission Act.

Mr. Lewis F. Depro and *Mr. Benjamin H. Vogler* supporting the complaint.

Mr. John T. Chadwell and *Mr. Luther C. McKinney* of *Chadwell, Keck, Kayser, Ruggles & McLaren*, Chicago, Ill., for the respondent.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

OCTOBER 21, 1963

PRELIMINARY STATEMENT

This proceeding, among other matters, tests the legality under Section 2(a) of the Robinson-Patman Act of a general industry practice, followed by respondent in submitting differing "competitive" bids for deferred deliveries of oat flour to its customers who use the flour as a raw material for baby foods, cereals and bakery goods. It also presents questions on the scope of the term "like grade and quality." A second count charges a violation of Section 5 of the Federal Trade Commission Act.

The original complaint issued September 11, 1960, charged the Robinson-Patman Act violation. An amended and supplemental complaint was issued by the Commission after the hearings had commenced and as of December 11, 1961. The amended complaint charged, among other things, that respondent's prices had been made unreasonably low or below cost with the intent, purpose and effect of hindering competition in oat flour and tending toward a monopoly in rolled oats.

Pleadings, Facts Admitted and Issues Raised Thereby

The original complaint in the first four paragraphs alleged that respondent is a New Jersey corporation, having its principal place of business in the Merchandise Mart Plaza, Chicago, Illinois (Para. 1); it is engaged in the production and processing, sale and distribution of various food products (which are described) and has plants located in some 28 cities in twenty States; it produces oat flour at Cedar Rapids, Iowa, and sells it to large industrial users for processing into various food products including cereals and baby foods; its sales of rolled oats amounted to approximately 75 per cent of the total industry sales, and its sales of all products in 1959 exceeded $300,000,000 while its oat flour sales in 1959 exceeded $1,000,000 (Para. 2); it is engaged in commerce as defined in the Clayton Act (Para. 3); it sells to persons in competition with each other, and it competes with other corporations in commerce (Para. 4).

The foregoing allegations are all admitted by the answer, with the exception of the percentage of rolled oats and the allegation that respondent manufactures one food product—macaroni, which it no longer produces. The admitted allegations are accordingly found as facts.

The critical allegations are contained in Paragraph Five of the complaint which charges that respondent, since about 1955 has been "* * * discriminating in price between different purchasers of its oat flour by selling such product to some purchasers at prices substantially higher than the prices at which respondent sells such product of like grade and quality to other purchasers * * *." The complaint further charges that respondent does not maintain a formal list of prices but instead submits prices in response to requests to bid. Illustrating, the complaint charges that the discrimination has ranged from one to five per cent or more and as much as 24 cents per cwt., whereas as little as five to ten cents differential will cause a buyer to shift suppliers.

Respondent denies these allegations but admits that it has no price list and alleges that it sells oat flour on a bid basis because of many factors, including the constantly changing market for grain. It further alleges that oat flour is a non-inventory item milled in response to each individual order in conformity with the customer's specifications.

Paragraph Six of the complaint charges, in statutory language, that the acts described have a tendency to lessen competition or create a monopoly in oat flour, and, in addition, "* * * to hinder competition or to create or further a monopoly in respondent in the manufacture, sale and distribution of rolled oat products."

Paragraph Seven states the conclusion that Section 2(a) has been violated. Respondent denies all the allegations in these paragraphs and asserts that suit is not in the public interest. Respondent asserts also that it is contrary to the purpose of the antitrust laws to restrict in any way the present system of competitive bidding.

The answer interposes, as affirmative defenses, allegations that the differentials (1) were to meet competition, (2) made only due allowances for differences in cost, and (3) were in response to changing conditions affecting the market for or the marketability of the goods concerned. Also, the practices are industry-wide and require industry-wide treatment. Thus, the central issues raised by Count I are:

(1) The applicability of Section 2(a) to competitive bidding situations,

(2) The applicability of the term "like grade and quality" to the circumstances here disclosed, and

(3) The affirmative defenses.

The amended complaint repeats the allegations of the original complaint as Count I and adds, as Count II, the charge of violation of Section 5 of the Federal Trade Commission Act.

After repeating the first four paragraphs of the first count in Paragraph One, Count II alleges, in Paragraph Two, the nub

of the charge which is that, "* * * from time to time since 1956 [respondent] sold or offered for sale its oat flour to certain customers at prices below cost or otherwise unreasonably low with the intent, purpose and effect of injuring, restraining, suppressing and lessening competition in the sale of oat flour and rolled oat products." It then cites three examples and states there are other instances. The examples are:

Date	Quantity	Amount below cost
	Cwt.	*Per cwt.*
March 1956	20,000	30¢
August 1956	600	10¢
July 1957	600	10¢

Respondent's answer to this paragraph is a simple denial.

Count II, Paragraph Four, alleges that the effect of such sales has been to lessen and eliminate competition in both the primary and secondary lines. The last paragraph alleges in effect that the acts "* * * have a tendency to and have actually hindered, suppressed, lessened and eliminated competition in the sale and distribution * * * of oat flour * * * products containing * * * oat flour, and have a tendency to hinder competition or to create or further a monopoly in respondent * * * of rolled oat products * * *." Said acts are in violation of Section 5 of the Federal Trade Commission Act. Respondent's answer to these paragraphs is also a denial.

Course of Proceedings

A prehearing conference was held December 12, 1960, at which counsel agreed to cooperate in the advance exchange and authentication of exhibits. This resulted in cooperation of a superior order and substantially reduced the time required for the hearings.

Some sixteen hearings thereafter were held at the instance of counsel supporting the complaint in Chicago, Illinois; Minneapolis, Minnesota; St. Louis, Missouri; Pittsburgh, Pennsylvania; New York, New York, and Washington, D.C., commencing May 22, 1961, and continuing with the long intervals permitted under the rules applicable to this case through August 17, 1962.

During the course of the Commission's case, a special hearing was held in Washington, D.C., on July 18, 1961, on a motion to place certain documents *in camera*. The motion was denied in part by order dated August 3, 1961. Petition for an interlocutory appeal was denied August 25, 1961.

Shortly after the *in camera* motion, the motion to amend the com-

plaint by adding the second count was made by counsel supporting the complaint. This was denied by the hearing examiner by order dated August 4, 1961. The Commission granted an interlocutory appeal from such denial and issued an amended and supplemental complaint dated December 11, 1961, by its order of the same date. This order instructed the hearing examiner "* * * that the evidence heretofore introduced in support of and in opposition to the original complaint shall have the same force and effect as though received at hearings under the complaint, as amended and supplemented * * *." It also informed him that he was to rule on motions for further cross-examination and to take such further action "as may be appropriate to protect any of the respondent's rights."

After a conference held January 5, 1962, in which the decision of the Commission was announced, the hearing examiner by order dated January 10, 1962, expressly fixed January 19, 1962, as the time for making motions pursuant to the Commission's Order of December 11, 1961, and reserved a time and place for taking additional cross-examination, should counsel for respondent desire it. Respondent made no application pursuant to that order for added cross-examination or for other relief, taking the position that the amendment violated its rights irreparably.

Motions to strike certain of the evidence received, subject to a motion to strike and to dismiss the complaint, were made June 25, 1962. These were argued August 16 and 17, 1962, immediately after counsel supporting the complaint had offered tabulations, summarizing the transactions concerning which evidence had been offered, and had rested. The motion to strike was granted in part and denied in part by order dated September 21, 1962, and the stricken exhibits were ordered placed in the rejected exhibits file. Some were later reoffered and received during rebuttal.

Counsel for respondent moved to dismiss Count I and Count II on the ground that counsel supporting the complaint had failed to make a prima facie case. Specifically, he charges a failure of proof that: (1) price differences were comparable in point of time or terms of sale, (2) the flour sold at the higher price to any customer was of like grade and quality to that sold at a lower price to another, (3) there was competitive injury, (4) there were sales below cost with a predatory intent, and (5) there was competitive injury from sales claimed to be at an unreasonably low price. The matter was argued at length and after discussion decision was reserved. The motion is now denied.

Respondent's case was commenced September 24, 1962, at Chicago, Illinois, and continued at intervals until January 16, 1963. Rebuttal

testimony then commenced and continued at Chicago, Illinois, and at Washington, D.C., until May 17, 1963.

Basis of Decision

Proposed findings were filed July 15, 1963, and briefs and counter-proposals September 3, 1963. Time to file this initial decision was extended by the Commission to October 21, 1963.

On the basis of the entire record, the following findings of fact, conclusions therefrom and order are made. All proposed findings not made in terms or in substance are denied as erroneous or immaterial.

FINDINGS OF FACT

1. The admissions contained in respondent's answer to the complaint heretofore described are hereby adopted as fact. These will not be repeated except in the interest of clarity or for the purpose of emphasis. Ensuing findings will be grouped under subheadings to which they primarily relate. Such grouping is not intended to insulate the groups which are in many instances related one to another.[1]

The Industry and Competitive Bidding

2. Oat flour is an intermediate product milled from the grain oats and then used in the manufacture of some consumer product. Oat flour is not customarily sold directly to ultimate consumers. (CF 12; RF 13)

3. Oat flour is used in producing, among others, the following products: baby food (both canned and dry), dry cereal, pancake and bakery mixes. The amount used varies by product. In some instances, it is used as a stabilizer, as, for example, in canned goods and frosting mixes. In other instances, it is the principal ingredient as in oat cereal and certain baby cereals. (RF 18; CF 3)

4. Millers of oat flour include respondent, the Quaker Oats Company, sometimes referred to as Quaker, and the following companies which are sometimes described by the name appearing in parentheses after the full name:

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[1] Pursuant to Rules effective August 1, 1963, citations to exhibits or to testimony will be made. The citation of a particular reference does not mean that there are not others or in any way detract from the fact that the entire record has been considered. Exhibits will be cited either as "CX" for Commission exhibits or "RX" for Respondent's exhibits. Transcript references will be cited as "Tr." or where appropriate to refer to the testimony of a witness as a whole by the name of such witness. In certain cases where proposed findings of both parties are in substantial agreement references will be made to such findings as "CF" and "RF," meaning Commission's Proposed Finding and Respondent's Proposed Finding, respectively.

Albers Milling Company (Albers), A Division of Carnation Company
Fruen Milling Company (Fruen)
Purity Oats Division of General Mills, Inc. (General or Purity)
Ralston Purina Company (Ralston)
National Oats Company (National) (CF 10; RF 20)

5. Albers recently re-entered the market; hence, its impact on this case is minimal (RX 1C).

6. The manufacturing facilities of Ralston and General are at times the subject of so many orders for the manufacture of oat flour for the production of consumer goods which they also produce that, at such times, they are not interested in making sales to others (Tr. 1161). Oat flour is not their major product. General Mills also had difficulty with some specifications (Tr. 2405).

7. Fruen has sold continuously only to Mead Johnson. It has occasionally sold also to Gerber (Tr. 1495–1507). It had not been able to meet the specifications of Gerber at times or those of others (Tr. 1596, Tr. 1608 *et seq.;* RX 5 a and b).

8. National Oats Company specializes in the production of oat products, including oat flour and rolled oats. It is also engaged in producing popcorn. It offers all of its oat flour for sale and does not produce consumer products from it. While, with Quaker, it is regarded as one of the prime regular producers of oat flour for sale, total net earnings from its entire business (as of 1957) were less than two per cent of the total net earnings of Quaker. It, however, produced and sold as much or more oat flour as did Quaker during the period 1955–1959 (Tr. 686, 816, 2202–3, CF 4, 5 citations).

9. Proof of sales in this case has been limited generally to sales to customers who ordinarily purchase oat flour in carload lots. There is some evidence that sales are also made to bakeries and a few samples of sales for experimental purposes or to fill out a carload are shown.

10. The largest user of oat flour is Gerber Products Company (Gerber), a baby food producer which has plants in Oakland, California; Rochester, New York; Asheville, North Carolina, and Frémont, Michigan (Tr. 2049). As the Asheville plant started operations late in 1959, the evidence does not concern it. Gerber uses approximately 10,000 cwt. of oat flour per month (Tr. 2075).

11. Other companies active in baby food production which compete with Gerber, and among themselves, are:

H. J. Heinz Company (Heinz), with plants in Tracy, California; Medina, New York; Chambersburg and Pittsburgh, Pennsylvania (Tr. 2192, 93)
Beech-Nut Lifesavers, Inc. (Beech-Nut)
Duffy-Mott (Duffy-Mott or Clapp)
Mead Johnson & Co. (Mead Johnson or Pablum) (Tr. 2333 *et seq.;* CF 11; RF 19)

Mead Johnson and Duffy-Mott do not manufacture a full line of baby products and Duffy-Mott sells its Clapp strained foods at a lower wholesale price than Heinz, Beech-Nut and Gerber (Tr. 2340 *et seq*).

Swift and Company manufactures straight meat products for baby food (Tr. 2340), and Libby McNiel and Libby were in the baby food business but discontinued it prior to 1955 (Tr. 2342).

12. Two companies using oat flour were engaged in the breakfast cereal business—Post Division of General Foods Corporation and Kellogg Sales Company—during the period 1957–1959. These companies are of comparable size and have national distribution of their cereals in one of which each uses oat flour. Serutan (also known as Life and Pharmaceutical, Inc.) also produces a regularizing cereal or dietary addition in which oat flour is used (Tr. 897, 227).

13. Pillsbury Mills and Procter & Gamble utilize oat flour, the former, in its frosting mix and, the latter, in certain pancake mixes. The proof does not establish how they compete with other users (Tr. 227, 2794, 2798).

14. Eastern States Milling and Missouri Farmers Association (M.F.A.) purchase oat flour for animal feeds (Tr. 3696, 3742).

15. Both respondent and National Oats engage in the production of rolled oats (or oatmeal). Rolled oats are used as a breakfast cereal and in baking. Respondent's share of the national rolled oats market exceeds three-fourths of all the rolled oats produced. National Oats has the next largest volume of something less than one-twentieth of the national volume. It is active in only one-fifth of the United States. Rolled oats as a breakfast cereal exceed all other hot cereals used for that purpose.

16. Purchasers of oat flour usually buy in carload lots and publish written specifications to the suppliers. These specifications are regarded as trade secrets and the documentary evidence regarding them was received *in camera*. A tabulation has been prepared listing such specifications without disclosing the name of the purchaser. A copy of such tabulation is attached as Appendix A.

17. The normal method of purchasing oat flour is for the purchaser to call, write, or wire two or more suppliers and ask each for a bid for covering a specified quantity deliverable over a stated period of time. Specifications of the purchaser have previously been made available to all likely sellers, and the bids are made for flour meeting such specifications. Suppliers, so requested, ordinarily submit bids, although, in some instances, no bid or a high bid will be submitted if the supplier is not interested at the moment due to other commitments in the manufacture of flour. The purchaser will usually award the

contract to the seller making the lowest bid. In some cases, however, where the bids are close, the purchaser may split his purchase to insure continuance of the availability of two suppliers (CF 20; RF 24, 26 and 27).

18. Exceptions to the normal method of purchase include the following:

(a) Prior to March 1954, National Oats had a contract with Gerber to sell oat flour to it on a cost plus basis. This contract was not renewed in 1954 or thereafter, but Gerber made a number of purchases from National Oats up until the middle of 1955 on a cost plus basis (Tr. 699, 2052–2055, 2087; CX 495, 602, 612, 615, 630, 868).

(b) Pillsbury Mills purchases oat flour only from respondent because, although they have endeavored to do so, National cannot produce an oat flour to meet Pillsbury's specifications (Tr. 782, 875).

(c) Mead Johnson allocates its purchases among suppliers and secures different prices from the same supplier, depending on what prices it is able to secure from other (Tr. 462–463, 3500–3501, 3682–3683: CX 156b).

Respondent's Method of Calculating Bids

19. Respondent issued a cereal report (CX 369–372) daily to its interested departments, including the Industrial and Institutional Division which was concerned with oat flour. This report gave the estimated standard and the estimated full costs for various oat flours, among other products here which are not material. So far as oat flour is concerned, the standard cost included the purchase price of oats of the day before plus perhaps a half cent (Murray Tr. 3842) and the manufacturing cost calculated from time to time by the accounting division. Full costs contained, in addition, an allocation of general administration and sales expense (Fenner Tr. 181). According to testimony of Richard R. Fenner, respondent's man in charge of bidding, the full costs in the cereal reports were not used (Fenner Tr. 184–85). Such costs include selling expense not chargeable to the Industrial and Institutional Division. Some calculations were made on exhibits received in evidence by C. H. Leavitt, the assistant to Richard R. Fenner which included full costs (CX 186A, 187, 189A, 210–216, 219, 220, 251A, 252A, 254A, 255A, 256A, 257A, 258A, 259A, 260A, 261A, 262A, 263A, 266A, 267A, 268A, 269A, 270C, 272A, 278A, 279A, 371, 372, 442, 443, 463, 464, 564A–C, 826A&B, 827B, 829A–C, 830A–B). It is not entirely clear whether these were contemporaneous calculations or notes made for a congressional committee.

20. Fenner, after taking over the Chicago Industrial and Institu-

tional Division in May of 1956 (Tr. 221), was responsible for the oat flour bids made (Tr. 176). He sometimes consulted William G. Mason, a vice president (Tr. 176), but there was no question about his own authority (Tr. 176–183), although there was an understanding that he would not sell below standard costs (Tr. 655, 1293).

21. While he could not recall details of particular cases (Tr. 161, 198, 205, 217 and 259 as examples) Fenner stated he would normally get a standard cost projection in the morning (Tr. 172; CX 368–372). If there were a bid on several cars within a month, this standard cost would be used, but if the bid were for a long term or a large amount, he would consult the grain department (Tr. 172–78). He would then get a report from the accounting department as to per hundred weight estimated cost (Tr. 174). To this would be added freight and a reasonable margin (Tr. 175). On occasion, he would consult with his immediate superior, Mr. Mason (Tr. 176). Sometimes the special standard cost received from consulting the grain department would exceed and other times be less than current standard costs (Tr. 179). The margin to be added would depend on the feel of the market (Tr. 181). Fenner quoted to try and get as much as he could for the product and still be competitive enough to get the business (Tr. 182).

Fragmentary Evidence Fixing Dates

22. Records reflecting transactions by respondent are fragmentary due to respondent's regular destruction policy (Tr. 261) and due to the fact that certain records were not preserved; e.g., records of special costs secured from the requests to the grain department (Tr. 3512, 3845–3866) and logs showing special instructions to millers (Tr. 3411). In addition, in making records, a day or so variation sometimes occurred between the occurrence and the date a record was made of it (Tr. 128). The date the record was made might be incorporated in the record and might thus indicate an occurrence one or more days later than it actually took place. Accordingly, inferences must often be made on the basis of probabilities as it is impossible, as one witness testified, to recall transactions after such a lapse of time as has occurred (Tr. 205, 217, 259).

23. Following a bid transaction, customers prepare a purchase order bearing a date within four or five days of the date the sale was consummated (Tr. 2116, 2271, 2356–57). In some instances, the customer will note on the face of the purchase order the date the sale was confirmed (Tr. 2272). At or about the same time, Quaker prepares either a contract or a mill order (Tr. 322–23). A contract is prepared if only

general delivery dates have been furnished by the customer (Tr. 225, 322–23). If specific dates have been given, a mill order for each car is prepared. All of the above-mentioned documents are evidence of a sale within four to five days of the actual transaction. If a contract has been prepared, the customer will, at a later date, supply Quaker with specific shipping dates. Quaker then writes a mill order, the date of which may have no relation to the date of sale (Tr. 313–14, 3580). When a carload of product is shipped, Quaker prepares an invoice (Tr. 282). Such invoices bear a date which may have no relation to the date of sale (Tr. 209, 6043, 6253).

24. Most oat flours are shipped in carload quantities by rail (Tr. 194–95, 1648) in bulk or in 50 or 100 lb. jute or cloth bags (Tr. 194–95). Different methods of packing and delivery entail different costs (Tr. 780), bulk shipments being the most economical, and 50 lb. bags the most costly.

Like Grade and Quality

Minute details concerning the proof offered which relates to the grade and quality of the oat flour sold to competing customers of Quaker are set forth in the following findings, because of the significance of the problem in this case and the dearth of controlling authority.

25. Respondent's oat flour is not held in inventory (Fenner Tr. 315–16, 319), but instead is milled to specifications only after an order is received (Tr. 319, 1632). The oats used by Quaker in milling its oat flour are U.S. Grade 1 and 2 of milling quality (Tr. 3821–23, 3851–53).

26. Customers are not concerned with whatever names a supplier attaches to his oat flour (Tr. 2266, 2325, 2351). Instead, the customers develop specifications (Tr. 3202) which they submit to the suppliers defining the characteristics required in their oat flour (Tr. 781, 2152–53). When a customer orders an oat flour, it is on the understanding that the required specifications will be met (Tr. 2350–51, 2302, 2152–53). Upon receipt by the customer the oat flour is checked for compliance (Tr. 2317). Specifications of various customers are set forth in Appendix A. If an oat flour supplier ships oat flour which does not conform to the customer's specifications, the customer promptly sends the oat flour back to the supplier (Tr. 251, 3110; CX 3i, 3k, 4b, 4c, 4d, 4e). The supplier is then obligated to supply another car which does meet specifications (Tr. 251, 1517, 2173, 2199, 2204, 2306–07, 2760–61, 3281, 3384, 3464, 3699; CX 103b).

27. Differences in the same customers' specifications will cause price deviations (Tr. 5491). For example, Quaker, on the same day,

quoted a different price to Mead Johnson on flour from the No. 14 system than for flour from the No. 5 system (CX 155a). Similarly, Heinz was quoted different prices (RX 32), as was Pillsbury (RX 43b). On the other hand, Quaker oat flour No. 14 and 36 carry identical standard costs (CX 368–72).

28. In the food field, manufacturers are dependent on analytic techniques for defining products (Tr. 3331). Thus, all designate the oat flour which they wish to purchase by specifications (Tr. 2152–53, 2349, 2747, 2939, 4500) and on occasion, require a "written agreement that all physical and chemical limits can be met" by a supplier (CX 469). One customer stated:

> The granulation is unsatisfactory, the bacteria is high, there is a very strong positive tyrosinase, the fat is low and the ash is high. The only conclusion that can be drawn is that this material does not meet our specifications, and therefore [it is] unsatisfactory for our use. (RX 3a)

Customers' specifications for oat flour include "proximate analysis" tests dealing with crude protein content, fat content, fiber content, mineral content, and moisture content. In addition, there are specifications defining performance properties of the flour (Tr. 2815). These may include measurements of viscosity or dispersibility, contamination by bacteria or other micro-organisms, residual enzymatic activities, particle size (granulation), texture, and other properties, depending upon the needs of the particular customer (Tr. 2682; CX 855a–b).

In addition, customers include, either expressly or impliedly, (Tr. 3280, 4515) the requirement that the flour perform satisfactorily (Tr. 2683, 2938–39, 3307, 3331). A flour may meet specifications and yet perform unsatisfactorily (Tr. 3108, 3335, 3485). For example, Kellogg in a letter to Quaker said:

> You are meeting the standards we set for the raw material, and we are at a loss to know why we have problems * * *. Unless your product satisfies our production people, we will be unable to purchase additional quantities from you * * * (CX 440b; see also Tr. 2815, 3096).

29. Heinz was offered a flour from Quaker's No. 14 system at a lower price than it was then paying for a flour from Quaker's No. 5 system (RX 25, 32). Heinz, after determining that the cheaper flour met its specifications (RX 30), tried it in a production run and summarized its experience by stating: "No. 14 Oat Flour—No Good—Grayish Cast—Cannot Use" (RX 31). Heinz concluded that it would not purchase the cheaper flour at any price (Tr. 2308, 2313–15). In 1957, Quaker met Post's sieve specifications, but the granulation of the flour nevertheless caused trouble and a change was required (Tr. 4488). Similarly, Quaker met Post's fiber requirements, but the

configuration of the fiber was such that it tended to plug Post's machinery. A change was required (Tr. 4489–90).

30. Post was offered Quaker's No. 2 flour and a flour from the No. 14 system (Tr. 4481). No. 2 was rejected at the outset (Tr. 4481), and flour from the No. 14 system proved unsatisfactory, despite changes made in it by Quaker over a six-month period in 1957.

31. Pillsbury was offered five different samples at estimated prices ranging from $5.15 per cwt. on No. 2 flour to $4.71 per cwt. on flour from the No. 14 system (RX 43b). Pillsbury's tests indicated they were different (RX 43d–g; Tr. 3308). Pillsbury used only No. 2 thereafter, although it was one of the more expensive samples.

32. Similarly, Kellogg tried flour from the No. 14 system and rejected it (CX 440b). Thereafter, Quaker had difficulty satisfying Kellogg (Tr. 2808–15, 3096).

33. When a customer inquired concerning an oat flour possessing particular characteristics or informed Quaker of a problem which had occurred in the use of a Quaker flour, Quaker assigned M. P. Wineberg, its cereal chemist, to deal with the problem (Tr. 2677–78, 2932). It was Wineberg's practice then to visit the plant of the customer in question and observe the nature of the manufacturing process in which the problem was occurring or for which flour was required (Tr. 2678, 2745). After visiting the plant, Wineberg would determine what was required in the milling of the flour (Tr. 2745–46, 3065; CX 387). He would then order an experimental production run. Thereafter, Wineberg would again visit the customer's plant and observe the performance of the flour in the customer's operation (Tr. 2679, 2747).

Wineberg dealt with problems experienced at Gerber (Tr. 2743, 2764–65, 2769, 2771–72, 2779), Heinz (Tr. 2743, 2787, 3063–64) Kellogg (Tr. 2743, 2809–11, 2814), Post (Tr. 2743, 2809–11), Beech-Nut (Tr. 2743, 2802, 2861), Pillsbury (Tr. 2743, 2794–97), Procter & Gamble (Tr. 2743, 2798–800), and Mead Johnson (Tr. 2743).

34. Customers also buy to a certain extent by sample (Tr. 2265, 4221–22). For instance, they ask Quaker to match a sample of oat flour which has proven satisfactory (Tr. 2683, 2908–09; CX 392), or they ask Quaker to submit a sample (CX 439) or a series of samples until one is found which works (CX 392, 440b; Tr. 2815–16, 2938–39). Thereafter, Quaker mills against the successful sample (Tr. 3068).

35. Quaker deliberately attempted to meet but not exceed Gerber's specifications in its development of flour manufactured under the No. 14 system (Tr. 162–3, 234, 3483, 3595–98).

36. National claims it has only one grade Lab-16, though it also mills a Lab-109 which differs only in grind (Tr. 759, 4929). It regards

its oat flour as of higher quality (CX 527A), meeting the specifications of all but Pillsbury which requires a finer grind than National is capable of producing (RX 40). National has experimented with the use of different grinds and variations in procedure, and, in shipping samples, has indicated costs would differ (RX 22A, 92A, 93).

37. Ralston exceeds customers' specifications in its oat flour and recognized that it might be able to provide a special flour for a particular customer (Tr. 1164–65, 4220–23).

38. General Mills claims to have two "grades," one of which is used in ready-to-eat cereal (Tr. 1642–43). The differences were not explained.

39. The oat flour purchased by the various buyers from time to time from Quaker is used interchangeably with oat flour purchased from others (Tr. 2267, 4477–79, 4512). Post manufactures an oat cereal called "Alpha-Bits" and uses oat flour purchased from Quaker and National in the preparation of such product. Post does not keep separate the oat flour from National from that obtained from Quaker, and if a situation should arise where the oat flour of one of the suppliers fails to meet a particular oat flour specification, Post remedies this situation by blending this oat flour out with the oat flour of the other recognized supplier that will be or is in conformance with Post's specifications (Tr. 4512).

40. There are no objective standards (such as grain standards) set up for oat flour by any agency of the government or business (Tr. 4978–4981, 5002).

41. When oat flour is deliberately manufactured to specifications with different uses and applications in mind, it is not in most cases interchangeable among customers (Tr. 2913). Different oat flour customers have different specifications because they (1) manufacture different products; (2) employ different manufacturing procedures; or (3) formulate their products differently (Tr. 2750, 3182).

42. Quaker's policy has been one of meeting each customer's specifications as economically and as efficiently as possible (Tr. 2751, 2747, 2757, 3068, 3182). It has made no effort to develop a universal flour satisfactory to all customers (Tr. 2747), contrary to the practice of other suppliers.

43. There are differences in the products produced by Quaker's customers which require differing characteristics in the flour used (Tr. 2746, 2827, 3075). Similarly, different manufacturing procedures permit the use of a flour having differing characteristics (Tr. 573, 2678, 2725, 2730, 2746). Gerber utilized a type of enzymatic digestion in manufacturing their dried cereals which resulted in a sheet of pre-

cooked cereal possessing a higher tensile strength than that manufactured by Heinz (Tr. 2790, 2822–23), or Beech-Nut (Tr. 2805). Since a higher tensile strength permits the use of a higher fiber content oat flour, Gerber could tolerate higher levels of fiber and bran in their flour than could their competitors (Tr. 2755–56). Gerber also had a device for removing a portion of the fibrous component from the slurry while it was being cooked on the drum drier rolls (Tr. 2756, 2790, 2822–24). Other producers of drum-dried cereal did not use such a device (Tr. 2756).

Because of the differences in their equipment and processes, Heinz could not have used the flour going to Gerber at any time during 1957, unless they had been willing to tolerate excessive manufacturing costs (Tr. 3118–19). Mead Johnson could not use the flour which was used by Gerber due to different processing methods (Tr. 235, 2760), nor could Beech-Nut (Tr. 2759). Moreover, customers use different recipes for their finished products even where they are producing a product similar to that produced by a competitor (Tr. 3119). For example, Beech-Nut uses one type of iron enrichment in its dry cereal, whereas Gerber uses another type. Beech-Nut's iron enrichment tended to react with certain organic acids present in fragments of an oat kernel called pericarp and perisperm to produce a discoloration in the finished product. Gerber did not encounter that reaction. Since Beech-Nut would not tolerate that situation, Quaker found it necessary to fractionate out pericarp and perisperm from Beech-Nut's flour (Tr. 2804, 2839, 3197).

44. During the period 1955 through 1959, Quaker made an oat flour possessing different characteristics for each of the following customers: Gerber, Mead Johnson, Heinz, Beech-Nut, Kellogg, Pillsbury, Procter & Gamble, and Post (Tr. 2750). With the exception of shipments for experimental runs, at no time during the period 1955 through 1959 did Quaker send the flour with identical characteristics to more than one of the customers with which Wineberg had dealings (Tr. 2900–02).

45. The physical and chemical characteristics differed. These differences were controlled; they were intentional; they were responsive to customer specifications (Tr. 2749–50). These differences occurred: in condition or state of the fat, condition or state of the protein, as well as protein content (Tr. 2736, 2918, 2965–67), the amount of microbiological contamination, viscosity characteristics, texture (Tr. 2749–50, 2830, 2914), degree of enzyme inactivation (Tr. 2749–50, 2994, 3433), free fatty acid content (Tr. 3066, 3419–20), fiber content (Tr. 2730, 3043, 3066, 3382), granulation (Tr. 2725, 2829, 3406), moisture,

viscosity (Tr. 2718, 2749–50), gum (Tr. 2919, 2964), gelatinization (Tr. 2720, 2964), and bran content (Tr. 2731–32, 3396–97).

46. The miller can, depending upon the techniques used, vary the end characteristics of the flour produced (Tr. 2698–99, 2749–50, 3266). He can prevent undesirable reactions from occurring during the milling process, and at the same time, he can alter his process in such a way as to create desirable characteristics in accordance with specific requirements of the customer (Tr. 2697–98).

For example, in some cases, the miller must inhibit some enzymes that are dispersed throughout the flour when it is ground. Those enzymes may react with the fat in the oat kernel to create free fatty acid. The free fatty acid, in turn, may combine with starches to form an amylose complex, which affects the production of extruded ready-to-eat cereals, or with atmospheric oxygen to form carbonyls, which create rancid, bitter off-flavors (Tr. 2697, 2704, 2715, 3003).

Similarly, the miller can control the fiber content through removal of more or less of the branny outer layers of the kernel which are high in indigestible fiber (Tr. 2730–31, 3045, 3066). He can vary the gum content by removing more or less of the fractions high in gum content (Tr. 2719). The granulation can be changed by virtue of the grinding and the classification after grinding (Tr. 3265), as well as the rolling (Tr. 3038–39). Through variations in drying, steaming, granulation and fractionation, the miller can control the viscosity of the oat flour (Tr. 2718–19). Bacterial contamination is controlled above and beyond that point which is a part of good milling practices through dry steaming, as well as certain sterilization techniques (Tr. 3065–66, 3133–35). The texture (sharpness or fuzziness of the particle) is controlled through the rolling and drying processes (Tr. 2728, 3032). The gelatinization of the finished flour may be varied by the amount of water applied in the form of steam (Tr. 2719–20, 2964, 3010–11, 3134–35). The moisture content of oat flours is controlled by the degree or amount of drying of the oats, the amount of water added prior to steaming, the amount of steam used during steaming, and the amount of water gained or lost during grinding, screening or air classifying (Tr. 2733). Both the protein content and quantity can be controlled (Tr. 2736). The protein content can be controlled by the removal of more or less of the aleurone layer of the kernel which is rich in protein (Tr. 2736, 2965–67, 3054). The nature of the protein is affected by heat treatment, which causes a phenomenon known as "denaturation" (Tr. 2965).

The miller can also vary the end characteristics of the oat flour by selecting specific raw material. He can select oats low in fiber content

in order to control that characteristic (Tr. 2370–31, 3043–45, 3066). He can select oats low in free fatty acid content and control that characteristic (Tr. 2708, 2980–81, 2987). He can select oats high in protein to increase the protein level (Tr. 2966).

47. In order to control the variations in the characteristics as among the various flours that Quaker produces, a customer performance sheet is prepared by the head miller before each production run for the benefit of the personnel in the mill. It specifies the system on which the flour is to be produced; the necessary machine settings; the raw materials to use; how to steam the product (add moisture, avoid moisture, or steam at normal moisture rates); how to set the cooling operation underneath the rolling and steaming operation; how to set the rolls (the tension to be applied and the rate of rolling); how to set the grinder (the size of perforation in the grinder screen and the air setting); how to classify to obtain the proper granulation (the size and combination of sieves) (Tr. 3408–10). None of these sheets or logs are maintained as permanent records (Tr. 3411) and none were accordingly offered at the hearings.

48. Quaker utilized several different combinations of the same milling machines to produce its various flours. A particular combination of machinery was referred to as a system (Heck, Tr. 3376–3473).

The No. 5 system included all of the manufacturing steps available to Quaker. It involved cleaning; drying; hulling; separation of the oat stream into "A" grade groats (plump and free from hulls) and "B" grade groats (some hull fragments); steaming; rolling; grinding and sieving (RX 46).

The No. 14 system differed to the extent that the portion of the cleaning system which rejects light oats was shortened. The drying step was eliminated and, at the outset in 1955, the groats were not separated into "A" grade and "B" grade. Subsequently, in 1958, the grading of groats into "A" and "B" grade was reinstated; "B" grade was used on the No. 14 system, and "A" grade was used on the new No. 36 system (RX 47).

In 1958, the No. 36 system was developed. It eliminated a storage step to prevent the build-up of free fatty acid in the groats after hulling. Also, "A" grade groats, free from hulls, were used (RX 48).

The No. 6 system did not employ the rollers or the steamer. The groats went directly to the grinder (RX 49).

The No. 60 system involved the additional step of long time storage of the groats at high temperatures. This was accomplished through a process of pre-heating the oats (RX 39b; Heck, Tr. 3441, 3470).

49. Following is a summary of the history of the problems of the

principal baby food customer manufacturers, the systems used to produce the characteristics required, and the variations from such systems:

(a) Beech-Nut uses oat flour in both canned goods and drum-dried pre-cooked cereals (Tr. 2744). Beech-Nut began to purchase flour from the No. 14 system in 1956 (Tr. 456). Beech-Nut could not, however, use the same flour which was being shipped to Gerber. Beech-Nut's process was such that the tensile strength of the sheet of drum-dried cereal was low and would fracture if too much fiber was present. Beech-Nut did not have a device such as that used by Gerber to remove excess fiber. Also, the nature of Beech-Nut's handling equipment caused flow problems if the flour was too fine. Finally, Beech-Nut required the removal of that fraction of the oat which, when combined with certain iron enrichments added by Beech-Nut, caused discoloration of the finished product (Tr. 2759, 2802–03; CX 410a). Accordingly, Quaker removed more fiber, more pericarp and perisperm and changed the grind on the Beech-Nut flour (Tr. 2804-05).

(b) Duffy-Mott used flour manufactured under the No. 14 system (CX 366a). Details concerning problems, if any, were not offered.

(c) Gerber manufactures both canned goods and drum-dried cereals containing oat flour (Tr. 2744). They were particularly concerned with bacteriological aspects of their oat flour (Tr. 2920; CX 376). In 1955, Gerber purchased a small quantity of flour manufactured from steamed, rolled dried groats produced on the No. 5 system (Tr. 2754). By late 1955, Quaker was selling Gerber a flour with a high fiber content produced from undried groats (green groats) on the No. 14 system (Tr. 234, 2754–57). In late 1958 or early 1959 (CX 381b), Gerber discontinued its purchase of flour from the No. 14 system because the flour was not performing properly (Tr. 389, 1885, 2175, 2760; CX 377, 380, 382a, 389). Gerber was furnished a sample of flour from the No. 36 system in 1959 (CX 386) but it never purchased that flour in quantity. To solve Gerber's problem, Quaker altered the viscosity characteristics of the flour by introducing, for Gerber only, the storage of dried oats for prolonged periods at relatively high temperatures (Tr. 2766–67, 2770–71; CX 393–94). This process was known as the special No. 14 system and later, the No. 60 system. After 1959 Gerber went to a low protein flour referred to as No. 65 (Tr. 1886), as well as a flour from the No. 5 system (Tr. 3082–83).

(d) Heinz manufactures both canned goods and pre-cooked drum-dried cereals containing oat flour (Tr. 2744, 2787). In 1954, Heinz was using a flour manufactured from unsteamed groats (Tr. 2790), which caused a rancidity problem (Tr. 2742, 2789, 3063). To overcome this problem, Heinz began using a flour from the No. 5 system and con-

tinued to do so until 1958. In 1958, Heinz went to a flour produced on the No. 36 system. Heinz was offered flour from the No. 14 system early in 1956, but it chose to reject that flour (Tr. 2788–89). During the 1955–1959 period, Heinz encountered bacterial contamination problems (Tr. 2789, 3065) as well as "cold water viscosity" problems (Tr. 2791–92). To overcome such problems, a change in steaming was ordered (Tr. 2793).

(e) Mead Johnson used oat flour in drum-dried pre-cooked cereals (Tr. 2806). From 1955 to 1957, Mead Johnson used flour from the No. 5 system. In 1957, Quaker undertook to sell Mead Johnson flour manufactured from green groats on the No. 14 system. Mead Johnson immediately encountered difficulty (Tr. 3549), because they had a 20% tighter fiber requirement than Gerber. Steps were taken to fractionate off more of that type of material (Tr. 2857). The Mead Johnson flour was produced from 100% of the groat stream, whereas Gerber's flour was produced from the 70% containing a high percentage of hulls (Tr. 2873). Mead Johnson encountered a granulation problem with flour from the No. 14 system in 1957, and it was necessary to alter the particle size of the flour to satisfy them (Tr. 2868; CX 398a).

50. Following is a summary of the history of the problems of the principal ready-to-eat cereal manufacturers, the systems used to produce the characteristics required, and the variations from such systems:

(a) Kellogg uses oat flour in extruded ready-to-eat cereals (Tr. 2744). Kellogg's first purchase from Quaker was flour from the No. 14 system in August of 1959 (CX 189a). While the flour met Kellogg's specifications, they were dissatisfied with its performance and refused to use it thereafter (Tr. 2809–10). Kellogg's experience with flour from the No. 14 system has been summarized as follows:

> Kellogg cannot run O.K.'s with Quaker's flour except when it is blended with Lab–16 [National's] oat flour. They can run O.K.'s with Lab–16 oat flour alone, but not Quaker's. (RX 74b)

Kellogg did not purchase again from Quaker until 1962, (Tr. 2808, 3096).

(b) Post manufactures extruded ready-to-eat cereals containing oat flour (Tr. 2744). Post began experimenting with oat flour in 1954 for use in its ready-to-eat cereals (Tr. 4501). It tested flours from the No. 2 and No. 5 systems in 1957 and found them unsatisfactory (Tr. 4481). In June of 1957, it bought its first carload of oat flour from Quaker (Tr. 496) which was the same as that supplied by Quaker to Gerber. That flour proved to be too high in free fatty acid

(Tr. 4481, 4505–06) and was, therefore, unsatisfactory (Tr. 4482). Post informed Quaker of the trouble, telling them that the free fatty acid level would have to be reduced (Tr. 4506) as it adversely affected the extrusion characteristics of the dough (Tr. 2705, 2776). On subsequent shipments of flour manufactured on the No. 14 system for Post, Quaker made alterations in an effort to overcome those problems (Tr. 2774–75; 4484–85). Thereafter, Post had difficulty with flour from the No. 14 system because it was too finely ground, and caused trouble in Post's handling equipment (Tr. 2782; Tr. 4485; CX 417). Quaker made changes to correct that problem (Tr. 2782; Tr. 4488–89; CX 416, 418a). Also, the configuration and amount of fiber in that flour caused difficulty and required changes (Tr. 2772–73; Tr. 4489–90; CX 421). In early 1958, Quaker developed the No. 36 system for producing a flour for Post (Tr. 2772–73, 2783). Due to the free fatty acid problem, Quaker made Post's flour from fresh groats, as well as the best 30% of the mill stream of oats (CX 382b). This was done for no other customer (Tr. 2777–78).

(c) Serutan which uses oat flour in a cereal supplement used flour manufactured under the No. 2 system (CX 303).

51. Following is a summary of the history of the problems of other customers, the systems used to produce the characteristics required and the variations from such systems:

(a) Pillsbury uses oat flour in cake icings or frostings (Tr. 2744, 2794). In about 1954, Pillsbury was using a No. 1 flour produced from unsteamed groats which created a shelf life problem (Tr. 2797). To overcome that problem, they switched to a No. 2 flour. Thereafter, they encountered a crystallization problem in their finished product. This is a condition in which sugar crystals grow progressively larger as the product ages (Tr. 2795). Oat flour, if finely ground, will overcome that problem (Tr. 2795; Tr. 3278). Since 1955, Quaker has produced progressively finer flours for Pillsbury (Tr. 2796). Presently, they are receiving a No. 105 flour. Pillsbury was offered flour from the No. 5, No. 14 and No. 36 systems, which was not satisfactory to Pillsbury (Tr. 3308).

(b) Procter & Gamble manufactures dry pancake mixes (Tr. 2744, 2798). Originally, Procter & Gamble used flour from Quaker's No. 6 system, but in 1958, due to a shelf life problem created by that flour (Tr. 2800), it began purchasing flour from the No. 14 system. Thereafter, Procter & Gamble complained that the flour from the No. 14 system was causing a problem of speckiness in their finished product. Accordingly, Quaker adjusted its manufacturing procedures to remove more of the pericarp and perisperm fragments of the oat kernel (Tr.

2799–2800). Also, Procter & Gamble complained regarding texture and Quaker accordingly supplied a finer grind flour (Tr. 2800). In 1958, Procter & Gamble was offered No. 2 flour as well as flour made of the No. 5 and No. 36 systems (CX 458).

(c) Missouri Farmers Association and Eastern States did not require a controlled oat flour. They used it in an animal feed. The only controls required were steaming and grinding, without further classifying (Tr. 3442–43, 3471–72). The No. 14 system was used in producing flours for these customers.

52. Appendix B is a table which summarizes the foregoing three findings. In making these findings the hearing examiner has relied heavily upon the carefully prepared testimony of M. P. Wineberg, the cereal chemist and Werner Heck, the chief miller of respondent, despite their interest. This was based among other things upon their demeanor, and the manner of answering the questions posed. Their testimony was corroborated by two customers, Pillsbury and Heinz. No rebuttal testimony was offered from other customers in contradiction of their testimony.

53. The hearing examiner took the position during the trial that he would take the facts covering the differences claimed to exist in oat flour delivered to various customers but would not receive opinion testimony whether such flours are of like grade and quality because in his view such an opinion would involve a mixed question of law and fact for the examiner and the Commission and was not a proper subject of expert testimony. The questions and answers are, however, recorded and are thus available.

Quaker's Costing Practices

54. Quaker does not figure the actual cost of any individual product produced in its oat mill (Tr. 1424, 1428). Quaker prepares no calculation of actual costs on oat flour (Tr. 1268–69; Tr. 1425–26; Tr. 3860; Tr. 3918–19). Quaker has no records from which such an actual cost could be calculated (Tr. 3806). The only figures calculating cost are periodic estimates of what costs will be (Tr. 1424).

55. Quaker's accounting department prepared a Daily Cereal Report (see e.g., CX 369, p. 1), reflecting estimated standard cost (Tr. 1431–32). It was an aid to the sales department (Tr. 173, 649).

56. Standard cost is a term used in accounting practice (Tr. 1431). It includes three basic elements: raw material cost; milling cost; and plant overhead (Tr. 3915–16). Development of such standard cost requires pre-production assumptions (Tr. 3915–16, 3933; Tr. 4748) regarding: the quantity of raw material required (Tr. 5321), the value

of the raw material (Tr. 5322), the quantity of by-products to be expected, the value of the by-products (Tr. 5323), the method of production (Tr. 5323–24), the time required to produce, the factory overhead to be associated with the product (Tr. 5323), and the volume over which the costs are to be spread (Tr. 5325–27).

57. Quaker's standard cost includes an estimated value of raw material, less estimated realization from the sale of by-products at some future date, plus estimated manufacturing cost, plant overhead and packing cost (Tr. 174; Tr. 1433, 3774).

Daily, at 1:15 p.m., the close of the grain market (Tr. 3855), Quaker's grain department estimates replacement cost of oats for use in the next day's standard cost projection (Tr. 3841, 3855), as well as the estimated by-product values (Tr. 3841).

Those estimates, however, cannot be inserted into standard cost until an estimate regarding yield is established. Accordingly, Quaker's head miller, its accounting people and its grain people met monthly to agree upon a yield to be used. The estimated yield was in terms of the total number of pounds of oats necessary to manufacture a net hundredweight of product (Tr. 1841–1842).

The following items were included in the manufacturing cost estimates (Tr. 3772–73): department labor, supervision, electric power, steam, machinery repair, elevator expense, grain elevator expenses, depreciation, hull grinding, car preparation supplies, mechanical handling equipment expense and plant overhead.

The plant overhead estimate included (Tr. 3773–74): personnel service labor, vacation and holiday pay, illness and accident pay, 140-hour guaranteed time, 70-hour lay-off time, sundry expense, Workmen's Compensation Insurance, general salaries and expense, auto and truck expense, donations, demurrage, methods engineering, trainee program, insurance, taxes, plant service labor, sundry depreciation, building repair, sundry power—electric, and sundry power—steam.

Estimated packing costs are added to these estimates to arrive at standard cost.

The items listed above, taken together, constitute the estimated cost of the product (Tr. 1432) at the mill. It does not include administrative selling expense or general overhead.

58. It was this "standard cost" that Fenner, under Vice President Mason's instructions (Tr. 1293), used as a floor in making bids (Tr. 181–3, 654–5, 3498, 3510, 3604–5, 3612–5), as heretofore pointed out.

59. Fenner testified, however, that he did not work from the Daily Cereal Reports when he had a request for a quotation on large or future contracts (Tr. 173) (ones involving more than a month or more

than several cars). Instead, he would go to the grain department (Tr. 3496) and ask for a new appraisal of raw material cost and by-product credits for the extended period (Tr. 172; Tr. 3842–43). The grain department insisted upon this procedure (Tr. 3599–3600).

In response to such a request, the grain department supplied a new estimate to the accounting department (Tr. 173; Tr. 3843, 3845, 3857), which, in turn, computed a new projected milling expense (Tr. 1846–47) and notified Fenner of the new estimated standard cost applicable to the particular bid (Tr. 654; Tr. 1294; Tr. 3845–46). The messages from the accounting department were in the form of a penciled note, teletype message (Tr. 668), or telephone call (Tr. 3660–61). No records were maintained reflecting the new estimates which were used on futures sales (Tr. 3512; Tr. 3856).

Quaker maintains a technical staff which continuously appraises current and long term market conditions for the major ingredients Quaker buys (Tr. 3885-86; Tr. 4050). It assists John Murray, the vice president of the grain department, in timing purchases so as to minimize both short term and long term ingredient costs (Tr. 4057–58). The services of this staff were used in connection with future sales of oat flours (Tr. 4060).

Dallas Western, a crop expert (Tr. 4085–86), is in charge of providing estimates of crop conditions and prospective yields for various grains (Tr. 3832). Quaker's Economic Research Department uses these prospective supply estimates, along with its own estimates of various demand factors (Tr. 3844) in statistical analyses designed to indicate the most probable future price action (Tr. 4049).

The statistical analyses (generally of the multiple correlation type) are applied to different locations and for different time periods. Weights are derived which indicate the relative importance to oat price of the supply and demand factors included. A single given factor may be more important in one month than in another (Tr. 3844). For example, in the first quarter of the new crop year (July–September), the total supply of old crop oats will be important (Tr. 4065). In the second quarter, new crop corn must be considered as influencing the price of oats (Tr. 4071–72).

Normally, the peak of oat prices occurs in early or mid-winter, and then declines into the July-August harvest period (Tr. 3497; Tr. 4107). Often, however, forces may exert influence sufficient to overwhelm this seasonal tendency. For example, according to Fitzgerald, March 15–20, 1956, the government's March 1 planting intentions report indicated a decline in oat acreage, and a marked upward revision in general price anticipations was called for (Tr. 4083).

In addition to forecasting the replacement value of oats for a deferred delivery contract, an estimate must also be made regarding the value of by-products (Tr. 3795–96). By-products have an important bearing on the cost of making oat flours because they act as a credit against the cost of grain (Tr. 849). Estimates regarding by-product values over an extended period may be different from current estimates. By-products also tend to fluctuate in value during the course of the year (Tr. 780–81, 849; Tr. 1460).

60. Beginning in August 1956, Quaker prepared an accounting advice which showed the amount of general, administrative and selling expense applicable to oat flour sales at that time to be 34¢ per cwt. In August 1957, another accounting advice sheet was issued by Quaker purporting to direct that the amount of general, administrative and selling expense applicable to sales credited to the Chicago Institutional and Industrial Food Sales Division should be 36¢ per cwt. The increase was determined from a study made in which past experience was one of the elements. It was customary for Quaker to review the advices in relation to the past and to the future, once or twice yearly. (Tr. 1425–52, 3761–65, (Whitfield RX 51 to 55).) In making their comparisons of selected sales to different customers of Quaker, counsel supporting the complaint has utilized these accounting advices (RX 51 to 55) as additions to standard costs to arrive at adjusted full costs. (CX 877A–z25.) The adjusted cost, so arrived at, includes the standard cost and the estimated general, administrative and selling expense applicable to such sales.

61. General administrative expenses are period charges which are not identifiable with specific units of production (Tr. 3943–44). General administrative expense includes the president's salary, the controller's salary, legal department expenses (Tr. 3784–85, 3800), state income taxes, franchise taxes (Tr. 3804–05), central office rent, and accounting department expense (Tr. 1438). It is a catch-all for expenses not directly allocable to products (Tr. 1438, 3779, 3800). During the period 1955–1959 it amounted to between 34¢ and 36¢ per cwt. for industrial sales (RX 51–55).

62. The Daily Cereal Reports also reflect an estimated unit full cost. Full cost is the sum of standard cost, plus estimated selling and general administrative expense (Tr. 1438). This full cost shown on the Daily Cereal Reports was inapplicable to industrial sales of oat flours (Tr. 1866; Tr. 3761, 3763) because it included selling expense incident to Quaker's general sales organization (Tr. 1853–55; Tr. 3780–81, 3783, 3786, 3797–98). Fenner testified that he sometimes quoted above estimated full cost on oat flours (Tr. 185) and sometimes below (Tr.

668), but he did not pay any attention to full costs (Tr. 184) in preparing bid quotations (Tr. 3498, 3612), because the relevant cost, insofar as he was concerned, was standard cost. As heretofore pointed out some of the records maintained by Quaker show for particular sales a comparison of full costs and prices. Fenner testified that he never authorized his assistants to bid below standard costs, and in the event it happened, it was simply an error (Tr. 655).

Price Discrimination and Sales Below Cost

63. Counsel supporting the complaint introduced evidence concerning more than 550 transactions involving sales of oat flour by respondent during his direct case. In addition, he offered evidence concerning the delivery of portions of such sales through invoices and "mill orders" where no proof of sale could be secured (RF [2] Appendix, pp. 50–107, and exhibits cited therein). At the request of the hearing examiner and at the close of his case, counsel supporting the complaint offered an Exhibit, 825a–z25, showing the transactions which he claimed showed price discrimination and sales below cost. These transactions were later the subject of proof by the respondent. Near the conclusion of his rebuttal counsel supporting the complaint offered a revised comparison (CX 877a–z25) which showed, in addition to the differences in price and full costs, the amount of flour ordered, the delivery period and the adjusted cost [*i.e.*, the standard cost plus the allocation of general administrative and selling expense which was allocated by respondent to the Industrial and Institutional Division (RX 51–55)]. In his proposed finding forty second, counsel supporting the complaint pointed out eight examples of sales claimed to be discriminatory (CF 42, pp. 34–35).

64. Counsel for respondent, in each of the instances described in Exhibit CX 877a–z25, sets forth his reasons why the comparison did not establish a price discrimination in Appendix to respondent's proposed findings of fact (pp. 108–138, incl.). These reasons are wholly supported factually in almost all cases by the testimony and exhibits cited in support of such reasons. (See exhibits and testimony cited to show why there is no discrimination or no sale below cost in the instance cited.) However, the conclusions of respondent contained in such reasons are rejected in the instances set forth in the following findings for the reasons there set forth.

65. The following comparisons constitute examples of sales to competing baby food manufacturers made at discriminatory prices

[2] RF means Respondent's findings. CF means Counsel Supporting the Complaint's findings.

(despite testimony that the flour sold to one could not be used by the other) because the flours were roughly comparable; were the same in appearance; the same in estimated cost; from identical raw material; were to be used for the same purpose by firms known by respondent to be in competition with each other, and were made at approximately the same time:

(a) The sale to Gerber on April 30, 1957 of 15,000 cwt. of No. 14 flour to be delivered within 76 days at the mill net of 4.44 and the sale to Beech-Nut on May 2, 1957 of 1,800 cwt. of No. 14 flour to be delivered within 50 days at 4.63 or 19¢ per cwt. above the price to Gerber (CX 877d).

Respondent's explanation (RF Appendix, p. 112) that the Beech-Nut flour had been subjected to additional aspiration and contained less fibre does not constitute a difference in grade or quality, merely a difference in treatment at no significant additional cost. No competent evidence has been offered to establish the difference in cost between the dates of delivery or arising by reason of differences in amount, and, it has not been established that the sale of 20 carloads over 2½ months committed Quaker's capacity to such an extent that it was unable to bid for 3 carloads at the same price. An examination of bids by other firms during April 1957 does not indicate that the bid was made to meet competition (RF Appendix p. 63).

(b) The sale to Gerber on July 23, 1957 of 15,000 cwt. of No. 14 oat flour at a mill net of $4.24 per cwt. deliverable in 67 days and the sale to Mead Johnson on July 30, 1957 of 600 cwt. of No. 14 oat flour to be delivered in 64 days at $4.44 per cwt. as part of an order of 7,200 cwt. of No. 5 oat flour sold at $4.60 per cwt. or 20¢ above the price to Gerber (CX 877e).

Respondent's explanation (RF Appendix, p. 113) that more effort was made to control fibre for the Mead Johnson flour and that the Gerber flour was made so as to hold bacterial contamination to a minimum does not constitute a difference in grade or quality; merely a difference in treatment at no significant difference in cost so far as the No. 14 oat flour was concerned. It has not been established that the inclusion of November and December in the Mead Johnson contract would have caused a commensurate increase in cost or that the seven-day interval between the sales made the contracts not comparable in time. Examination of bids preceding the sale in the month of July 1957 (RF Appendix, pp. 64 and 65) does not indicate that the bids were made to meet competition.

(c) The sale to Mead Johnson described in subparagraph b above and the sale to Gerber on July 31, 1957 of 50,000 cwt. deliverable over

233 days at a price of $4.20 (CX 877f) or 24 cents below Mead Johnson's price.

Respondent's explanation (RF Appendix, p. 114) to substantially the same effect as that made with respect to the comparison made in connection with the sales described in subparagraph b does not constitute a defense for the reasons stated under said subparagraph.

(d) The sale to Gerber described in subparagraph c above and the sale to Beech-Nut on August 6, 1957 of 600 cwt. at a mill net price of $4.45 or 25¢ above Gerber's price (877g).

Respondent's explanation (RF Appendix, p. 115) that the Beech-Nut flour had less of certain fibres which had led to discoloration and Gerber had a finer grind flour does not constitute a difference in grade or quality; merely a difference in treatment at no significant difference in cost. It has not been established that the difference in price is justified by a difference in cost of the two sales or that the eight days' difference in the dates of sale was significant. An examination of the bids preceding the sale in the months of July and August 1957 (RF Appendix, pp. 64–66) does not indicate that the bids were made to meet competition.

(e) The sale to Gerber on April 8, 1958 of 3,200 cwt. of No. 14 flour deliverable in 13 days at a mill net price of $4.36 and the sale to Mead Johnson on April 8, 1958 of 1,200 cwt. of No. 14 flour deliverable in 24 days at a mill net price of $4.50, or a difference of $.14 per cwt. (CX 877s).

Respondent's explanation that Mead Johnson's flour was of a coarser granulation and not made with bacterial control in mind and that the Gerber flour was made from the lower 70% of the groat stream and was bacteria controlled (RF Appendix, p. 122) fails to constitute a difference in grade and quality but merely a difference in treatment. It has not been established that such a difference in treatment caused any significant difference in cost. To the contrary, the projected standard costs in the cereal reports were identical. The testimony of Fenner (Tr. 3501, 3564–65) that there was no way of determining when price changes were made for Mead Johnson is not adequate to counteract the record evidence that the price was made on the date indicated.

66. The hearing examiner rejects the comparison offered by counsel supporting the complaint of the sale to Gerber on September 3, 1957 of 13,000 cwt. of No. 14 flour at a mill net of $4.40 deliverable in 143 days and the sale to Beech-Nut on September 13, 1957 of 600 cwt. of No. 14 flour deliverable in 16 days or a difference of 11 cents (877h).

Respondent's explanation (RF Appendix, p. 115) so far as grade and quality is concerned is substantially the same as under subpara-

graph d of paragraph 44 and is also rejected. However, the difference in projected standard costs was 17 cents (877h) and thus more than the difference in the net prices; accordingly, it does not appear that the difference in the two prices can be regarded as other than competitive bids made in good faith.

The hearing examiner also rejects the other comparisons contained in proposed finding forty second proposed by counsel supporting the complaint because it has not been established that the persons whose sales were compared were in competition with each other.

67. The comparison of sales exemplified by Finding No. 65 because of the lack of evidence of recent comparable bids by others, (see Tabulation if Sales & Bids—pp. 50–107, RF Appendix) the extent of the price difference, (CX 877) the differences between Quaker's bids and the competing bids made by its competitors (see CF Appendix charts I, II and III) demonstrate that the price differences were not differences which might normally be expected in cases of good faith competitive bidding.

The Proof Concerning Below Cost Sales and Reasonableness of Quaker's Prices

68. It has not been established that Quaker sold oat flour below actual costs and could not have been established because Quaker does not calculate the actual cost of any product produced in its oat flour mill (Tr. 1424–1428). Moreover, it keeps no records from which such an actual cost could be computed (Tr. 3806). That no actual costs for oat flour are computed was repeated by all respondent's witnesses concerned with it (Tr. 1268–69; Tr. 1425–26; Murray, Tr. 3860 and Johns, Tr. 3918–19).

69. Respondent's witnesses also pointed out numerous reasons why standard costs could not be used as a basis for estimating even actual production cost. The cost of the grain may well be more or less than the estimate (Tr. 1461–1466). Volume of production may also vary the actual unit manufacturing cost from the estimate (Tr. 3971) which would render the standard calculated invalid (Tr. 5343). The increasing volume of Quaker production thus would tend to have its standard costs understated (See CX 491–92). And, the use of new manufacturing systems where no experience had been developed would make for further inaccuracy. (Tr. 5324–25.)

70. National's experience that it was required to recalculate its estimated costs under its cost plus arrangement after actual costs were ascertained substantiates respondent's position that prospective costs

should not be regarded as synonymous with actual costs (CX 671; Tr. 4233–34; RX 14, RF Appendix 26A and 27).

71. The foregoing findings establish, therefore, that the standard costs set forth in the respondent's so-called cereal reports (CX 368–372) cannot be used as the actual cost applicable to the production of oat flour. They are not the "cost of goods sold," to use a customary accounting phrase.

In the case of the special costs estimated for long-term or large quantity contracts, there are no figures available (Tr. 3512, 3856). We are left with a hindsight speculation as to what estimates may have been made at the time, and such estimates likewise may bear no correlation to the actual costs. This is true because as respondent's witnesses testified the grain department has alternate methods of coverage as follows:

(a) The grain department may rely upon existing oat inventory (Tr. 849, 4585) which may exceed 5 million bushels, depending upon the time of the year (Tr. 6614);

(b) It may buy the requirements in the cash market (Tr. 3846, 4093) and place them along with other oats in the 10 million bushels of storage capacity at Cedar Rapids (Tr. 6614);

(c) If there is an insufficient flow of cash oats, it may buy futures, selling them out later as equivalent amounts of cash oats are purchased (Tr. 3870);

(d) It may hedge the requirements in the futures market (Tr. 3898, 4093);

(e) It may stand on the short position in expectation that the raw material price will decline (Tr. 3846, 4586); or

(f) It may enter into a contract with a third party for deferred delivery on cash oats (Tr. 6615).

Which alternative is followed depends on the price outlook (Tr. 3846). If a price rise in oats is anticipated, the Economic Research Department will urge Vice President Murray of Quaker's Grain Department to cover Quaker's requirements in the cash market (Tr. 4092). If a decline in price is anticipated, they will urge Murray to buy hand-to-mouth. (Tr. 4092). If they feel the futures price of oats will advance more than the price of milling quality oats, they will advise that futures be purchased (Tr. 4092–97).

72. In any event, taking standard costs on the day of the bid as contained in the cereal reports (CX 368–372) the number of instances pointed out of sales approaching standard costs are so few that they substantiate Fenner's testimony that it was a mistake if he bid below standard cost (Tr. 655). To the contrary, during the delivery period

there were a number of instances when delivery was made on a date where the price was below the standard cost shown by the cereal report for the date of delivery (CX 854). It was not established what the grain cost was for the entire contract. It could not be because the grain department kept no records from which the accuracy of its predictions could be determined (Tr. 3870–71).

73. On the other hand, the standard cost or the cost of goods sold despite the accounting convention that it alone is utilized to determine gross profits in juxtaposition to the price received (Tr. 3911–4013, 5314) cannot, purely as a matter of mathematics, be regarded as the sole measure of what it costs a company to do business in a particular product (Compare Tr. 4553–54, 6607–08). Some account must be taken of general, administrative and selling expenses.

74. For products other than those sold by the Industrial and Institutional Division, the cereal reports calculated daily a figure reflecting selling and general administrative expenses (CX 368–372; Tr. 1438). These expenses included the salaries of the president, comptroller, the legal department expense, state income taxes, franchise taxes, central office rent, accounting expense and all other expenses not directly connected with the production of a particular product (Tr. 1438, 3779–3805). While those contained on the cereal reports (CX 368–372) were not applicable to industrial sales of oat flowers according to the uncontradicted testimony (Tr. 1866, 3761–63), commencing in August 1956 a special accounting advice was circulated which allocated such costs to the Industrial and Institutional Division (RX 51–55; Tr. 3763–64, 3781–87). Thus, Quaker clearly recognized that its projected standard costs failed to compensate it for the entire cost of doing business in a particular product. It arbitrarily allocated an additional sum to cover that additional charge against total income (RX 51–55).

75. There is no recognized accounting practice which determines just how general administrative and selling expense must be allocated to a particular product. Corporations adopt different methods of doing so (Tr. 3915, 3937, 5463, 3914–15, 4613–14, 2254, 3914–15, 4751). Quaker as a matter of administrative discretion, not based on a factual survey, (Tr. 3980) allocated the percentage shown on its accounting advice to oat flour sales (RX 51–55), although oat flour accounts for such a small percentage of Quaker's total business that precise allocation is difficult (Tr. 3974–75).

76. Quaker's action in projecting standard costs (CX 368–372) and allocating general administrative and selling expense to its oat flour sales (RX 51–55) is regarded by the hearing examiner as setting up a standard or floor to determine, in the absence of bona fide competi-

tion, what was the least price it was reasonable for it to secure for its oat flour. This price has been designated in the exhibits offered by counsel supporting the complaint as the adjusted full cost (CX 877a–z25).

77. If we compare the sum of the standard cost (as shown on the applicable daily cereal report [CX 368–72]) plus the appropriate accounting advice (RX 51–55) with the price in the series of instances which counsel supporting the complaint charges constitute price discrimination in favor of Gerber, we find that Quaker sold Gerber at a price below such sum in the following instances: July 31, 1957 (877g); September 3, 1957 (877h); and May 23, 1958 (877w). These instances in the opinion of the hearing examiner constitute examples of sales at unreasonably low prices.

Factual Basis for Finding Price Discrimination in Competitive Bidding

78. Counsel supporting the complaint take the position in their proposed findings, conclusions and order that more than a mere difference in price is essential to establish price discrimination in the oat flour industry under its competitive bidding practices. (See VI Summary of Facts and Conclusions, p. 64.) They reach the conclusion that "the price discrimination must be determined, therefore, on the bid cost relationship between the various customers between 1956–1959" (id.). However, counsel for respondent take the position that cost and bids are immaterial. At the same time, they seem to concede that if there can ever be price discrimination in a competitive bidding situation (which they vigorously deny—Answering Brief, pp. 3–8) all counsel supporting the complaint need show is that: "* * * the actual delivered prices are proved to be (1) different, (2) between comparable transactions, (3) involving goods of like grade and quality, and (4) there is an accompanying competitive injury" (Respondent's Answering Brief, p. 10).

79. It has been established in the proof described in the foregoing findings that in the instances set forth: (1) actual delivered prices have been different, (2) in transactions which have not been shown to be incomparable by reason of differences in cost, (3) which involve oat flour of like grade and quality, and (4) such differing prices are made to persons actively competing against each other in goods in which oat flour is a significant ingredient, thus tending to impair their ability to compete with each other.

80. In support of their position that more then mere price difference must be shown in an industry where competitive bidding is the rule,

complaint counsel have demonstrated: (a) that the oat flour market was an expanding market (CF Table III, CF, p. 51), (b) that prices charged in 1956–1957 to Gerber were generally closer to standard costs than prices charged to others (CF Appendix Table II), (c) that during 1956–1957, over the delivery period, the contract prices on the dates of delivery were less than the adjusted costs on that day in 93% of the cases and less than standard costs in 30% of the cases, whereas the percentage was significantly less in cases involving other customers (CF Appendix Table III), (d) that the difference between Quaker's price and the next bid was in the great majority of cases (almost ¾) greater than 10 cents per cwt. (CF Table XIV), (e) that, as a matter of economic probability, in an expanding market, where, as here, there were relatively few buyers and sellers, prices would tend to exceed production costs plus selling and general administration costs by a margin of profit. (Watson 5404–5407, 5416–5419, 5422, 5425–5427, 5429, 5449, 5476.)

81. The hearing examiner finds that while the statistical presentation made by counsel supporting the complaint under the force of skillful cross-examination was shown to have many detailed errors due to the haste in which it was prepared, Scott Walker, the Commission expert under whose direction it was prepared, on the basis of all of his testimony, was candid in admitting errors and in withdrawing his support for exhibits which were clearly erroneous. The examiner, therefore, has accepted as factually approximate the charts and tabulations received in evidence as corrected which form the bases for the preceding finding (Walker). With the exception of Table XIII (See R. Answering Brief, p. 32), counsel for respondent, appear to accept the impact of other tabulations while vigorously denying their applicability. (e.g., R. Answering Brief, p. 9.)

Evidence Bearing on Intent

82. With the exception of a few instances, not shown to have been acted upon at the management level, where salesmen have in their competitive reports sought retaliatory action against National Oats (CX 664 *et seq.*) there is no evidence in the form of statements of intent to injure National Oats (CF p. 112). Counsel supporting the complaint, presumably to establish such an intent demonstrated:

(1) that prior to 1954, the year before Quaker actively returned to the oat flour business, National Oats had an exclusive cost plus contract with Gerber, the largest user of oat flour, which was terminated in 1954. (Tr. 2051, 2126, 2134, 2138, 4236, 4241; CX 671, RX 10),

(2) that Quaker in its competition with National Oats for the

Gerber oat flour business, formerly National's largest customer, consistently favored that company over its competitors during the years 1955 to 1957 (see preceding finding),

(3) that in two of its rolled oats promotions Quaker sought by special cash allowances to increase its share of the market in two territories in which National Oats was strongest in sales of that commodity during the period when it was actively competing with National Oats for the Gerber oat flour business (Tr. 1311–1318, 1766; CX 641, 652A–D; Tr. 2013, 1392 1404; CX 646),

(4) Quaker acquired two companies, both of which had previously purchased oat products from National Oats (Tr. 1339, 1340, 1978, 1984; CX 667, 668).

83. Quaker's vice president in charge of sales testified that Quaker's decision to set up the Industrial Sales Department was not directed at competitors; that he did not even know that Fenner was competing with National for some oat flour accounts (Tr. 1305–1306) and that there was no connection between the promotions of rolled oats and the sale of oat flour (Tr. 1391, 1811). Mr. Proctor, of National Oats, stated there was no direct tie-in (Tr. 893). He felt there was some loose connection because rolled oats and oat flour were made in the same plant (Tr. 889). Both Quaker (Tr. 1315) and National Oats engaged in regional promotional activities prior to those described in the preceding finding. (Tr. 864, 2029, 2043–45.)

The Effect on Competition in the Primary Line

84. Following is a statistical summary showing total sales in hundredweight (cwt.) by each of the sellers of oat flour during the period 1955–1959:

Year	National (CX 494)	Quaker (CX 491 & 492)	Ralston [3] (CX 602 a-j)	Gen'l Mills (CX 630b)	Fruen (CX 615b)	Albers (CX 612e)	Industry total
1955	141, 764	42, 666	*(CX 602a)	28, 840	5, 400	1, 440	(*)
1956	100, 239	105, 105	18, 500	34, 600	13, 800	686	272, 930
1957	128, 772	165, 456	8, 815	54, 900	22, 200	546	380, 689
1958	292, 200	191, 456	10, 090	28, 800	32, 100	2, 412	557, 058
1959	368, 985	213, 917	37, 160	27, 600	23, 400	17, 765	688, 827

[3] Includes Rol-Cut oat flour as well as Ralston oat flour.
*Not available.

Source: (R. Appendix p. 44).

(Compare CF p. 51, Table III which shows slightly lower figures for Quaker, presumably because CX 491, 492 were not considered, and combines totals of firms other than National and Quaker. From lack of criticism of this table in Complaint Counsel's Reply (pp. 38, 39, 53–55), we assume that they agree on the correctness of respondent's appendix.)

Respondent's figures thus establish that by Quaker's activity in 1956, it *increased* its share by 62,439 cwt., while in the same period the share

of National Oats was *decreased* 41,525 cwt. In the following year 1957, the total market increased by some 107,759 cwt. and Quaker's share 60,351 cwt., while National Oat's share of the increase was somewhat less than half that amount or 28,533 cwt.

85. Complaint Counsel compares Quaker, National and the sales of others to Gerber, the recipient of the alleged discrimination in its Table X. While admittedly the Universe and sales to others cannot be complete because of the unavailability of Ralston's figures for the year 1955, the share of Quaker in the Gerber business increased some 56,470 cwt. between 1955 and 1956, while National's decreased some 55,296 cwt. Similarly in 1957, Quaker's sales to Gerber increased another 49,530 cwt. over 1956, and National's sales decreased some 17,200 cwt.

86. Comparing these figures with the 1955–1956 overall increase in Quaker's share and decrease in National's, we find the following:

National's Total Decrease
41,525 cwt.
Quaker's Total Increase
62,439 cwt.

National's Decrease to Gerber
55,296 cwt.
Quaker's Increase to Gerber
56,420 cwt.

87. From the complete statistics available following 1956, the following tabulation sets forth the approximate percentage of market shares and Industry Total in cwt.:

Year	Industry total (thousands of cwt.)	Market Shares					
		National	Quaker	Ralston	General Mills	Fruen	Albers
1956	272	37.7	39.5	4.4	13.0	5.2	.3
1957	380	34.1	43.8	1.6	14.5	5.9	.1
1958	557	52.5	34.4	1.8	5.2	5.8	.4
1959	688	53.6	31.1	5.4	4.0	3.4	2.6

Source: RF 80. R. App. p. 44.

(Compare CF p. 53, C Reply, pp. 38–39, #60 which concedes the differences are slight.)

In comparing figures subsequent to 1957, note is to be taken of a number of circumstances which may tend to modify trends which might otherwise be anticipated:

(1) In 1958 and 1959, General Foods (Post) and Kellogg first made significant purchases from National as follows:

[In hundredweight]

	1958	1959
Kellogg		118,615
Post	210,206	138,372

(Source: CX 494b, 868c, Table IX).

Whereas in the same years they purchased much smaller amounts from Quaker, the latter being a competitor in dry oat cereal.

[In hundredweight]

	1958	1959
Post	20,231	55,757
Kellogg		23,400

(Source: id.)

(2) Moreover during this same period and by 1959, the Small Business Committee of the House of Representatives undertook an investigation of the industry and Quaker added a fixed margin to its bids. (Tr. 1210, 1214; 1230–1237; 1244–1248; 1272–1274; 1290–92; 1329, 1374–7; 1450; 1905. CF p. 29.)

(3) Ralston from about 1956 devoted their oat flour production priarily to dog food because of limited production. (Tr. 1153-5; 1173; 4177–8.) This was later overcome thru increased plant capacity and resulted in increased volume of sales to others. (Tr. 4179, 4158.)

(4) General Mills is primarily interested in producing oat flour for its dry cereal "Cheerios" and uses 80–85% of its production of oat flour therein (Tr. 1648–9). On occasions, it has declined to bid or quote high prices to other customers because of lack of capacity (Tr. 1710–2; 1719–20; 2141; 2306; 2321–2).

(5) Albers did not enter into the oat flour business on a substantial scale until 1959 (RX 1c).

(6) Fruen is primarily a supplier to Mead Johnson (Tr. 1495; CX 615 a–b). General Mills and Ralston cut into its business with Mead Johnson in 1959. (CX 630b; 602g–j.) It had difficulty in meeting specifications of Gerber (Tr. 1522–23; 1629), Heinz (1595–6; 1609), and Beech-Nut (Tr. 1609, 1624). However, when Gerber was satisfied with Fruen's flour, its price was high. (Tr. 1514: 1524–5; CX 623.) Beech-Nut also complained of its high prices. (Tr. 1596.)

(7) Quaker had some difficulty in performance of its flour at Gerber in 1958 (Tr. 389, 1885, 2760, 2175; CX 377, 380, 382a, 389).

88. Despite the reduction in its overall business and in its sales to Gerber in 1956 and 1957, National's financial statements as analyzed by Quaker's public accountants (Tr. 4635 *et seq.*) showed net earnings during the entire period, 1954 to 1959, and, its total dollar sales, varied less than ten percent during that period (RX 68b; CX 563). [Note 1958 is for six months only. See R. Appendix, p. 45.] Financial Ratios are as follows:

NATIONAL OATS COMPANY

[Financial ratios]

	1954	1955	1956	1957	1958	1959	1960	1961
Current ratio [4]	1.76	2.72	2.22	2.52	4.33	2.93	3.86	4.23
Ratio-average [5] net worth to operating profit	13.91	17.90	14.21	14.67	[6] 10.82	20.02	15.40	19.98
Ratio-average [7] net worth to earnings	6.46	8.27	6.15	6.24	5.14	9.47	6.82	9.08

[4] The ratio of total current assets to total current liabilities (Johns R. 4635). The ratio is indicative of the company's ability to meet its short-term obligations. The higher the ratio, the more satisfactory the financial condition of the company (Johns R. 4647). It is determined by dividing the total current liabilities into the total current assets (Johns R. 4636).
[5] Obtained by dividing the average net worth into the operating profit (Johns R. 4642).
[6] Six months only.
[7] Obtained by dividing the average net worth into the net profit. (Source R. Appendix, p. 45.)

89. With respect to the cost plus contract between National Oats and Gerber the uncontradicted evidence is that this was terminated in 1954 (Tr. 2051, 2126, 2134, 2138, 4236, 4241, 4262 RX 10), some three years prior to Quaker's establishment of its Institutional and Industrial Sales Department which sparked the rapid growth of the latter's oat flour business. (Tr. 1214.) However, during the entire year 1955, National continued to be Gerber's principal supplier. (C Table IX, p. 60; CX 494b, 868.) When Quaker commenced its operations and in 1956, 1957–58, National's business with Gerber decreased from 86,296 cwt. in 1955 to 6,201 cwt. in 1958. (C Table X, p. 61.) While Quaker's business increased from 3,800 cwt. in 1955 to 97,100 cwt. in 1958. (id.)

90. Apart from the fact that of necessity when Quaker was successful bidder, other suppliers lost the business, there is no proof in addition to that set forth in the preceding findings from which the effect of Quaker's campaign on such suppliers other than National can be quantitatively evaluated. Albers (RX 1) entered the business to all intents and purposes in 1959, and no supplier has gone out of business since 1955 (Tr. 854–55). General Mills increased its capacity in 1957 (Tr. 1711, 1732) as did Ralston. (Tr. 4179.)

Possible Effect on Competition in the Secondary Line

91. No customers compete in the resale of oat flours (Tr. 277–79). Oat flours are not resold as such, but are processed upon receipt and mixed with other ingredients to produce a variety of finished products (Tr. 2148; Tr. 2318).

92. Counsel Supporting the Complaint called witnesses from three customer companies: Heinz, Beech-Nut and Gerber. They compete with each other in the sale of the following products:

Gerber	Heinz	Beech-Nut
	DRY BABY CEREAL	
Oatmeal, mixed cereal, high-protein cereal, cereal quads (CX 669a).	Oatmeal, pre-cooked cereal, high-protein cereal (CX 780).	Oatmeal, mixed cereal, high-protein cereal, cereal quartets (CX 820).
	CANNED BABY FOODS	
Str. veg. & beef, str. veg. & chicken (CX 669a).	Str. beef w/veg., str. chicken w/veg. (CX 780).	

93. The evidence offered does not establish the manner in which the following companies compete with any other customers in the sale of products containing oat flour:

Customer:	*Product*
Pillsbury	Cake frostings (Wineberg Tr. 2794).
Procter & Gamble	Pancake mixes (Wineberg Tr. 2798; Fenner Tr. 227).
Serutan	Pharmaceutical product (Fenner R. 227).

94. There has been no proof that Eastern States and M. F. A. are other than non-competing regional producers. Eastern States is located in New York (CX 344). M. F. A. is located in Missouri (CX 340). Both produce a calf starter cattle food (Tr. 3696, 3742).

95. Kellogg and Post compete in the sale of ready-to-eat cereals containing oat flour (Tr. 897), but Kellogg purchased no oat flour from Quaker until late 1959, when it first entered the market (Tr. 897; CX 189a). It discontinued its purchases immediately (Tr. 2808).

96. The evidence concerning the following manufacturers of baby food is insufficient to determine whether or not they compete in all lines with Heinz, Beech-Nut, and Gerber:

Mead Johnson
Duffy-Mott

The evidence concerning them is that:

Mead Johnson produces a dry baby cereal or cereals containing oat flour which is marketed under the name "Pablum" (Tr. 226; Tr. 2341).

Duffy-Mott does not manufacture dry baby cereal (Tr. 3742; Tr. 2340). While there is evidence that Duffy-Mott uses oat flour in canned baby foods (Tr. 3742–43), there is no proof as to the kinds of canned oat flour products it produces.

97. Gerber, Heinz and Beech-Nut are old, established companies in sound financial condition. A detailed tabulation of the three companies' sales and net earnings follows:

	Net sales					
	Heinz (CX 779)		Beech-Nut (CX 817)		Gerber (CX 670a)	
	Amount	Year ended	Amount	Year ended	Amount	Year ended
1955	$234,179,207	4/27	$111,465,565	12/31		
1956	262,425,046	5/ 2	123,026,537	12/31	$99,682,746	3/31
1957	278,852,384	5/ 1	111,121,701	12/31	108,120,414	3/31
1958	293,811,817	4/30	114,974,768	12/31	118,636,966	3/31
1959	316,856,669	4/29	115,568,322	12/31	126,833,497	3/31
	Net earnings					
	Heinz (CX 779)		Beech-Nut (CX 817)		Gerber (CX 767)	
	Amount	Year ended	Amount	Year ended	Amount	Year ended
1955	$8,782,324	4/27	$6,498,209	12/31	$5,453,585	3/31
1956	10,583,944	5/ 2	7,998,509	12/31	7,017,537	3/31
1957	10,626,252	5/ 1	8,583,803	12/31	7,771,935	3/31
1958	[8] 9,336,913	4/30	8,121,605	12/31	7,549,728	3/31
1959	11,095,742	4/29	8,104,045	12/31	7,255,050	3/31

[8] The decrease in Heinz' net profits is attributable to some extent to changes in their method of distributing products (Brettholle R. 2247) to general business conditions (Brettholle R. 2255–56), and to a general price reduction in its West-East market (Brettholle R. 2255–56).

98. While the cost of oat flour as an ingredient in baby foods is relatively small (Tr. 2147, 2144, 2200, RX 24) and relatively few baby foods contain significant amounts of oat flour in their recipe, (Tr. 2317, 2404–5; CX 780, 818 and 669a), thus making the percentage of sales of products containing oat flour relatively low (RX 23, CX 670b, 767; 817, 818 and 669a), and although wholesale prices of Heinz, Gerber and Beech-Nut tend to be the same, (Tr. 2332, 2338, 2341, 2148); the volume of cereals containing oat flour from Gerber for example ranged from $4,700,000 to $6,000,000 and of all items between $10,000,000 and $24,000,000 (CX 670b, Tr. 2061–62) and a very small difference in price is sufficient for a baby food manufacturer to shift from one supplier to another provided the products are of equal quality. (Tr. 2268–69.) Thus, each customer discriminated against suffers a reduction in gross profit by the amount of the discrimination which in many cases is substantial.

Respondent's Factual Basis for Meeting Competition Defense

99. In replying to both the price discrimination charge and the below cost selling, respondent avers that it was merely meeting the practices of its competitors.

It shows for example that General Mills quoted a price of $4.43 per cwt. to Gerber at Fremont and presumably claims that this justified Quaker's price of $4.48 per cwt. (Respondent's answering brief, pp. 40–41.) However, it fails to point out that the General Mills bid took place in September 1955 while the Quaker bid was not made until the end of February 1956. (Respondent's Appendix pp. 51–53.) In this regard respondent has failed to establish that the bids were comparable because in the meantime the oat flour bids to Gerber by others had risen as high as $4.60 per cwt., (Respondent's Appendix p. 52) and Quaker itself had received a contract in December at $4.78 per cwt. (id.). The listing of prices at which sales were made without an indication of the dates at which such sales were made is not deemed adequate to constitute a meeting competition defense.

With respect to below cost sales, Quaker in final argument pointed out twelve instances in 1956 in which its competitors had made sales below Quaker's full costs for #14 flour, in nine of which the price was below Quaker's adjusted cost and in six of which below Quaker's standard cost all computed on the cereal reports for the day before the sale. The computation also showed figures for #5 flour showing fourteen cases where sales were made below Quaker's full cost, ten of which were below Quaker's adjusted cost and four below its standard cost computed in the same fashion. (See CX 869 & 854 for source figures.)

REASONS FOR DECISION

Because the combined research of counsel and the examiner has not found controlling precedent for three major issues in this case *i.e.*

1. What is meant by like grade and quality?
2. When do differences in price in an industry in which competitive bidding generally prevails become violations of § 2(a) of the Robinson-Patman Act?
3. What is cost or unreasonably low prices for the purpose of a regulatory proceeding?

the hearing examiner has made findings of fact in much greater detail than would ordinarily seem necessary.

Like Grade and Quality

The first approach to reaching a decision in this case is to consider the meaning of the phrase "like grade and quality" because unless there is a discrimination in price of goods of like grade and quality there cannot be a violation of § 2(a) of the Robinson-Patman Act,[9] as charged in Count I.

The choice by Congress of the word "like" rather than the word "same" affords the first clue. Clearly Congress realized that if only identity of product was covered, avoidance would be too simple, and wholly within the control of a person intent upon violating the law with impunity. Similarly, the choice of the word "grade" in addition to "quality" imports something more than a mere difference. The difference must be one which is recognized not alone by the seller and the favored buyer but more generally in the industry. Moreover, the conjoined word "quality" appears to import the concept of intrinsic value, likeness in worth.

Hence as a starting point we may take the statement of the Attorney General's National Committee that "The 'like grade and quality' concept, we think, was designed to serve as one of the necessary rough guides for separating out those commercial transactions insufficiently comparable for price regulation by the statute." [10]

It is undisputed that Quaker manufactures its oat products from milling quality oats comparable to US grades 1 and 2. Clearly also, is it that there are no governmental or industry standards setting up grades. To the contrary, there is much evidence pointing to an indus-

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[9] *Champion Spark Plug Company*, 50 F.T.C. 30, 47 (1953).
Austen, *Price Discrimination and Related Problems under the Robinson-Patman Act*, p. 38. (2nd ed. 1959).

[10] The Attorney General's National Committee to Study the Antitrust Laws (1955), pp. 157–158.

try concept of only a single grade with possible modifications to suit particular problems of the subsequent users.

On the other hand, Quaker takes the position that it tailor-makes its oat flour for each customer and Weinberg's evidence is uncontradicted that one customer cannot use the oat flour supplied to another. Physically also, the flour will differ much as a hard boiled egg will differ from a three minute egg. Both are cooked eggs of course, and both are likewise milled oats. However, to the customer the control of the enzymes, the viscosity of the slurry produced, the tensile strength of the resulting sheet on his roll or the bacterial content in his can will be of crucial importance meaning perhaps the difference between a profitable and a losing manufacturing operation.

Desired results are obtained by the combination of the right processes in the proper order with appropriate delays and heat treatments to secure the proper particle size and the other appropriate physical characteristics. In this the same machinery is used with some steps or machines by-passed in some cases, and some adjustments of heat or screen size made in others.

Changes of the routing of oats thru the machines or the addition or omission of processes have been given separate system numbers (see Respondent's Appendix, pp. 28–43) and, in addition there are adjustments in the machinery within the system to secure given results.

As to these numbered systems, while no actual costs are available, Quaker had assigned in its daily cereal reports varying standard and full costs (see CX 369–372). It calculated no costs for its adjustments within systems and in fact does not even maintain as a permanent record the mill logs showing these adjustments. Some numbered systems bear widely divergent costs (eq. #5 & #14) and if the same customer on the same date seeks to purchase some of each he will have to pay a different price. As to these there may be some question whether they are of like grade and quality. However, for other systems such as #14 and #36 Quaker seemingly developed them to be competitive and has placed on each the same standard costs. While these are to be used for the same purpose (*i.e.* for the manufacture of baby food) they would seem to be sufficiently comparable for the purpose of the statute. And, it would seem that by placing the same standard costs on each, Quaker has intended that they should be.

This case is unlike *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*[11] because, in that case, there was a difference in the amount of butter fat in the ice cream sold to the allegedly favored customer. But-

[11] 148 F. Supp. 312 (N.D. Ill. 1960 *affirmed* 287 F. 2d 265 (7 Cir. 1961), *cert. denied*, 368 U.S. 829 (1961).

ter fat content is generally recognized as a measure of quality in the dairy industry. It has no counterpart in this case. *Boss Manufacturing Company* v. *Payne Glove Company* [12] likewise involved different quality raw material sold under different degrees of quality control. The "pork" [13] and "gasoline" [14] cases are likewise inapplicable since the differences were generally recognized as constituting differences in grade and quality.

The proper emphasis, it seems, is whether the product is actually costed for sale to competitors. Such a case is *General Foods Corporation*, 52 F.T.C. 798 (1956) where it was held that Maxwell House coffees were of like grade and quality where they were to be resold by competitors to the same type of customer even though the requirements of the competitors' storage facilities necessitated the use of slightly different raw materials in the blend and divergent grinds.

This situation seems comparable to a change in brand name,[15] a change in sizing [16] or a change in text of a stamp [17] which would not justify discriminatory pricing. Hence, as to those oat flour numbers which are substantially similar in cost, Section 2 (a) of the Clayton Act would seem to apply.[18] Having determined the jurisdictional question that oat flour of the same cost in this proceeding was of the same grade and quality, we next consider whether or not the fact that the industry customarily sells at competitive bidding removes the case from the purview of the Robinson-Patman Act.

Competitive Bidding Under Section 2(a)

The evidence is uncontradicted that competitive bidding to the manufacturer [19] customers of Quaker is entrenched as a custom in the industry despite the few exceptions. It is also clear that there is a shift-

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[12] 71 F. 2d 768 (8 Cir. 1934), *cert. denied*, 293 U.S. 590 (1934).

[13] *Atlanta Trading Corporation* v. *F.T.C.*, 258 F. 2d 365 (2d Cir. 1958).

[14] *Midland Oil Company* v. *Sinclair Refining Company*, 41 F. Supp. 436 (N.D. see 194).

[15] *Champion Spark Plug Co.*, 50 F.T.C. 30 (1953); *Goodyear Tire and Rubber Co.*, 22 F.T.C. 232 (1936); *U.S. Rubber Co.*, 46 F.T.C. 998 (1950); *Sylvania Electric Products*, Docket 5728 (1954); *Page Dairy Co.*, *Docket* 5974 (1953); *E. Elderman and Co.*, Docket 5770 (1955); Austen, *Price Discrimination* (1959 Ed.), p. 38.

[16] *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743 (1947), 87 F. Supp. 989, 187 F. 2d 919 (5 Cir. 1951).

[17] *Samuel H. Moss*, 36 F.T.C. 640, *affirmed*, 148 F. 2d 378 (2 Cir. 1945), opinion clarified, 155 F. 2d 1016 (2d Cir. 1946). See also, *Moore Business Forms, Inc.* v. *Federal Trade Commission*, 307 F. 2d 188 (D.C. Cir. July 12, 1962).

[18] See also *Columbia Broadcasting System, Inc.* v. *Amana Refrigeration, Inc.*, 295 F. 2d 375, 378 (7th Cir. 1961), and Austen, "Price Discrimination," p. 38 (1959 Ed.).

[19] Initially a question was presented whether the fact that the product was to be further processed, not sold, exempted its sale from Section 2(a). The conference report made while the bill was pending, demonstrates that this question was considered and a charge to have that effect was rejected. (H.R. Report No. 2951, 74-Cong. 2d Sess. 1–9, June 8, 1936.)

ing floor under the bidding, *i.e.* the market price of oats.[20] Under such circumstances we are inclined to agree with counsel for respondent that we must reconcile the Robinson-Patman Act and the Federal Trade Act "with the broader antitrust policies that have been laid down by Congress" by dismissing the complaint, unless it be shown that the competitive bidding carried on by Quaker was a mere cloak for discrimination between customers.[21] Reading the Clayton Act to be sure that it is administered in a manner consistent with the Sherman Act [22] would tend toward the approval of any plan so apparently productive of competition. For, the Sherman Act was specifically designed to protect competition against unreasonable restraints.

It is a common legislative device, to insure competition of sellers to government, to require them to submit their offerings under sealed competitive bidding as a protection against collusion and as an insurance of a fair price.

Here, the private enterprise consumer seeks similar protection. And, he should be permitted to secure it. No one objects to the consumer insisting that his suppliers bid against one another. Bids to meet competition are expressly authorized under the Robinson-Patman Act. That does not mean, however, that suppliers under the guise of offering competitive bids may favor one customer over another. If there is such a favoring of one customer over another it makes no difference that in form there was competitive bidding. That is the essence which may be distilled from a number of decisions permitting a supplier to meet but not to beat his competitors' lawful price.[23]

If the supplier aggressively seeks to further undercut his competitor he would tend himself to engage in unlawful discrimination.

There is a sharp dispute in this case both as to what the facts show concerning the sales made by Quaker and as to what normally should occur in lawful competitive bidding transactions.

With respect to what has occurred, the hearing examiner has found

[20] At an early stage in the case there was some contention, presumably based on *Huber* v. *Pillsbury,* 30 F. Supp. 108 (S.D.N.Y. 1939) that the market conditions proviso might apply to exempt this case from the provisions of the statute. *Moore* v. *Mead Service Co.,* 190 F. 2d 540, 541 (10 Cir. 1951), *cert. denied,* 342 U.S. 902 (1952) and *Balian Ice Cream Co.* v. *Arden Farms Co.,* 231 F. 2d 356, (9 Cir. 1955), *cert. denied,* 350 U.S. 991 (1956) seem to hold that the *eiusdem generis* rule has been applied to confine the exception to conditions similar to those expressly set forth. See Rowe Price Discrimination under the Robinson-Patman Act (1962) p. 326.

[21] *Automatic Canteen Co.* v. *F.T.C.,* 346 U.S. 61, 74 (1953).

[22] *Standard Oil Co.* v. *F.T.C.,* 340 U.S. 231, 249 (1951).

[23] *Standard Motor Products, Inc.* v. *F.T.C.,* 265 F. 2d 674, (2d Cir. 1959).

Balian Ice Cream Company v. *Arden Farms Co.,* 231 F. 2d 356 (9 Cir. 1955), *cert. denied,* 350 U.S. 991 (1956).

Standard Oil Co. v. *F.T.C.,* 340 U.S. 231 (1951) cf. *Sunshine Biscuits* v. *F.T.C.,* 306 F. 2d 48 (7 Cir. July 11, 1962, Docket 7708).

as a fact that respondent Quaker in the sales which it made to Gerber favored that concern over others to whom it made sales by agreeing to supply it with oat flour at a price considerably lower than it was offering oat flour of like grade and quality to other competing baby food manufacturers. It was even found that the difference between the price paid on Quaker's sale and the price offered by other bidders was also high, and that Quaker's price was much lower than the prices made on similar sales by other suppliers. Finally it was demonstrated that Quaker's price in most instances failed to cover its productive costs and administrative and selling expenses.

Respondent in addition to vigorously attacking the statistical proof of counsel supporting the complaint offered the testimony of two Economic Experts who created the impression that it was their opinion that the pattern of bidding was what might be anticipated in any competitive bidding situation and that it did not appear to contain abnormalities which would point to discrimination rather than hard but fair competition.[24]

Complaint counsel countered with his experts.[25] These gentlemen between them pointed out that the oat flour industry is an oligopoly with its very few suppliers and customers. They also took the position that in an expanding market with increasing demands the tendency would be for suppliers to increase their prices until they covered both cost of production and general and selling expense and in addition accounted for a profit. The hearing examiner holds this position.

With respect to the large discrepancy between Quaker when successful bidder and the next high bidder, there was a like conflict of economic opinion. The hearing examiner with the experience of the Attorney General's *Report on Identical Bidding on Public Procurement* (1962) and the *Presidential Proclamation Ex Order 10936* 26 Fed. Reg. 3555 (1961) in mind maintains that, particularly in an oligopoly, where there are so few bidders that each is well aware of the capabilities of the others, there would be a natural tendency for bidders who desired the business (and no one contends that National was not at all times anxious to have it) would submit bids which closely approximated each other. Accordingly, with the relationship of cost to price which is disclosed and with which we next deal, the bid pattern in the instances charged as dicrimination appears to include characteristics which would not be found in normal competitive bidding and therefore is within Section 2(a) of the Robinson-Patman Act.

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[24] See Testimony of Professors, Thomas A. Hieronymus and Daniel C. Hamilton.

[25] William R. Lemberg, Professors Donald S. Watson, Roy Ashman, and S. A. Walker.

The Unreasonably Low Cost

As to Count II, Respondent contends and the hearing examiner agrees that actual costs have not and cannot be shown. Respondent, however, also takes a position that for the purpose of a regulatory statute the only cost that can be considered is the cost of production. This, it says, is estimated in the standard cost supplied to the divisions in the so-called cereal reports and it has never been cut.

Dismissal of Count II, however, cannot be so lightly accomplished. Economists and accountants agree that for purposes of ascertaining gross profits on a balance sheet all that should be considered are the cost of replacing the item sold [26] but no one can deny that some share of the general overhead and selling expense plus a profit must be made on an item if a company dependent upon it for survival is to remain in business. Quaker so underpriced National in its competition for Gerber that National just was unable to remain in the running. This, however, was not a case of the more efficient company outstripping its less efficient rival—for Quaker a substantial portion of this time was bidding below the sum of its cost of production and its overhead and selling expense as it had itself estimated them.[27] Surely a sale down to estimated standards cost might be justified to meet competition,[28] but its consistent adoption to beat competition continuously by a wide margin smacks of an unfair practice. Such conduct, therefore, both colors Quaker's bidding practices withdrawing them from their character of good faith competitive bidding and itself constitutes a separate unfair practice,[29] which, if continued by a company so disproportionately well financed in comparison with smaller competitors that it will eventually, in the normal course, drive the latter out of business.

Having dealt with the major contentions of counsel, we turn now to the less difficult.

The first of these problems is whether or not the prices compared by counsel supporting the complaint are comparable because calling for different periods of delivery.

Transaction Comparability

All parties agree that all circumstances must be taken into consideration in determining whether or not particular prices may be compared.[30]

[26] Johns, Hieronymus.
[27] CX 367–372 ; RX 51 & 52.
[28] See Hieronymus, Watson.
[29] Compare *U.S.* v. *National Dairy Products Corp.*, 372 U.S. 29 (1963).
[30] *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1, 8 (7 Cir. 1949) ; *Krug* v. *International Telephone & Telegraph Corp.*, 142 F. Supp. 230, 235 (D.N.T. 1956) ; Rowe (*supra*) p. 50 ; Austen (*supra*) p. 25.

However, there is a sharp difference in the factors which are decisive in determining what periods of delivery will be considered.

Respondent takes the position that there are three different kinds of transactions which cannot be compared at all. One transaction, it designates Rush, which calls for delivery in less than ten days. The second, it calls Spot, which calls for delivery of 1–3 cars anywhere from eleven days to one to two months. And, the third, a Futures Sale, calls for delivery of a large quantity stretched over several months. (RF 28.)

Complaint counsel properly points out that the distinctions are anything but clear-cut. It describes them as "arbitrary" (C Reply, p. 55) and, in addition, as not properly established (C R pp. 57, 58).

The hearing examiner agrees that a Futures contract may not necessarily be discriminatory because it is sold at a price different from an over-the-counter transaction or Spot sale.[31] However, Respondent had the burden of going forward once complaint counsel established that the transactions were made to competing customers at different prices when the standard costs of the two transactions were identical or differed by considerably less than the price difference. Respondent's proof was vague and indefinite on the point that the milling costs were different between Rush, Spot and Futures transactions. No one could recall and there were no records of grain costs where more than three cars were to be sold over a period of a month or more. Sometimes, the estimate of costs might be greater, sometimes, less than the cereal report standard cost according to Respondent's witnesses. In these circumstances, we believe that the transactions compared must be considered comparable. Our next inquiry is whether or not injury to competition was probable.

Injury to Competition

The test to be applied under Count I and that to be applied under Count II, respondent contends differ immeasurably. Under Count I, both the statute and the pleadings are satisfied if injury to either competition among respondent's competitors (the primary line) or competition among respondent's customers (the secondary line) may be anticipated.[32] With respect to Count II, it contends, the pleadings require that complaint counsel establish both an intent to injure competition *and* an effect on competition.[33]

There is little difficulty in this case in finding a *probable* injury in both the primary and secondary lines of competition. While respond-

[31] See Chairman Dixon's address before the Millers National Federation 4/26/61.
[32] R Brief, pp. 19–29.
[33] R Brief, pp. 43–46.

ent contends that probable injury to its competition is not established by loss of volume to a particular customer,[34] surely, discrimination in favor of one customer (a competitor's largest), a sharp drop in the sales of a competitor of respondent to that customer in this industry, where there are so few buyers and sellers, cannot but have an impact on competition as a whole.[35] So also on the secondary line where competition is so keen that a cent difference in cost will result in a shift of a supplier, consistent favor in large amounts to one of three fully competitive customers cannot help but result in a diminution of the gross profits of the other two and a consequent injury to competition among them.[36]

With regard to Count II under the pleadings there must be intent to injure as well as actual injury to competition.[37] At the conclusion of the case for the Commission, drawing all inferences favorable to the complaint, there was sufficient evidence to prevent dismissal. The coincidence that Quaker sold oat flour to National Oat's largest customer at prices far below Quaker's estimated full cost (this comparison was then the same evidence from which the Quaker's estimated production cost plus its estimated general administrative and selling cost might be inferred) and, that Quaker was at about the same time engaging in a promotion in rolled oats in National's almost exclusive territory could be stretched into an inference that Quaker was intentionally attempting to further its dominance in the oat products business thru this two-pronged attack on National Oats. However, the uncontradicted and credible testimony of Quaker's officials and employees coupled with Proctor's (of National Oats) denial that there was a direct connection between the two events, made the inferences no longer tenable. In addition, Quaker's economic proof while insufficient to persuade the hearing examiner that Quaker's competitive behavior was not favoring Gerber demonstrated that an industrial concern might well hold some of the views expressed with respect to the propriety of bidding down to its production or standard costs as a proper competitive maneuver—not an act of unfair competition. Hence, the hearing examiner determined that there was a failure of preponderant proof of intent to

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[34] Respondent's Answering Brief, pp. 29–34.

[35] See *Forster Mfg. Co.*, Docket No. 7207, March 18, 1963, regarding *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F. 2d 950, 954 (10 Cir. 1959), *cert. denied*, 363 U.S. 843 (1960).

[36] *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948), *In the Matter of American Oil Company* Docket No. 8183, June 27, 1962, *Scott Publishing Co. v. Columbia Basin Publishers Inc.*, 293 F. 2d 15 (9 Cir. 1961) Handler, Problems of antitrust 62 Columbia LR. 930, 950.

[37] Comparison of the language in the motion of counsel supporting the complaint with the amendment allowed by the Commission shows that the latter substituted "and" for "or" thus demonstrating its intention that both must be established by proof.

injure National Oats.[38] With this determination, it becomes unnecessary to consider whether the pleaded actual, as distinguished from a probable injury to competition, occurred.

Accordingly, the hearing examiner has reached the following conclusions.

CONCLUSIONS

1. The respondent is engaged in interstate commerce and the sales complained of occurred in interstate commerce. Hence, the Federal Trade Commission has jurisdiction over respondent and the transactions here involved.

2. The adoption by an industry of the practice of competitive bidding for raw material having the fluctuating cost characteristics of oat flour (*i.e.* connection with prices quoted on a recognized commodities exchange) does not of itself make the suppliers, who engage in the practice, violators of Section 2(a) of the Robinson-Patman Act merely because there may be differences in the price charged two customers due to fluctuations in the cost of the basic raw material on the commodity market.

3. Despite the prevalence of competitive bidding in an industry, a supplier whose prices consistently favor one purchaser over its competitors to the probable detriment to competition is guilty of violation of Section 2(a) of the Robinson-Patman Act if the goods sold are of like grade and quality.

4. The following factors may be considered in determining whether a supplier is favoring a particular customer:

(a) Sales below the supplier's estimated production cost plus the supplier's estimated allocation of general administrative and selling expense when the market is expanding,

(b) The pattern of bidding by other suppliers in the immediate past,

(c) A consistently higher second bid by other suppliers to the purchaser alleged to be favored,

(d) The fact that the difference between the price at which the product is sold to the favored purchaser is considerably less than the price charged other purchasers and is also considerably more than is normally required to secure the business.

5. Considering the factors included in conclusion four, respondent has favored Gerber over Beech-Nut and Mead Johnson to an extent not justified by normal bidding procedure.

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[38] The hearing examiner has not failed to note that a few salesmen's competitive reports (CX 664 *et seq.*) urged Quaker to take specific action directed against National. The significant fact is that Quaker management was not shown to have followed these suggestions.

6. Beech-Nut and Mead Johnson compete with Gerber in interstate commerce in the sale of products made in part from the oat flour sold.

7. Oat flour designated by Quaker as number 14 or number 36, which was the subject of the sales to Gerber considered discriminatory because sold at prices lower than sales to Beech-Nut and Mead Johnson, was of like grade and quality despite some differences in physical characteristics necessitated by the further manufacturing processes employed by Gerber, Beech-Nut and Mead Johnson which were somewhat different.

8. Whether a commodity is of like grade and quality is a legal question and is not a proper subject of expert testimony.

9. In determining that the oat flour sold Gerber, Mead Johnson and Beech-Nut was of like grade and quality, the hearing examiner, while recognizing that the flours sold the three firms were not interchangeable because of slightly different physical qualities and because of resulting performance characteristics which created production problems if flour made for one was used by another, took into consideration

(a) that the oat flour was made from the same grade of oats, in the same machinery—with adjustments and variations in the extent of the types of processing—

(b) that there are no generally recognized grades of oat flour,

(c) that in estimating the costs of the flour supplied to the three customers the standard costs of each varied at the same time and in the same amount throughout the period,

(d) that Quaker customarily made adjustments in milling procedure to meet production problems of particular customers without charge,

(e) that no records were retained which demonstrate the actual changes in milling which were made,

(f) that the physical differences resulted primarily from the length and order of heat treatment and storage and from the adjustments in machinery governing particle size and shape without in any way changing the quality or grade of the product itself. The changes appeared to be of the same nature as alterations in a ready-made suit or differences in the grind of coffee, and not differences which would ordinarily have commercial significance. The adoption of a rule in which such changes would prevent the application of Section 2(a) of the Robinson-Patman Act would nullify the statute.

10. Respondent did not sustain its burden of going forward to show that the prices compared were not comparable.

11. Complaint counsel established that all transactions called for delivery at a future date and were, hence, not over-the-counter transactions. Thus, the burden of going forward was on respondent. Respondent's witnesses in describing the types of transactions as Rush, Spot and Futures without a clear distinction and definite proof of cost differences between them did not sustain that burden. The absence of records showing special costs on the larger transactions coupled with testimony that they might call for a higher or lower standard cost fails to establish any difference which has legal significance.

12. The proof established that on the primary line competitors of respondent lost business and one such competitor lost a large proportion of the business it had previously had with the customer favored by respondent's discriminatory prices. This created the probability that competition might be injured.

13. The proof established that on the secondary line respondent favored by discriminatory prices one baby food manufacturer which was a competitor with two others in a line in which the wholesale prices of the finished product were generally identical. Thus the less favored customers sustained a lessening of gross profit vis-a-vis the favored baby food manufacturer. This created the probability that competition might be injured.

14. The proof fails to establish that respondent sold below actual costs.

15. For the purpose of Section 5 of the Federal Trade Commission Act, cost must include an appropriate allocation of general administrative and selling expense.

16. The proof established that Quaker in sales to a favored customer frequently sold below the sum of its estimated cost and allocation of general administrative and selling expense. Such a price in an expanding market was an unreasonably low price, unless made to meet specific competition.

17. The proof created a suspicion of intended injury to competition but failed to establish that respondent priced its oat flour with the intent of injuring competition in the sale of oat flour or rolled oats.

18. Under the pleadings, proof of Count II fails by reason of the failure to establish intentional injury to competition and accordingly it is unnecessary to determine whether actual injury to competition occurred.

19. Count II is accordingly dismissed.

20. Respondent has failed to justify its price discrimination because it has not established:

a) that its oat flour prices were made in good faith to meet competition,

b) that its oat flour prices were in response to changing market conditions,

c) that respondent's price differentials made only due allowance for differences in cost of sale or delivery.

21. This proceeding is in the public interest and a violation of Section 2(a) of the Robinson-Patman Act has been established as alleged in Count I.

22. The following order is accordingly issued.

ORDER

It is ordered, That respondent, The Quaker Oats Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale of oat flour in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in price by selling such oat flour to any purchaser at prices higher than those granted to any other purchaser for oat flour of like grade and quality:

1. Where such other purchaser competes in fact with the unfavored purchaser in the sale of products consisting in whole or in part of oat flour or

2. Where respondent, in the sale of oat flour is in competition with any other seller.

Provided however, That nothing herein shall prevent respondent from engaging in good faith in competitive bidding without collusion in any industry in which the practice of buying oat flour under that system has been established or from engaging in submitting sealed competitive bids without collusion in response to requests from any governmental agency. For the purpose of this order, Respondent shall not be deemed to be engaged in good faith in competitive bidding if:

(1) its prices to any customer or customers are consistently lower than its prices to others who are competitors of such favored customers unless it can justify such differences by differences in cost, and

(2) its prices fail to include either its actual cost of sale (including the cost of acquisition, processing, preparation for marketing, sale and delivery of the oat flour) or its estimated cost therefor, whichever is higher.

APPENDIX

Source:
OAT FLOUR

Code Letter Assigned By Counsel to Company Issuing Specifications to Avoid Revealing Identity	Date of Issue	Raw Material and Processing	Color
A	12/27/56	Oats used shall be clean, sound, scoured oats and shall be essentially free from smut, weed seeds, and other foreign matter. Product obtained by the grinding and bolting of cleaned, hulled oats.	White to light tan.
B	*Page 1:* 5/10/55 *Page 2:* 8/24/55	Shall be made by grinding clean, cooked, rolled oats.	NS [2]
B	6/10/58	Shall be made by grinding clean, cooked, rolled oats.	NS
B	9/25/59	Shall be made by grinding clean, cooked, rolled oats.	NS
C	3/31/55	Finely ground oat groats or rolled oats which have been properly cleaned, mechanically dried and the hulls completely removed before grinding. None of the grain should be removed by screening.	Very light tan; free from black specs and reasonably free from brown specs.
D	1/12/55	Pulverized whole oats with nothing taken out.	NS
D	3/16/59	Product obtained by the processing of cleaned, hulled oats.	White to light tan.
E	5/4/59	Nos. 1 and 2 white oats, no added byproduct.	White to light tan.
F	7/15/57	NS	NS
F	4/13/59	NS	NS
G	1/23/59	NS	NS
G	3/13/59	NS	NS
G	4/17/59	NS	NS
H	5/24/57	Sound, sweet white oats; no added byproduct (aspirator stock).	White to light tan.

See footnotes at end of table.

1131 Initial Decision

A

CX 855a

SPECIFICATIONS [1]

Purity	Granulation
No foreign matter; no off odor or off flavor; no rodent contamination; maximum insects—8; maximum filth—5; all deliveries shall comply in every respect to the requirements of the Federal Food, Drug & Cosmetic Act and regulations promulgated thereunder.	On Tyler 20 mesh (20 MIS), 1.00%. Through Tyler 100 mesh (100 MIS), 2.50%.
Free of dampness, mold and lumps; odor shall be clean and free (not musty or rancid); compare heavy extraneous material with furnished photographic prints (maximum allowance: "Poor"); strict standards for control of rodent and insect filth; comply with all requirements of Federal Food, Drug & Cosmetic Act in regard to adulteration and labeling.	To pass 20 mesh, 100.00%. To pass 50 mesh, 85.00%. To pass 70 mesh, 75.00%.
Free of dampness, mold and lumps; odor shall be clean and free (not musty or rancid); compare heavy extraneous material with furnished photographic prints (maximum allowance: "Poor"); comply with all Federal requirements under the Federal Food, Drug & Cosmetic Act in regard to adulteration and labeling.	To pass 20 mesh, 100.00%. To pass 50 mesh, 85.00%. To pass 70 mesh, 75.00%.
Free of dampness, mold and lumps; odor shall be clean and free (not musty or rancid); compare heavy extraneous material with furnished photographic prints (maximum allowance: "Poor"); comply with all Federal requirements under the Federal Food, Drug & Cosmetic Act in regard to adulteration and labeling.	To pass 20 mesh, 100.00%. To pass 50 mesh, 85.00%. To pass 70 mesh, 75.00%.
Clean and pure; free from rancidity, foreign odor or taste; free from rodent and live insect contamination; insect fragments shall not exceed 20 per 200 grams; conform to the provision of the Food, Drug & Cosmetic Act.	To pass #20 screen, 99.00% (min.). To pass #40 screen, 80.00% (min.). To pass #80 screen, 50% (min.)—80.00% (max.). To pass #100 screen, 40 % (min.)—75.00% (max.).
Must be guaranteed free from contamination or infestation of any kind; cleanly milled; free from foreign particles; comply with U.S. Pure Food Laws.	To pass through a standard screen 16 meshes to the inch, having openings of .046.
Processed under strictly sanitary conditions: free of foreign matter; no off odor; no off flavor; conform in every respect to requirements of Federal Food, Drug & Cosmetic Act and regulations promulgated thereunder; pesticide residue not to exceed federal tolerances; from May 1 through September 30 shall be fumigated with methyl bromide at shipper's expense.	To pass USS #20, 99.00%. To pass USS #100, 82.00%.
No off odor; no off flavor	On #20 U.S. Standard sieve, .00%. To pass #35 U.S. Standard sieve, 90.00% (min.).
Must meet sanitary standards representative of good commercial practice; must not contain viable insects; free from contaminations and all foreign materials.	To pass USBS sieve #50, 99.5%. To pass USBS sieve #100, 95.0% (min.).
Must meet sanitary standards representative of good commercial practice; must not contain viable insects; free from contaminations and all foreign materials.	To pass USBS sieve #50, 99.5% (min.). To pass USBS sieve #100, 95.0% (min.).
Purity—clean	On U.S. 30 (Tyler 28) mesh and all coarser screens, 0.0%.
Purity—clean	On U.S. 30 (Tyler 28) mesh and all coarser screens, 0.0%.
Must comply with the requirements of the Federal Food, Drug & Cosmetic Act; purity—clean.	On U.S. 30 (Tyler 28) mesh and all coarser screens, 0.0%.
No off-odor; no off-flavor; essentially no contamination or extraneous foreign material; to be milled and processed in accordance with good commercial practice and under strict sanitary conditions so as to comply with Federal, State and local regulations.	On screen no. 10, 0.0% (max.). On screen no. 20, 1.5% (max.). On screen no. 30, 2.6% (min.)—3.5% (max.). On screen no. 40, 10.0% (min.)—11.0% (max.). To pass screen no. 40, 86% (min.)—89.0% (max.) To pass screen no. 60, 70.0% (max.).

APPENDIX

Source:
OAT FLOUR

Code Letter Assigned By Counsel to Company Issuing Specifications to Avoid Revealing Identity	Catechol Oxidase Test	Free Fatty Acid (Max.)	Protein		Fat Per Cent	
			Min.	Max.	Min.	Max.
A	Very slight pink color.	NS [2]	14	As delivered basis.	6	As delivered.
B	NS [2]	30 [3]	17.2		(Moisture free basis)	8.9
B	NS	30	17.2	Moisture free basis	(Moisture free basis).	8.9
B	NS	30	17.2	Moisture free basis	(Moisture free basis).	8.9
C	NS	NS	16 (Moisture free basis)	19	NS [2]	
D	NS	NS	17.0		.0	(A.H.)
D	VS pink color	NS	16.5	(18±1%)	6.5	(7.8±2%)
E	NS	20 or less	17	(Dry basis)	7	8 (dry basis)
F	NS	NS	15.2 (As is moisture basis)	17.2	5.5 (As is moisture basis)	7.5
F	NS	NS	15.2 (As is moisture basis)	17.2	5.5 (As is moisture basis)	7.5
G	Must show absence of enzyme.	NS		NS [2]	6 (12% moisture basis)	7
G	Must show absence of enzyme.	NS		NS	6 (12% moisture basis)	8
G	Must show absence of enzyme.	NS		NS	6 (12% moisture basis)	8
H	Negative	Less than 20.	17	(Dry basis)	7	8 (dry basis)

See footnotes at end of table.

A—Continued

CX 855a

SPECIFICATIONS [1]—Continued

Fiber Per Cent		Moisture Per Cent		Ash Per Cent		Total Spores (Max.)	Flat Sours (Max.)	Thermophylic Anaerobes (Max.)	Nitrogen	
Basis	Max.	Min.	Max.	Basis	Max.				Min.	Max.
As delivered.	1.75	8	12	As delivered.	2	50	20	1/6		NS
Moisture free basis.	1.5	----------	10	Moisture free basis.	[5] 2.2	NS [2]	NS [2]	NS [2]		NS
Moisture free basis.	1.5	----------	10	Moisture free basis.	[5] 2.2	NS	NS	NS		NS
Moisture free basis.	1.5	----------	10	Moisture free basis.	[5] 2.2	NS	NS	NS		NS
NS [2]		----------	10	Moisture free.	2.25	NS	NS	NS		NS
	[6] 1.5	----------	8.3	NS [2]	1.7	NS	NS	NS		NS
	1.8 (1.5±2%)	7	10	NS (1.9±1%)	2.1%	NS	NS	NS		NS
(Dry basis) [2]		8	10	(Dry basis)	2.5	NS	NS	NS		NS
NS		6.5	8.5	(As is moisture basis.)	1.77% (±0.20%)	NS	NS	NS		
NS		6.5	8.5	(As is moisture basis.)	1.77% (±0.20%)	NS	NS	NS		
2 (12% moisture basis)		7	11	NS		NS	NS	NS	2.3% (12% moisture basis)	3.0%
2 (12% moisture basis)		----------	11	NS		NS	NS	NS	2.3% (12% moisture basis)	3.0%
2 (12% moisture basis)		----------	11	NS		NS	NS	NS	2.3% (12% moisture basis)	3.0%
2.5 (Dry basis)		8	10	(Dry basis)	2.5	NS	NS	NS	NS	

APPENDIX

Source:
OAT FLOUR

Code Letter Assigned By Counsel to Company Issuing Specifications to Avoid Revealing Identity	Usage Behavior Test
A	An 8% solution by weight of a representative sample to be prepared, canned, and processed; resulting gel system shall possess no off odor or off flavor.[4]
B	NS[2]
B	NS
B	NS
C	NS
D	NS
D	NS
E	NS
F	Performance of this material shall be such that product specifications for product or products utilizing it are met.
F	Performance of this material shall be such that product specifications for product or products utilizing it are met.
G	Must meet finished product standards
G	Must meet finished product standards
G	Must meet finished product standards
H	NS

[1] Source: In Camera specifications except for customer H whose specifications are not In Camera but are represented by CX 414(a)-(b).
[2] Not specified.
[3] Expressed in ml. of 0.1 N alkali required for a 10 Gm fat basis.
[4] When used in canned goods.
[5] Expressed as "minerals."
Expressed as "crude fiber."

A—Continued

CX 855a

SPECIFICATIONS [1]—Continued

Packing	Miscellaneous
1st choice: multi-wall paper bags adequately closed, free from dirt and other foreign matter containing 100 lbs. of oat flour net weight. 2d choice: cotton bags.	Testing procedure: 6 random selected samples; 12 random selected samples if load exceeds 250 units; no sample smaller than 5 lbs. Acceptance of all deliveries shall be subject to inspection of the buyer of representative samples drawn from actual lots which the seller proposes to deliver.
Shall not have been packed hot	Free fatty acid and heavy extraneous materials tests described.
Shall not have been packed hot. Each shipment to be supplied from one lot or as few lots as possible.	Heavy extraneous materials test described.
Shall not have been packed hot. Each shipment to be supplied from one lot or as few lots as possible. To be shipped in 100 lb. net 4 layer paper bags.	Heavy extraneous materials test described.
1st choice: multi-wall paper bags. 2d choice: cloth bags, only when paper is not available.	Testing procedure: AOAC vacuum oven method for moisture; AOAC methods for ash and protein. Subject to inspection and approval upon arrival.
50 lb. multi-wall paper bags	
Multi-wall paper bags, containing 100 lbs. of oat flour free from foreign matter.	
NS [2]	Granulation test: Rotap for 2½ minutes using 2 jar rings per screen; 100 g. sample.
NS	Test methods available to suppliers on request. Must be entoleted or equivalent prior to packaging.
To be shipped only in paper bags 100 lbs. per bag	Test methods available to suppliers on request. Must be entoleted or equivalent prior to packaging.
NS	
NS	
NS	
NS	Granulation test: 50 gram sample ten minutes on a rotap sifter. Lactic acid test: 11 ml. of sediment minimum.

APPENDIX B

Flour Produced Under Specified Systems Offered, Used and Refused by Quaker's Customers

Customer	Flour or System						
	No. 2 Flour	No. 5 System	No. 6 System	No. 14 System	No. 36 System	No. 60 System	No. 105 Flour
BABY FOOD MFG.:							
Beech-Nut				U.1956-59			
Duffy-Mott				U.1959			
Gerber		U.1955		U.1955-58 R.1959	0.1959	U.1959	
Heinz		U.1955-58		O.1956 R.1956	U.1958-59		
Mead Johnson		U.1955-57		U.1957-59			
CEREAL MFGS.:							
Post	O.1957 R.1957	O.1957 R.1957		U.1957 R.1957	U.1958-59		
Kellogg				U.1959 R.1959			
Serutan	U.1956-59						
MISC. MFGS.:							
Pillsbury	U.1956-59	O.1958 R.1956		O.1958 R.1956	O.1958		U.1959
Procter & Gamble	O.1958	O.1958	U.1956-58	O.1957 U.1958-59	O.1958		
Eastern States				U.1957-59			
Missouri Farmers Ass'n				U.1957-59			

O.—Offered.
R.—Rejected.
U.—Used.

OPINION OF THE COMMISSION

NOVEMBER 18, 1964

By ELMAN, *Commissioner:*

The complaint in this proceeding, issued September 14, 1960, charged respondent with price discrimination in the sale of oat flour, in violation of Section 2(a) of the Clayton Act. Injury to competition at both the seller's and buyer's levels was alleged. On December 11, 1961, the complaint was amended to include a second count, charging respondent with having sold oat flour "at prices below cost or otherwise unreasonably low, with the intent, purpose and effect of injuring, restraining, suppressing and lessening competition", in violation of Section 5 of the Federal Trade Commission Act. After full evidentiary hearings, the hearing examiner issued an initial decision in which he dismissed the second count of the complaint but upheld the first and entered an order to cease and desist. The matter is before the Commission on the cross-appeals of respondent and complaint counsel.

During the period 1957–1958, respondent and one other company, National Oats, dominated the oat flour industry, accounting between them for more than 75% of total industry sales. In 1957 respondent's sales were somewhat greater than National's, but in 1958 their posi-

tions were reversed. Prior to 1957 the Gerber Products Company, a substantial purchaser of oat flour, generally bought most of its requirements from National, but on a few occasions in 1957 and 1958 respondent was able to wrest Gerber's business from National by offering Gerber a blend known as "run 14" at a lower price than respondent was charging other purchasers for different oat flour blends. It is these transactions that the complaint charges violated both Section 2(a) of the Clayton Act and Section 5 of the Federal Trade Commission Act.

Respondent makes a threshold contention that the price discrimination law has no proper application to the oat flour industry because the normal method of purchasing is for a buyer to approach two or more suppliers and ask each for a bid covering a specified quantity deliverable over a stated period of time. However, if one purchaser receives lower bids from a seller than the seller makes to other purchasers under the same conditions and at approximately the same time, the resulting sales may be—and in the present case, we find, are—sufficiently comparable for purposes of applying Section 2(a). *Cf. Corn Products Refining Co.* v. *F.T.C.*, 324 U.S. 726, 740.

On the price discrimination side of the case, the most seriously contested issues concern the existence of injury to competition. Section 2(a) forbids price discrimination only "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them". Competition, like commerce, "is not a technical legal conception, but a practical one, drawn from the course of business" (*Swift & Co.* v. *United States*, 196 U.S. 375, 398), and in determining the legality of challenged price discriminations, we have been directed to "make realistic appraisals of relevant competitive facts. Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis." *F.T.C.* v. *Sun Oil Co.*, 371 U.S. 505, 527.

The test under Section 2(a) is whether there is a reasonable probability that competition may be adversely affected by a practice under which a seller sells his goods to some customers at prices substantially lower than he charges their competitors for like goods. *Corn Products Refining Co.* v. *F.T.C.*, 324 U.S. 726, 742; *F.T.C.* v. *Morton Salt Co.*, 334 U.S. 37, 49–50. The record here lacks the requisite proof to establish such a probability. There is no showing that the cost of oat flour is a sufficiently significant element in the price of the finished product to be a cause of adverse competitive effects; fluctuations in the price of oat flour seem to have little or no competitive significance in the sale

of the finished product. See *Minneapolis-Honeywell Regulator Co.* v. *F.T.C.*, 191 F. 2d 786, 791 (7th Cir. 1951). There is no showing that the ability of the allegedly disfavored purchasers to compete with Gerber was, or will probably be, handicapped by respondent's sales of run 14 to Gerber. Gerber received so little practical benefit from purchasing run 14 at low prices from respondent that, after little more than a year, it discontinued using it and resumed the purchase of higher-priced blends.

In finding that run 14 was of like grade and quality to respondent's other blends, the examiner gave controlling weight to the fact that respondent had not shown that the cost of manufacturing run 14 was different from the cost of manufacturing respondent's other oat flour blends and that there are no objective standards for oat flour set up by government or business. However, if there are substantial "physical differences in products which affect consumer preference or marketability", *Universal-Rundle Corp.*, F.T.C. Docket 8070 (decided June 12, 1964), p. 4 [65 F.T.C. 924, 955], such products are not of like grade and quality within the meaning of the statute regardless of whether manufacturing costs are the same or whether objective standards have been established by government or business. The record shows that run 14 had a substantially higher hull content than other oat flour blends, requiring reprocessing by the purchaser, and was generally unacceptable except to Gerber.

The complaint also alleges competitive injury at the seller level. Section 2 of the Clayton Act, as originally enacted in 1914, forbade price discrimination "where the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce". 38 Stat. 730. The statute was "expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations * * * have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country." H.R. Rep. No. 627, 63d Cong., 2d Sess. 8 (1914). As the Supreme Court has put it, the aim was "to curb the use by financially powerful corporations of localized price-cutting tactics which had gravely impaired the competitive position of other sellers." [1]

When Congress in 1936 set about to strengthen Section 2 of the

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[1] *F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 543. See, e.g., *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234 (2d Cir. 1929); *Fleischmann Co.*, 1 F.T.C. 119; *Pittsburgh Coal Co.*, 8 F.T.C. 480.

Clayton Act by means of the Robinson-Patman amendments, its expressed concern was primarily with abuses of buying power—that is, with injury to competition among the purchasers from a seller engaged in price discrimination—rather than with abuses of selling power, involving injury to the seller's competitors. See, e.g., *F.T.C.* v. *Morton Salt Co.*, 334 U.S. 37, 43. But there was no design to limit the application of the price discrimination law with respect to injury at the seller's level. *F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 544; *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 120. On the contrary, the Robinson-Patman amendments were intended to strengthen the statute's proscriptions of such discrimination—for example, by making explicit that price discrimination having the requisite adverse effects on competition was unlawful even if only a single competitor was injured.[2]

Of course, neither in 1914 nor in 1936 was it the intent of Congress that keen, vigorous and fair competition should be considered unlawful discrimination at the seller level. The Commission has recognized that there is a crucial difference "between normal and legitimate pricing activities designed to obtain a larger share of business in a marketing area and those which represent a punitive or destructive attack on local competitors and impair the vitality and health of the processes of competition."[3] On this record, we cannot say that respondent's competition with National for Gerber's business was "a punitive or destructive attack" or "impair[ed] the vitality and health of the processes of competition." All of the major producers of oat flour competed with respondent throughout the nation. National Oats—respondent's principal competitor and the firm supposedly harmed by respondent's pricing tactics—was a profitable, healthy concern and a strong competitor, and respondent's sales of run 14 to Gerber did not weaken, or have a tendency to weaken, National's ability to compete.

The Section 5 charges in the complaint must also be dismissed for failure of proof. We do not base dismissal, however, on the examiner's finding that respondent's sales of run 14 were not below actual cost. Even nondiscriminatory, non-below-cost pricing may, in some circumstances, be an unfair method of competition. In the hands of a powerful firm, selling at unjustifiably low prices may be a potent weapon of predatory and destructive economic warfare, and hence

[2] 80 Cong. Rec. 9416–17 (1936) (remarks of Congressman Utterback). See, e.g., *Maryland Baking Co.* v. *F.T.C.* 243 F.2d 716 (4th Cir. 1957); *E. B. Muller & Co.* v. *F.T.C.*, 142 F. 2d 511 (6th Cir. 1944) Cf. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207.

[3] Reply Brief for the Federal Trade Commission, p. 8, filed in the Supreme Court in *F.T.C.* v. *Anheuser-Busch, Inc.* (No. 389, October Term 1959), 363 U.S. 536.

unfair, especially where such sales are subsidized out of profits made in other product lines where the seller is strong and his competition weak. The present record, however, does not support an inference that respondent acted predatorily or otherwise unfairly in competing with National for the Gerber account.

Commissioner MacIntyre did not participate.

Commissioner Jones did not participate for the reason that oral argument was heard prior to her taking the oath of office.

FINAL ORDER

This matter having been heard by the Commission on cross-appeals by respondent and complaint counsel from the initial decision of the hearing examiner, and the Commission having determined, for the reasons stated in the accompanying opinion, that the initial decision should be set aside and the complaint dismissed,

It is ordered, That the initial decision be, and it hereby is, set aside; and that the complaint be, and it hereby is, dismissed.

Commissioner MacIntyre not participating, and Commissioner Jones not participating for the reason that oral argument was heard prior to her taking the oath of office.

IN THE MATTER OF

AMERICAN EDUCATION SOCIETY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-859. Complaint, Nov. 19, 1964—Decision, Nov. 19, 1964

Consent order requiring Yonkers, N.Y., sellers of books through door-to-door salesmen to cease misrepresenting that their solicitors are church-sponsored, or conducting surveys, that the books are specially priced, and that the publisher of the books sponsors scholarship funds.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that American Education Society, Inc., a corporation, and Noel N. Marder, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing

to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent American Education Society, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Respondent Noel N. Marder is an officer of the said corporate respondent and formulates, directs and controls the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. The offices and principal place of business of both the corporate and individual respondent is located at 733 Yonkers Avenue, Yonkers, New York.

PAR. 2. Respondents are now, and for several years last past have been, engaged in the advertising, sale and offering for sale of books, including an encyclopedia called the Universal World Reference Encyclopedia. Respondents cause their said books, including the Universal World Reference Encyclopedia, when sold, to be transported from the State of New York to purchasers thereof located in various other States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said books in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. Respondents sell said books, including the Universal World Reference Encyclopedia, at retail to the general public. Sales are made by respondents' agents, representatives or employees who contact prospective purchasers in their homes or at their places of business. These agents, representatives or employees operate in the usual and customary manner of door-to-door salesmen.

Respondents have formulated, developed and carried out a plan for selling their said books, including the Universal World Reference Encyclopedia, which is commonly known and referred to as their "Church Lead" program. Under this plan or program, respondents obtain or cause to be obtained a list of the members of various churches from the pastors of such churches. Respondents supply their agents, representatives or employees with, and instruct them to use and follow, and said agents, representatives or employees do use and follow, printed sales presentations in orally soliciting the purchase of respondents' books, including the Universal World Reference Encyclopedia, by church members whose names were obtained under the "Church Lead" program.

Respondents, in said printed sales presentations and other printed material, and respondents' agents, representatives or employees, in the course of their sales talks, make many statements and representations concerning the offer, price, publication and origin of respondents'

books, including the Universal World Reference Encyclopedia, the status of respondents' agents, representatives or employees and the benefits which will allegedly accrue to prospective customers if they purchase respondents' said books.

Typical, but not all inclusive, of said statements and representations are the following:

1. That respondents' sales representatives were calling on prospective customers at the suggestion, recommendation or instructions of the prospect's pastor.

2. That respondents' agents, representatives or employees were not acting in the capacity of sales agents, but were engaged in conducting research and surveys.

3. That respondents are publishers of books and bibles used in churches and schools throughout the country, and that respondents prepared, compiled and published the Universal World Reference Encyclopedia and other reference books sold and offered for sale by respondents.

4. That respondents are offering the Universal World Reference Encyclopedia and other books sold singly or in combination therewith to specially selected families at a special introductory price in return for the prospect's agreement to display the said books in his home, to recommend to friends that they purchase the said books, and to write a letter commending said books.

5. That respondents' agents, representatives or employees are representatives of, that they are sent to call on prospective customers by, and that they make their offers of respondents' said books pursuant to the suggestion of a church organization, and that such organization is known as the "Council of Christian Education."

6. That scholarship funds and scholarship programs have been established in the prospective customers' church, and that respondents donate to such funds and programs the monies which they would otherwise expend in advertising their encyclopedia set and other books.

7. That by purchasing respondents' said encyclopedia set and other books, the children of the prospect and other children will be able to secure a college education.

PAR. 4. In truth and in fact:

1. In a substantial number of instances respondents' sales representatives were not calling on prospective customers at the suggestion, recommendation, instructions or other sponsorship of the prospective customers' pastor or other person or organization other than the respondents; and furthermore, representations of pastoral or other endorsement or sponsorship were false and misleading because the said

sales representatives failed to reveal the material fact that compensation was paid for the said endorsement or sponsorship of respondents' merchandise in those instances where such endorsement or sponsorship was accorded.

2. Respondents' agents, representatives or employees, when calling on prospective customers, were not conducting surveys or research but made such representations for the purpose of gaining entrance into prospects' homes with the ultimate objective of making a sale of respondents' merchandise.

3. Respondents do not publish and did not compile the Universal World Reference Encyclopedia or any of the other books sold, and offered for sale by them.

4. Respondents' offer of the Universal World Reference Encyclopedia and other books was not a special offer made to selected families but was made to all prospects generally.

5. The prices quoted to prospects by respondents' agents, representatives and employees for the Universal World Reference Encyclopedia and other books were not special introductory prices lower than those to which the respondents in good faith expected to increase the said prices at a later date, nor lower than the prices at which the said merchandise had actually been sold by the respondents, nor lower than bona fide prices at which the said merchandise had been offered by the respondents to the public on a regular basis for a substantial period of time, but were the respondents usual and regular selling prices for the said encyclopedia and other books.

6. The Council of Christian Education is a trade name and an organization established by the respondents. Respondents' agents, representatives and employees accordingly are not representatives of, are not sent to call on prospective customers by, and do not make offers of encyclopedia sets and other books on behalf of a bona fide church organization known as the "Council of Christian Education".

7. Scholarship funds and scholarship programs have not been established in the various churches whose members are solicited by respondents' agents, representatives or employees to purchase respondents' encyclopedia set and other books. Respondents do not donate to such funds the monies which they would otherwise spend in advertising their said books.

8. Prospective customers have no assurance that in purchasing respondents' encyclopedia set and other books, they will thereby enable their own children and other children to obtain a college education.

Therefore, the statements and representations set forth in Paragraph Three were and are false, misleading and deceptive.

PAR. 5. Furthermore, in the course and conduct of their business, respondents have caused the corporate name "American Education Society, Inc.", to appear on their business stationery, advertising material and other printed material and other printed matter.

Through use of the corporate name "American Education Society, Inc." respondents have represented, directly or by implication, that their business is a society of educators.

PAR. 6. In truth and in fact, respondents' business is not a society of educators.

Therefore, the representation referred to in Paragraph Five is false, misleading and deceptive.

PAR. 7. By supplying their agents, representatives or employees with the printed sales presentations described in Paragraph Four, respondents placed in the hands of said agents, representatives or employees the means and instrumentality for misleading and deceiving the public.

PAR. 8. In the course and conduct of their business, respondents have been, and now are, in direct and substantial competition in commerce with other corporations, individuals and firms in the sale of books of the same general nature as those sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true, and to enter into contracts for respondents' products because of such erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter

executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent, American Education Society, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 733 Yonkers Avenue, in the city of Yonkers, State of New York.

Respondent Noel N. Marder is an officer of said corporation and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and the proceeding is in the public interest.

ORDER

It is ordered, That respondent American Education Society, Inc., a corporation, and its officers, and respondent Noel N. Marder, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of encyclopedias or other books or publications, or any other 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:

1. That the respondents' sales representatives are calling on prospective customers at the suggestion, recommendation, instructions or under other sponsorship of the prospective customer's pastor or any other person or organization, other than respondents unless respondents establish that such is the fact, and, in immediate conjunction with any representation respecting pastoral or other ascribed suggestion, recommendation, instruction, sponsorship, a full, truthful and nondeceptive disclosure is made to prospective purchasers of the amount and type of any considera-

tion theretofore and thereafter to be accorded for such suggestion, recommendation, instruction or sponsorship.

2. That respondents' sales representatives or sales agents or employees are engaged in conducting a survey or research or that the purpose of the call or interview by respondents' sales representatives or sales agents relates to other than the sale of books, merchandise or services; or that any other of respondents' representatives or agents are engaged in conducting a survey or research unless respondents establish that such is the fact.

3. That respondents are publishers of the Universal World Reference Encyclopedia; or representing, directly or by implication, that respondents are publishers of, or have compiled or prepared, any other book or publication offered for sale by them unless respondents establish that such is the fact.

4. That prospective purchasers of respondents' merchandise have been specially selected; *Provided, however*, That nothing herein shall prohibit respondents from making a full truthful and non-deceptive statement of the reasons why such prospect is being solicited and stating when such is the case, that a prospect's name was obtained from a designated person or organization and that respondents' sales solicitation has been inspired by information respecting the prospect's race and his financial ability to purchase respondents' merchandise.

5. That any price at which respondents' books are offered for sale is a special introductory price or a reduced price, unless respondents establish that it is less than the price to which the respondents in good faith expected to increase the price at a later date; or that the price at which the books are offered for sale is a price which is lower than the genuine former price at which the said books were actually sold; or is lower than the bona fide price at which the said books were offered to the public on a regular basis for a substantial period of time.

6. That respondents or respondents' agents, representatives or employees are representatives of, or are sent to call on prospective customers by, or are offering respondents' books pursuant to the suggestion of, the "Council of Christian Education".

7. That scholarship funds and scholarship programs have been established in the churches of prospective customers, or that by purchasing respondents' books, the children of the prospect or other children will be able to secure a college education, unless respondents establish that such is the fact.

8. That respondents donate to scholarship funds and scholarship programs the monies which they would otherwise expend in advertising and promoting their books; and

It is further ordered, That respondent American Education Society, Inc., a corporation, and its officers, and respondent Noel N. Marder, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of encyclopedias or other books or publications, or any other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Using the corporate name "American Education Society, Inc." or any other name of similar import to designate or refer to respondents' business, or otherwise representing that their business is a society of educators.

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

WAYNE GOLF BALL COMPANY ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-860. Complaint, Nov. 25, 1964—Decision, Nov. 25, 1964

Consent order requiring a Roseville, Mich., corporation engaged in rebuilding used golf balls, to cease selling or distributing such golf balls without conspicuously disclosing that they are previously used golf balls which have been rebuilt or reconstructed.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Wayne Golf Ball Company, a corporation, and Raymond S. Zack and Albert Asselin, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Wayne Golf Ball Company is a corporation organized, existing and doing business under and by virtue of

the laws of the State of Michigan with its office and principal place of business located at 31117 Little Mack Avenue, Roseville, Michigan.

Respondents Raymond S. Zack and Albert Asselin are officers of said corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of previously used golf balls which have been rebuilt or reconstructed to dealers for resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped and transported from their place of business in the State of Michigan to purchasers thereof in various other States of the United States and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as those sold by the respondents and with manufacturers, jobbers and retailers of new golf balls.

PAR. 5. In the course and conduct of their business, respondents rebuild or reconstruct golf balls, using in said process portions of the ball which have been previously used.

Respondents do not disclose either on the balls, on the wrapper or on the box or bag in which the balls are packed, or in any other manner, that said golf balls are previously used balls which have been rebuilt or reconstructed.

When previously used golf balls are rebuilt or reconstructed, in the absence of any disclosure to the contrary, or in the absence of an adequate disclosure, such golf balls are understood to be and are readily accepted by the public as new balls, a fact of which the Commission takes official notice.

PAR. 6. By failing to disclose the facts as set forth in Paragraph Five, respondents place in the hands of uninformed or unscrupulous dealers means and instrumentalities whereby they may mislead and deceive the public as to the nature and construction of the said golf balls.

PAR. 7. The failure of the respondents to disclose on the golf ball itself, on the wrapper and on the box or bag in which they are packed,

or in any other manner, that they are previously used balls which have been rebuilt or reconstructed has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said golf balls were, and are, new in their entirety and into the purchase of substantial quantities of respondents' products by means of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, were and are, all to the prejudice and injury of the public and of the respondents' competitors, and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Deceptive Practices proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having reason to believe that the respondents have violated the Federal Trade Commission Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings and enters the following order:

1. Respondent Wayne Golf Ball Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan with its office and principal place of business located at 31117 Little Mack Avenue, Roseville, Michigan.

Respondents Raymond S. Zack and Albert Asselin are officers of said corporation and their address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondents and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Wayne Golf Ball Company, a corporation, and its officers, and Raymond S. Zack and Albert Asselin, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of used, rebuilt, reconstructed or re-covered golf balls in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to clearly and conspicuously disclose on the boxes or bags in which the respondents' rebuilt or reconstructed golf balls are packaged, on the wrapper and on said golf balls themselves, that they are previously used balls which have been rebuilt or reconstructed. Provided, however, that disclosure need not be made on the golf balls themselves if respondents establish that the disclosure on the boxes, bags and/or wrappers is such that retail customers, at the point of sale, are informed that the golf balls are previously used and have been rebuilt, reconstructed or re-covered.

2. Placing any means or instrumentalities in the hands of others whereby they may mislead the public as to the prior use and rebuilt or re-covered nature and construction of their golf balls.

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

MOUNTAIN CITY TOBACCO BOARD OF TRADE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8638. Complaint, Aug. 17, 1964—Decision, Nov. 30, 1964

Consent order requiring the Mountain City Tobacco Board of Trade, Inc., to cease their planned common course of action to restrict competition in the purchase and sale of burley tobacco in the Mountain City, Tenn., market, in

pursuance of which they prevented the erection and operation of new tobacco warehouses, prevented operators of auction warehouses from expanding their business, retained in themselves the selling time available in the Mountain City market and excluded others therefrom, and restricted the selling time allotted to new entrants.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that each and all of the parties named in the caption hereof, and hereby made respondents herein, and more particularly hereinafter described and referred to as respondents, have violated the provisions of Section 5 of the said Act, (U.S.C., Title 15, Sec. 45) and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, the Commission hereby issues its complaint charging as follows:

PARAGRAPH 1. The following is a description of the respondents:

(1) Respondent, Mountain City Tobacco Board of Trade, Inc., hereinafter referred to as respondent Board, is a corporation duly organized under the laws of the State of Tennessee, with its principal office and place of business located in Mountain City, Tennessee. Membership in respondent Board is limited to those persons, firms, corporations, and associations engaged in or about to engage in business as a Burley sales tobacco warehouseman, buyer, or re-handler of Burley tobacco on the Mountain City Tobacco market.

There are nine auction warehouses presently operating on the Mountain City burley tobacco market, as follows:

No. 1 Mountain City Burley Warehouse.
No. 2 Mountain City Burley Warehouse.
No. 3 Mountain City Burley Warehouse.
No. 4 Mountain City Burley Warehouse.
No. 5 Mountain City Burley Warehouse.
No. 1 Rainbow Burley Warehouse.
No. 2 Rainbow Burley Warehouse.
No. 3 Rainbow Burley Warehouse.
No. 4 Rainbow Burley Warehouse.

Membership in the Mountain City Tobacco Board of Trade, Inc., is divided into two categories; warehousemen and purchasers of burley tobacco other than warehousemen. Each warehouse or the person, firm, or corporation operating such warehouse is automatically a participating member and is entitled to one vote on matters coming before the respondent Board. Membership among purchasers of burley tobacco may be either participating or non-participating. Purchasers

who are participating members are also entiled to one vote each. Firms composed of more than one individual constitute only one member and are accorded only one vote.

The following named individuals are now, or have been during the time mentioned herein, officers and/or members of respondent Board and, as such and individually, are named as respondents herein, and in that capacity have dominated, controlled and directed, and are now dominating, controlling, and directing the affairs of said respondent Board, including the policies and practices hereinafter set forth:

Jack Shoun, President
R. C. Coleman, Vice President
O. L. Coleman, Secretary and Treasurer

Although respondent Board was organized and chartered in 1962 with the announced and stated purpose of associating together those persons, firms and corporations interested in the buying, selling and handling of burley leaf tobacco on the Mountain City tobacco market, and its tobacco trade territory, and for the purpose of adopting and maintaining such reasonable rules, regulations and requirements as are necessary to promote the honest and efficient conduct of said tobacco business and build up the tobacco market and protect the interests of growers, planters, buyers and handlers of burley leaf tobacco on the Mountain City tobacco market, including the allocation of selling time to each tobacco auction warehouse operating on said market, it is now and has been since its organization a mere instrumentality or vehicle through which respondent members place into effect and carry out the illegal policies and practices as hereinafter set forth.

(2) Respondents R. C. Coleman, Sr., R. C. Coleman, Jr., Joseph Coleman, O. L. Coleman, and Mrs. Harriet Sikes are copartners in the R. C. Coleman Company, Tabor City, North Carolina. Said partnership is engaged in the business of operating tobacco auction warehouses, five of which are in Mountain City, Tennessee, and are commonly known, referred to and described as Mountain City Burley Warehouse Nos. 1, 2, 3, 4, and 5. Said respondents are members of the Mountain City Tobacco Board of Trade, Inc., and as such and individually are named as respondents herein.

PAR. 2. Burley tobacco produced in the States of Tennessee, North Carolina, and Virginia is brought by the growers thereof to the tobacco auction warehouses, operated and controlled by different members of respondent Board, where it is sold at auction to purchasers or agents or representatives thereof, who are also members of said respondent Board and who are, in a great many instances, engaged in the export

tobacco trade or in the domestic manufacture of tobacco products in States other than Tennessee. Said tobacco is shipped or otherwise transported by such purchasers from said State of Tennessee to other States within the United States and the District of Columbia and foreign countries. There has been, and now is, a constant current course of trade in commerce in said tobacco and tobacco products between and among the several States of the United States and the District of Columbia and with foreign countries.

PAR. 3. (1) The Mountain City tobacco market is located in the northeasternmost part of Tennessee. Burley tobacco brought to the Mountain City market is classified as Type 31 by the United States Department of Agriculture and is grown principally in the following nine States: Virginia, North Carolina, Tennessee, Kentucky, Ohio, Indiana, Missouri, Illinois, and West Virginia.

The total annual sales of burley leaf tobacco throughout the United States has grown steadily over the years. In 1916 when there were 48 burley leaf tobacco markets in the United States, a total of 265,429,-825 pounds of burley tobacco was sold at an average price of $16.68 per cwt. In 1961, 61 burley leaf tobacco markets sold 605,026,343 pounds of burley tobacco at an average price of $66.44 per cwt. The Mountain City tobacco market, which conducted its first sale in 1950, has increased its sales from 1,473,406 pounds at an average price of $47.55 per cwt., to 6,636,110 pounds sold in 1962 for a total cash value of $3,878,769 or $58.45 per cwt.

Approximately one-half of the tobacco sold on the Mountain City market is furnished by farmers from Johnson County, Tennessee. To these farmers burley tobacco, which is the second most important cash crop in Tennessee, represents their principal source of cash income. Thus, the efficiency and timeliness of the marketing of this perishable commodity is of the utmost importance to a substantial number of farmers.

The marketing season for burley tobacco on the Mountain City market generally begins during the last week of November and closes in the early part of January the following year.

Prior to taking his tobacco to market, the farmer must get it in "high order." This is accomplished by a series of procedures which, briefly described, consist of ripening the tobacco in the field; hauling it to the curing barn where it is cured and later allowed to gather moisture for handling; moved to the pack barn for storage where the tobacco dries again so that it will not spoil; and then when the tobacco is ready for market, made pliable again for re-handling, then sorted and graded.

Once tobacco is in "order" it is a perishable commodity which may deteriorate in quality and value due to climatic and atmospheric conditions. Accordingly, it is necessary to have the tobacco sold quickly once it is brought and placed on the floors of various warehouses.

After tobacco is delivered to a warehouse, it is weighed and a ticket is prepared showing the grower's name, the serial number of the lot, and the number of pounds contained therein. The ticket also has blank spaces for inserting the name of the buyer, his private grade mark, the price paid per pound, and the grade mark to be inserted by the representative of the Secretary of the United States Department of Agriculture who acts under the provisions of Tobacco Inspection Act of 1935.

The foregoing completed, the warehouse begins a sale at the beginning of the first row or first pile. The sales group is composed on one side of the row of a man representing the warehouse who walks just ahead of the auctioneer and starts the bid on each pile of tobacco. This man is known as the "starter." The first bid is not a "firm" bid. Following the auctioneer is another representative of the warehouse called the "man in the hole." Actually, he is the sales manager of the warehouse who carries the bidding on up after the starting bid has been put on by the starter. Behind him are other buyers representing the various tobacco companies. (The Mountain City tobacco market is furnished with one set of buyers representing six tobacco and two re-drying companies.) A ticket marker is also in this group to mark the ticket when the tobacco is sold with the price it brought, the name of the purchaser, and the company grade which the purchaser calls out to him. On the other side of the row, there are buyers from the various other buying companies who follow the sales and such speculators as would like to attend the sale and bid on the tobacco. After the opening bid is put on the first pile of tobacco by the starter representing the warehouse, the auctioneer takes this figure up and begins to call or chant the bid and to accept bids from buyers on either side of the row or from the warehouse's "man in the hole." After the sale of each pile of tobacco, the ticket marker inserts the price the tobacco brought at the sale in the blank space provided on the ticket. This ticket also has the name of the warehouse, the name of the company buyer, and company grade. After the ticket marker makes these notations on the ticket, he drops it back on the pile of tobacco. If a farmer is dissatisfied with the last bid received for his tobacco, he then has the privilege of turning the ticket, which is rejection of the bid. This is done, ordinarily, by tearing off the name of the buyer or by folding the ticket or by just tearing the bottom part of it.

After tobacco is purchased at auction, it is either removed from the warehouse floor and shipped to the re-drying plants of the purchaser in its green state or hauled to local re-drying plants and subsequently shipped to the tobacco manufacturer for further processing.

(2) The successful operation of a tobacco auction warehouse is dependent upon receiving a portion of the total selling time allocated to a tobacco auction market. Auctioning time, or selling time, on the Mountain City market is allocated according to the rules and regulations of the Burley Auction Warehouse Association, Mount Sterling, Kentucky. This voluntary association annually sets the length of the selling day and the opening and closing dates for the pre-Christmas selling season. The length of the selling day for the Mountain City Tobacco Board of Trade was set at 3½ hours for the 1962–63 season. During each hour of auction, the Burley Auction Warehouse Association has set a maximum figure of 360 baskets to be sold per hour, thus allowing the Mountain City tobacco market a sale of 1,260 baskets per day. If the Mountain City Tobacco Board of Trade elects, however, it may sell on a poundage basis rather than a basket basis. The permissible poundage for 3½ hours selling time is 302,400 pounds in lieu of the 1,260 baskets, and since the Mountain City market has a low average pounds per basket, the Mountain City Board of Trade has elected to sell on the poundage basis.

The distribution of the selling time to the warehouses on the Mountain City Board of Trade and similarly the allocation of pounds to be sold by these various warehouses is determined according to the rules and regulations of respondent Board.

Under the regulations in effect in this market, the allotted selling time to each warehouse is based on a combination of the floor space system and performance system. Under such system the percentage of the total selling time allocated to the market is in turn allocated to each warehouse according to the percentage of floor space such warehouse bears to the entire warehouse floor space on the market except as modified and restricted as hereinafter set forth.

PAR. 4. Said respondent Board acting under and through the direction, control and authority of its officers, as well as certain of its warehouse members, has in the past and now continues to conduct and exercise control over the operations of the Mountain City tobacco auction market under certain bylaws, rules and regulations, prescribed, approved and promulgated by said respondent Board, which bylaws, rules and regulations, among other things, allot, apportion, regulate, and adjust the selling time among the said auction warehouses. Furthermore, said respondent Board passes upon applications for mem-

bership and imposes fines and penalties for violations of its bylaws, rules and regulations; and at all times herein mentioned, the Mountain City tobacco market has been dominated and controlled and is now under the domination and control of respondent Board and certain of its warehouse members.

The authority of said respondent Board is respected, accepted and adhered to, by the buyers, agents and representatives of the principal tobacco manufacturing companies, and by the independent buyers and speculators whose presence is necessary for a successful tobacco auction sale. Consequently, it is virtually impossible for any firm, person or corporation to engage in the tobacco business, other than as a producer or grower, in the Mountain City tobacco market, without first having been admitted into membership in respondent Board and becoming obligated to adhere to and abide by the bylaws, rules and regulations promulgated and prescribed by said respondent Board.

PAR. 5. The respondents named herein are in competition with other members of respondent Board in the purchase, sale and handling of tobacco through the facilities owned, leased or operated by certain of them for the purpose of conducting auction sales of the burley leaf tobacco brought to the market and placed on the various auction warehouse floors for sale by the growers as described in Paragraphs Two and Three herein, and in the buying and selling of such tobacco for export to foreign countries or for domestic use in the manufacture of cigarettes and other tobacco products for sale and distribution in various States in the United States and in the District of Columbia and for export to certain foreign countries, except insofar as their said competition has been hindered, lessened or restrained, or potential competition among them, and with others, forestalled, prevented, hindered and suppressed by the unfair acts, practices, methods and policies of said respondents as hereinafter set forth.

PAR. 6. Respondents, acting between and among themselves and also through and by means of respondent Board, for a number of years last passed, and particularly since about 1962, and continuing to the present time, have, by means of a planned common course of action among themselves, conspired or combined to adopt, carry out, and maintain, and did adopt, carry out and maintain, in commerce between and among the several States of the United States and in the District of Columbia and with foreign countries, an undue and unreasonable hindrance, restriction, suppression or prevention of the establishment and operation of market facilities and market opportunities and competition in the purchase and sale of burley leaf tobacco on the Mountain City tobacco market. Furthermore, member respond-

ents, acting between and among themselves have caused the Mountain City Tobacco Board of Trade, Inc., to be incorporated and used as a medium or instrumentality solely for the purpose or with the intent of perpetuating their dominance and control of the auctioning of tobacco on the Mountain City market, and, in fact, said dominance and control has been perpetuated by virtue of said respondents adopting, as sole incorporators and participants at the first meeting of the Mountain City Tobacco Board of Trade, restrictive and unreasonable bylaws as hereinafter set forth.

PAR. 7. Pursuant to, and in furtherance and effectuation of, the aforesaid planned common course of action, the respondents have done and performed the following things:

(1) They have adopted bylaws to discourage or prevent, or for the purpose or with the intent or effect of discouraging and preventing firms, persons, and corporations from erecting, building or operating any new tobacco auction warehouses in or near the Mountain City tobacco market area;

(2) They have adopted bylaws to discourage or prevent, or for the purpose or with the intent or effect of discouraging and preventing firms, persons, and corporations now engaged in the business of operating tobacco auction warehouses in the Mountain City tobacco market from expanding their present tobacco auction warehouse facilities therein;

(3) Respondent members of respondent Board have formulated and adopted bylaws for the allocation of selling time to the warehouse members of respondent Board for the purpose or with the intent or effect to retain in themselves and for their own advantage and to the exclusion of others such selling time as is made available to the warehouses in this market;

(4) Respondent members of respondent Board have formulated, agreed upon and passed bylaws which restrict the selling time allocated to new warehouse entrants on the Mountain City tobacco market for said entrants first year on the market;

(5) Respondent members of respondent Board have formulated, agreed upon and passed bylaws which limit the gain or loss of selling time allotted after the first year of operation to new entrants on the Mountain City tobacco market to 8% with the intent or effect of perpetuating the restrictions on new entrants described herein;

(6) Respondent members have formed and organized respondent Board and have adopted the bylaws as hereinbefore set forth for the purpose or with the intent of hindering, restraining, or otherwise discouraging competitors from entering into the sale of burley leaf to

bacco on the Mountain City tobacco market and with the intent of hindering, restraining or otherwise discouraging competition with those competitors who have entered the Mountain City tobacco market for the sale or auction of burley tobacco on said market.

PAR. 8. Each of said respondents named herein has directly or indirectly participated in, approved, or adopted the aforesaid bylaws and planned course of action and the acts and practices done in furtherance of and pursuant thereto.

PAR. 9. The aforesaid planned common course of action, together with the acts and practices of respondents as hereinbefore alleged, each and all operated to prevent a substantial volume of tobacco from being sold or purchased by persons, firms and corporations who sought to compete in the market operations of the Mountain City tobacco market, and thereby unduly and unreasonably hindered, restricted, suppressed and prevented competition in the sale and purchase of tobacco at auction on the Mountain City tobacco market. Among the specific effects in this respect are the following:

(1) Persons, firms and corporations seeking to erect, expand and use tobacco warehouse facilities in market operations on the Mountain City tobacco market, and persons, firms and corporations desiring to enter the Mountain City tobacco market as competitors in the tobacco auction warehouse business have been discouraged, forestalled or hindered from so doing by bylaws which prevent such potential auction warehouse competitors from receiving sufficient selling time to permit them the opportunity to compete successfully.

(2) Farmers whose farms are located in the area normally serviced by the Mountain City tobacco market have been and are being deprived of the privilege of selling their tobacco at the warehouse of their choice as a result of the unlawful, unreasonable and arbitrary acts and practices of respondents and respondent Board.

(3) Farmers offering tobacco for sale at auction on the Mountain City tobacco market have been compelled, because of the unreasonable allocation of selling time to competitive warehouses on the Mountain City tobacco market by said respondent Board, to sell such tobacco as has been placed in said competitors' warehouses privately to said competitors' warehousemen thus depriving them of the benefit of such higher prices they may have received from competitive auction bidding.

(4) Respondents, through the unilateral adoption of the Mountain City Tobacco Board of Trade, Inc., By-Laws, have used respondent Board as an instrumentality or medium through which they have attempted to restrain competition and have in effect restrained compe-

tition in the business of operating tobacco auction warehouses in the Mountain City tobacco market by restricting, hindering and interfering with the operation of new warehouse entrants on said market through the adoption and passage of discriminatory, unreasonable and unlawful bylaws, rules and regulations.

(5) Respondents have acquired control of such a nature and to such an extent over the purchase and sale of tobacco in the Mountain City tobacco market that it threatens to create, and has created in certain respects, through the instrumentality of respondent Board, a monopoly in the business of buying and selling burley tobacco on the Mountain City tobacco market.

PAR. 10. The effect of the aforesaid planned common course of action and the acts and practices carried out by respondents pursuant thereto, both individually and collectively, and the adoption and implementation of the Mountain City Tobacco Board of Trade By-Laws, as hereinbefore alleged, are contrary to public policy; have a dangerous tendency to hinder and suppress and have actually hindered and suppressed competition and restrained trade between respondents and others in the purchase, sale, and distribution of tobacco and tobacco products in commerce, as "commerce" is defined in the Federal Trade Commission Act; have a dangerous tendency to create in said respondents a monopoly in the auction sale of tobacco on the Mountain City tobacco market; and have unreasonably restrained such commerce in the said tobacco and tobacco products and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having issued its complaint on August 17, 1964, charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with a copy of that complaint; and

The Commission having duly determined upon motion thereafter filed that in the circumstances presented the public interest would be served by waiver here of the provision of Section 2.4(d) of its Rules that the consent order procedure shall not be available after issuance of complaint; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes

only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission having considered the aforesaid agreement and having determined that it provides an adequate basis for appropriate disposition of this proceeding, the agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered:

1. Respondent Mountain City Tobacco Board of Trade, Inc., is a corporation organized, existing and doing business under the laws of the State of Tennessee, with its principal office and place of business located in Mountain City, Tennessee.

Respondents, Jack Shoun, R. C. Coleman, Sr. and O. L. Coleman, are, or were during the time mentioned in the Commission's complaint, officers of said corporation. The address of respondent Jack Shoun is Mountain City, Tennessee and the address of respondents R. C. Coleman, Sr. and O. L. Coleman is Tabor City, North Carolina.

Respondents, R. C. Coleman, Sr., R. C. Coleman, Jr., Joseph Coleman, O. L. Coleman and Mrs. Harriett Sikes are copartners trading under the name and style of R. C. Coleman Company and Mountain City Burley Warehouses and all are members of the Mountain City Tobacco Board of Trade, Inc. Their address is Tabor City, North Carolina.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents, Mountain City Tobacco Board of Trade, Inc., a corporation, and Jack Shoun, president, R. C. Coleman, Sr., vice president, O. L. Coleman, secretary and treasurer, individually and as officers of said corporation; and R. C. Coleman, Sr., R. C. Coleman, Jr., Joseph Coleman, O. L. Coleman, and Mrs. Harriett Sikes, as copartners trading under the name and style of R. C. Coleman Company and Mountain City Burley Warehouses; and all of the above-named persons as members and as representatives of warehouse members of Mountain City Tobacco Board of Trade, Inc., individually and as officers, directly or through any corporate or other device, in connection with the procuring, purchasing, offering to purchase, selling or offering for sale, burley leaf tobacco, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from devising, adopting, using, adhering to, maintain-

ing or cooperating in the carrying out of any plan, system, method, policy, act or practice, in the form of any agreement, understanding, or bylaw, rule or regulation, which:

1. Allots or causes to be allotted, selling time to a new entrant's warehouse space on the Mountain City tobacco market on any basis or in any manner (a) which fails to give full credit to the size and capacity of a new entrant's first unit of suitable and available warehouse space, and (b) which fails to give reasonable credit to the size and capacity of a new entrant's suitable and available warehouse space in excess of the first unit;

2. Limits the possible gain or loss in selling time allotted to any warehouse on the Mountain City tobacco market for any one selling season to 8%, of the selling time allotted to such warehouse for the preceding selling season;

3. Allots or causes to be allotted any selling time on any basis or in any manner which includes warehouse space that is not suitable and available during the selling season for the sale of tobacco at auction in the Mountain City tobacco market;

4. Has the purpose or the effect of foreclosing or preventing a new entrant warehouse on the Mountain City tobacco market, or any other warehouse doing business on that market, from competing therein; or

5. Places in effect or carries out any act, practice, policy or method, prohibited by any provision or part of this order, through respondent Board or any other instrumentality, agent, agency, medium or representative.

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

BLAIRMOOR KNITWEAR CORPORATION ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS

Docket C-861. Complaint, Dec. 2, 1964—Decision, Dec. 2, 1964

Consent order requiring manufacturers and importers of wool products, located in Long Island City, N.Y., to cease violating the Wool Products Labeling Act by labeling sweaters falsely as "40% mohair, 40% wool, 20% acetate," falsely identifying fibers and percentage thereof, and failing in other respects to comply with labeling requirements.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Blairmoor Knitwear Corporation, a corporation and Mademoiselle Fifth Avenue, Inc., a corporation and Tola Knitwear Corp., a corporation and Leon A. Messing, individually and as an officer of said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Blairmoor Knitwear Corporation, Mademoiselle Fifth Avenue, Inc., and Tola Knitwear Corp., are corporations organized, existing and doing business under and by virtue of the laws of the State of New York.

Individual respondent Leon A. Messing is an officer of the said corporations and formulates, directs, and controls the acts, policies and practices of the corporate respondents including the acts and practices hereinafter referred to.

Respondents are manufacturers and importers of wool products with their office and principal place of business located at 3300 Northern Boulevard, Long Island City, New York.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondents have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, shipped and offered for sale in commerce as "commerce" is defined in said Act, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products but not limited thereto, were sweaters stamped, tagged, labeled or otherwise identified as containing 40% mohair, 40% wool, 20% acetate, whereas in truth and in fact, said sweaters contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were certain sweaters with labels on or affixed thereto, which failed to disclose the percentage of the total fiber weight of the wool product, exclusive of ornamentation, not exceeding five percentum of said total fiber weight of (1) woolen fibers; (2) each fiber other than wool if said percentage by weight of such fiber is five percentum or more; (3) the aggregate of all other fibers.

PAR. 5. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act of 1939, in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "mohair" was used in lieu of the word "wool" in setting forth the required fiber content information on labels affixed to wool products when certain of the fibers described as "mohair" were not entitled to such designation, in violation of Rule 19 of the Rules and Regulations under the Wool Products Labeling Act of 1939.

(b) Words which constitute the name or designation of a fiber which was not present in the product appeared in the required fiber content information on the stamp, tag, label, or other mark of identification affixed to the wool product, in violation of Rule 25 of the Rules and Regulations under the Wool Products Labeling Act of 1939.

PAR. 6. The acts and practices of the respondents as set forth above were, and are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter

executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondents, Blairmoor Knitwear Corporation, Mademoiselle Fifth Avenue, Inc., and Tola Knitwear Corp., are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, with their office and principal place of business located at 3300 Northern Boulevard, in the city of Long Island City, State of New York.

Respondent Leon A. Messing is an officer of the said corporations, and his address is the same as that of said corporations.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Blairmoor Knitwear Corporation, a corporation and its officers, and Mademoiselle Fifth Avenue, Inc., a corporation and its officers, and Tola Knitwear Corp., a corporation and its officers, and Leon A. Messing, 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 introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation, distribution or delivery for shipment, or shipment in commerce, of sweaters or other wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely or deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.

2. Failing to securely affix to, or place on, each such product, a stamp, tag, label or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a) (2) of the Wool Products Labeling Act of 1939.

3. Using the term "mohair" in lieu of the word "wool" in setting forth the required information on labels affixed to wool products unless the fibers described as mohair are entitled to such designation and are present in at least the amount stated.

4. Using words which constitute the name or designation of a fiber which is not present in the product in or as a part of the listing or marking of required fiber content on the stamp, tag, label, or other mark of identification affixed to the wool product.

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

MASON, AU & MAGENHEIMER CONF. MFG. CO., INC.

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

Docket 7733. Complaint, Jan. 7, 1960—Decision, Dec. 3, 1964

Order dismissing complaint which charged a Long Island, N.Y., candy manufacturer with granting discriminatory prices and advertising and promotional allowances to certain of its customers.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondent has violated and is now violating Section 2(a) and Section 2(d) of the amended Clayton Act (U.S.C., Title 15, Sec. 13), hereby issues its complaint as follows:

COUNT I

PARAGRAPH 1. Respondent 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 Old Country Road, Carle Place, Long Island, New York.

PAR. 2. Respondent is engaged in the business of manufacturing, distributing and selling candy and confectionery products.

Respondent's total sales for the year 1958 were in excess of $5,000,000.

PAR. 3. These products were sold by respondent for use, consump-

tion, or resale within the United States and respondent causes them to be shipped and transported from the State of location of its principal place of business to purchasers located in States other than the State in which the shipment or transportation originated.

PAR. 4. Respondent maintains a course of trade in commerce, as "commerce" is defined in the amended Clayton Act, in such products described among and between the States of the United States.

Respondent maintains and operates a manufacturing plant in Mineola, Long Island, New York. From this plant it ships and sells throughout the United States to various purchasers located in the several States of the United States, including Pennsylvania.

PAR. 5. In the course and conduct of its business in commerce, respondent is discriminating in price between different purchasers of its products of like grade and quality by selling to some purchasers at higher and less favorable prices than it sells to other purchasers competitively engaged in the resale of its products with the non-favored purchasers or their purchasers.

For example, respondent sells the substantial bulk of its total output to three categories of buyers:

(1) Vending machine operators,

(2) Chain stores which include grocery, drug, variety, and theater, and

(3) Wholesalers which sell to independent retailers.

For many years respondent has been granting a 10–12% discount in price on its products to favored vending machine operators, including Automatic Canteen Company, ABC Vending Corporation, and Union News Company. The vending machines owned and operated by these companies are located in various trade areas in competition with non-favored purchasers including: (1) vending machine companies which must purchase at higher and less favorable prices from respondent; (2) chain stores including grocery, drug, variety, and theater which purchase at higher prices from respondent; and (3) retail customers of non-favored wholesale purchasers from respondent, purchasing at the non-favored price plus a wholesale markup.

PAR. 6. In the course and conduct of its business in commerce, respondent is competitively engaged with other corporations, individuals, partnerships and firms in the manufacture, distribution and sale of its products.

PAR. 7. The effect of respondent's discrimination in price as alleged, may be substantially to lessen, injure, destroy or prevent such competition as alleged or tend to create a monopoly in the lines of commerce in which respondent and its purchasers are engaged.

PAR. 8. The foregoing acts and practices of the respondent as alleged, violate Section 2(a) of the amended Clayton Act, (U.S.C. Title 15, Sec. 13).

COUNT II

PAR. 9. Each of the allegations of Paragraphs One through Four above, are hereby realleged and made a part of Count II as though set out in full.

PAR. 10. In the course and conduct of its business in commerce, respondent has been paying advertising and promotional allowances to certain favored customers without making the allowances available on proportionally equal terms to all other customers competing in the distribution and sale of its products.

For example, respondent has at various times paid sums of money to Penn Fruit Company, Food Fair Company, and American Stores Company for promotional or advertising activities.

Such allowances were not offered or made available on proportionally equal terms by respondent to other customers competing in the resale of respondent's products of like grade and quality with those customers receiving the allowances.

PAR. 11. The acts and practices of respondent as alleged violate Section 2(d) of the amended Clayton Act (U.S.C. Title 15, Sec. 13).

ORDER DISMISSING COMPLAINT

This proceeding, which charged violations of Sections 2(a) and 2(d) of the Clayton Act, as amended, 15 U.S.C. 13(a), 13(d), was placed on the suspense calendar by Commission order dated February 26, 1963,* and is now before us for final determination of respondent's motion to dismiss for lack of public interest. That motion was premised upon two grounds—discontinuance of the challenged practices prior to issuance of the complaint and a change in respondent's management and control subsequent to issuance of the complaint as the result of the acquisition of all of its capital stock by Bayuk Cigars, Inc., a company having no connection with the challenged practices. The hearing examiner granted the motion. Upon consideration of complaint counsel's appeal from the examiner's dismissal, the Commission concluded that it could not realistically determine whether the challenged practices had been discontinued without additional information concerning Bayuk's pricing policies and the effectiveness of Bayuk's controls over respondent's merchandising activities. Pending completion of an investigation to secure such information, the Commission placed the matter on the suspense calendar.

*Reported in 62 F.T.C. 1515.

The evidence presented by respondent in support of the motion to dismiss established that a new board of directors had been appointed after respondent's acquisition by Bayuk, and that a majority of the new board was composed of individuals connected with Bayuk who have no previous affiliation with respondent. The new board created a special executive committee charged with the responsibility of insuring compliance with applicable state and federal laws. The investigation further indicates that Bayuk's president has instructed respondent's president that no discriminatory practices will be permitted. Respondent is required to forward duplicate invoices to Bayuk's headquarters, thus enabling Bayuk to scrutinize respondent's pricing policies. Bayuk's treasurer has submitted an affidavit in which he stated that he has general supervision over respondent's accounting and bookkeeping methods, and that specific steps, including the requirement of periodic reports aided by newly acquired data processing equipment, have been taken to prevent price discrimination and the payment of promotional allowances except where actually earned. Thus, it appears that Bayuk has in good faith instituted a continuing program designed to eliminate the practices which formed the nucleus of the complaint against respondent.

On the basis of the above facts, the Commission is satisfied that the public interest in the present case would best be served by granting respondent's motion to dismiss the proceeding. Accordingly,

It is ordered, That respondent's motion to dismiss the complaint be, and it hereby is, granted and that the complaint be, and it hereby is, dismissed.

Commissioner Jones not participating for the reason that oral argument was heard prior to her taking the oath of office.

IN THE MATTER OF

BAKERS OF WASHINGTON, INC., ET AL.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8309. Complaint, Mar. 7, 1961—Decision, Dec. 3, 1964

Order denying respondent's exception to the recommendation after remand and its request that the complaint be dismissed—and making effective the original order to cease and desist of February 28, 1964, 64 F.T.C. 1079, stayed by order of June 3, 1964, which required a Seattle trade association of wholesale and retail bakers to cease fixing prices for bread.

OPINION AFTER REOPENING

DECEMBER 3, 1964

By DIXON, *Commissioner*:

On February 28, 1964, the Commission issued its decision and order in this matter, directing respondents to cease and desist fixing bread prices.[1] In finding that the unlawful acts and practices had occurred in interstate commerce, as required by Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, the Commission took official notice of certain facts [2] concerning respondent Continental Baking Company's organization and business that had been developed in another and earlier proceeding before this agency, *In the Matter of Continental Baking Company*, Dkt. 7630 (1963) [63 F.T.C. 2071]. Thereafter, at the request of respondent Continental, the Commission remanded [3] the instant proceeding to its hearing examiner for such further hearings as might be necessary to give Continental, in accordance with Section 7(d) of the Administrative Procedure Act, "an opportunity to show the contrary" of those facts officially noticed from the earlier record. Pursuant to that order of the Commission, hearings were held in Seattle, Washington, on July 20 and 21, 1964, and the record thereof was certified to the Commission on September 24, 1964, together with the hearing examiner's recommendation that the Commission affirm its earlier decision in the matter.

In its effort to "show the contrary" of the facts officially noticed by the Commission in its opinion of February 28, 1964, respondent Continental called eight (8) witnesses, including its regional manager from its regional office in San Francisco, California; its plant manager in Seattle; and six (6) of the Seattle plant manager's supervisory subordinates (*e.g.*, a sales manager, a route supervisor, etc.). Their testimony covered just over 200 pages.[4] The Commission's attorney called no witnesses, but introduced, pursuant to a stipulation with opposing counsel, certain excerpts from the testimony of Continental's President, R. Newton Laughlin, before the Senate Subcommittee on Antitrust and Monopoly.

The substance of the facts noticed in our earlier opinion may be summarized as follows. Ultimate responsibility for the affairs of Continental Baking Company is centered in the company's headquarters in Rye,

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[1] *In the Matter of Bakers of Washington, Inc.*, F.T.C. Dkt. 8309, reported in 3 CCH Trade Reg. Rep. Par. 16,843 (February 28, 1964) [64 F.T.C. 1079].

[2] *Id.*, Commission's opinion, pp. 15–20 [64 F.T.C. 1079, 1118–1123].

[3] Opinion, reported in 3 CCH Trade Reg. Rep. Par. 16,915 (May 21, 1964).

[4] Tr. 675–907.

New York. Its 29-State (and District of Columbia) bakery operation is divided into a number of "regions," each of which covers several states and is headed by a "regional manager" responsible to the home office for the successful operation of the individual baking plants located in his multi-state area. The individual bakery, headed by a "plant manager" responsible first to his "regional manager" (who is frequently located in another state) and ultimately to the home office in Rye, New York, sells the company's bread in an assigned territory through driver-salesmen who call on such local purchasers as grocery stores, restaurants, and so forth. At the three major "levels" of corporate responsibility—headquarters, region, and plant—that responsibility is vested in an executive (president, regional manager, plant manager), aided by a staff divided along functional lines (*e.g.*, personnel, engineering, production, purchasing, sales, and so forth).

The home office in New York was found to have exercised ultimate control over the territories assigned to the several regions and to the individual plants within those regions. It was also found that the home office in Rye, New York, does the purchasing for the company as a whole, buying and paying for raw materials for the individual baking plants from suppliers located in many States: that the home office, in the interest of maintaining a uniform standard of quality for its products (for example, "Wonder Bread"), prescribes production methods and standards through the issuance of "production bulletins" and regional supervision; that the home office in New York approves all price changes by the individual baking plants; that the home office collects from its individual baking plants all monies received by them for sales of Continental products, taking care of bakery expenses by sending money to them from New York, depositing it in "local" bank accounts for the use of the individual plants; that the home office prescribes an accounting system to be followed by the individual baking plants, requiring from them a detailed *weekly* report of production, sales profit and loss, and so forth, in addition to sending auditors to check their books twice a year or more, and regional cost analysts to evaluate the efficiency of their operation; that the home office in New York selects regional managers and, through them, managers and department heads of each of the local baking plants, frequently shifting managers from one plant and region to another; that the home office purchases all employee insurance; that the home office, through its regoinal officials, supervises the maintenance of the individual baking plants and the delivery trucks used by them; that the home office, through its own "labor relations man," supervises the negotiation of its bakeries' labor contracts; that the home office, through its own "art department," de-

signs most of the packages and wrappers in which its bakeries sell its products; and that the home office in Rye, New York, through its own "advertising department" there and a retained New York advertising agency, produces, places, and pays for virtually all of the company's advertising, including that placed in both national and local media, and supplies the bakeries themselves with "point-of-purchase" advertising materials to be placed in grocery stores.

These are the essentials of Continental's multi-State organization and operation as described by its headquarters, regional, and other officials in the earlier Commission proceeding referred to above. In their effort to "show the contrary" of those facts insofar as the Seattle bakery is concerned, respondents have now offered testimony that we think can be summarized as follows. The Seattle bread plant (together with the company's Seattle cake plant) is under the jurisdiction of a "regional office" located in San Francisco, California, as are similar plants located in the four States of California, Utah, Oregon, and Washington, a multi-State territory with a circumference of some 3,500 miles. The manager of that regional office has six department heads reporting to him: a regional production supervisor; a regional personnel director; a regional engineer; a regional vehicular supervisor; a regional cost analyst; and a regional sales manager.

The manager of the Seattle plant (who also manages the company's Seattle cake plant) reports to that regional manager in San Francisco. This Seattle plant manager, in turn, exercises his management control through several supervisory subordinates having responsibilities somewhat similar to those of their counterparts at the higher regional level, including a production superintendent; a chief engineer; a garage superintendent; a sanitation superintendent; and office manager; and four sales managers. The sales managers are in charge of 21 "route supervisors," who in turn supervise 12 "route salesmen." These salesmen sell and deliver bread baked in Continental's Seattle plant to some 3,500 Washington customers, including grocery stores, restaurants, and so forth, an average of just over five driver-salesmen for each route supervisor, and some 30 or more customers for each salesman. Both the route supervisors and the driver-salesmen reporting to them are paid a combination of a base salary plus a commission on sales. The bakery loads the delivery trucks overnight in accordance with the driver's instructions of the previous evening, the driver's request being based on his estimate of his needs for the next day's deliveries. He calls on each customer on his route (*e.g.*, grocery stores) at least once each day, returning to some of the larger stores several times during the day, replenishing the grocer's supply of bread, cleaning and straightening the loaves on the shelf space assigned to him by

the grocer, putting up (with the grocer's permission) signs and displays or "point-of-purchase" advertising materials, and otherwise trying to increase the sales of his product (for example, "Wonder Bread") by the store to consumers.

This testimony thus affirms the essentials of the Commission's noticed findings as to Continental's organizational structure and general operational methods.

In several particulars, however, the testimony offered here does attempt to "show the contrary" of a number of the facts previously noticed by the Commission. Thus, the manager of Continental's regional office in San Francisco testified that the Rye, New York, "labor relations man" does not participate in the negotiations of the Seattle plant's labor contracts; while the regional and home offices doubtless approve those contracts, initial negotiation is a function of the Seattle bakery officials. Further, the Seattle plant manager does not need regional or home office approval to hire and fire his "department heads" (sales managers, etc.).[5] We accept these two corrections of our noticed findings.

His testimony in regard to a number of the other noticed facts is less persuasive, however. He claims that, whatever may be the practice of the company's other regional managers in other parts of the country, he exercises no control over the territory served by the Seattle bakery, its production methods, its sales, or its prices. As to the geographical limits of the Seattle plant's sales territory, he says he leaves this to the "terrain." He does not claim, however, that the Seattle plant manager could commence selling in any state it chose without regional or home office approval. And whether he, as regional manager, exercises any control over the production procedures and standards of the Seattle bakery is not particularly significant; the fact noticed here in our prior opinion is that the home office in Rye, New York, issues "production bulletins" prescribing uniform standards—and by this we understand minimum standards of quality for the company's major products, for example, "Wonder Bread"—while the regional production supervisor "is constantly in touch with the plants."[6] This witness testified that he had on his staff an official called the "regional

[5] This does not suggest, of course, that Continental's personnel policies are themselves a local matter. This Seattle plant manager, for example, was transferred there less than three years ago (February 1962), after more than four years in the company's regional office in San Francisco. And his present sales manager in Seattle has held that position for less than a year, having been transferred there from the position of production manager in the San Francisco plant.

[6] Opinion of the Commission, p. 17 [64 F.T.C. 1079, 1120].

production supervisor," and did not deny that this official "is constantly in touch with the plants," including the Seattle plant.

In regard to the matters of sales and pricing in the Seattle area, this regional manager's testimony that he leaves these solely to the discretion of the Seattle plant manager is wholly unpersuasive.[7] First, the suggestion that he has no responsibility for these activities in his region is flatly contrary to the testimony given in the earlier case by another of the company's regional managers, who said that his responsibilities were "to operate the business and the bakeries under my control and try to make some money * * *. I am responsible for pricing in the trading areas that I have charge of."[8] Secondly, this regional manager's denial of responsibility for pricing and sales in his region appears inconsistent with the fact that he has on his San Francisco staff an official called the "regional sales manager," and is contradicted by the further fact that a former holder of that position testified, in this proceeding, that in the course of his duties in that "regional" job, "I * * * spent a great deal of time here in Seattle."[9] Thirdly, this claim that the San Francisco regional office excercises no supervisory control over Seattle sales and pricing is at odds with testimony and documents previously admitted in this case. At the original hearing, the then-manager of the Seattle plant, a Mr. Kenneth D. Covington, testified that while he could "suggest"[10] prices and price changes, they had to be "approved" by the regional office in San Francisco.[11] Continental's counsel summed up the testimony of that Seattle plant manager on this point by saying that "he writes a letter of recommendation to his regional manager and subsequently gets

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[7] It is not entirely clear from this regional manager's testimony that he really intended to deny his general, over-all responsibility to the home office in New York for sales, prices, and thus profits in the Seattle area. In response to his counsel's question as to "whether or not you regard your function as the regional manager to *operate* the businesses and the individual bakeries *yourself*," he answered, of course, in the negative. Tr. 724 (emphasis added). And he further testified:

Q. Are you responsible, Mr. Hooks, for the sales volume of each bakery or *is it more accurate to state that you are responsible for the sales volume of your region as a whole?*

A. No; each plant is responsible for his own sales volume as well as his profits. [Tr. 725–726 (emphasis added).]

The fact that this regional manager holds each of the individual plant managers in his region "responsible for his own sales volume as well as his profits" is in no way inconsistent with the finding that *he*, the regional manager, is in turn held responsible, by the home office in New York, for, as his attorney put it, "the sales volume of your region as a whole."

[8] Opinion of the Commission, p. 18 [64 F.T.C. 1079, 1121].

[9] Tr. 709.

[10] Tr. 411, 426. He testified further:

Q. Did you also fill out a form, what Continental Baking Company calls a Form 487, in which you requested a price rise effective on September 22?

A. Yes, sir. [Tr. 448.]

[11] Tr. 427.

approval for a price change but * * * he did not mean to testify to, your Honor, that he was able to say what goes on internally in Rye, New York." [12]

A number of documents substantiated this, showing that, when the Seattle plant raised its prices in 1958, the manager of that plant sent a "recommendation" for the increase to his regional superior, the regional manager in San Francisco, who in turn submitted it to the home office in Rye, New York, for the personal approval of the company's president.[13] Questioned about these documents, the then-manager of the Seattle plant testified that he had also followed this procedure in raising his prices in 1960.[14] The following testimony seems to us conclusive:

Q. Now, I show that Exhibit 23E to the witness and I would like to ask the witness whether that indicates that the president of the company gave approval to the 1958 suggested price raise?

The WITNESS. Yes, it does.

Q. And may I ask you, did you receive approval from the president of the company for your suggested 1960 price rise?

A. I don't recall that I received approval direct from the president of our company. *Other than through our own regional office* [in San Francisco].[15]

In any event, however, the contention that the San Francisco regional office is a mere "service" unit exercising no executive control over the Seattle baking plant,[16] even if accepted fully, would not warrant a finding that Continental's Seattle plant manager has unlimited pricing authority. Certainly there can be no doubt that, while he is permitted to initiate actions within certain limits of authority previously delegated to him by his superiors, and is allowed to "recommend" for their approval actions not within that area of his delegated discretion, he must, and does, account not just ultimately but *weekly* to the company's home office in Rye, New York. Here there

[12] Tr. 425.

[13] CX 23A–D. See also CX 24–27, 29.

[14] Tr. 423, 424.

[15] Tr. 426–427 (emphasis added). This Seattle plant manager further testified that he discussed "the effect that the increased cost of labor would have on the price of manufactured loaves of bread" with his regional manager in San Francisco, tr. 415, and that, when he ships bread to another Continental plant in Portland, Oregon, the price to be "charged" the sister plant "is computed by our regional manager," tr. 435–436. This is supported by the fact that the regional office has on its staff a "regional cost analyst," tr. 719. The Seattle plant manager was unable to say how the regional manager makes that computation, tr. 436–437. "Q. There is nothing to prevent him [the regional manager] from changing the discount from 40 to 50 or 30 [percent] of whatever he wants, is that correct? A. No, sir." Tr. 438.

[16] This regional manager suggested that Continental's individual baking plants in his region have an autonomy and independence comparable to that of the independently-owned bakeries associated with such organizations as Quality Bakers of America. Tr. 717–718. One of the Seattle plant officials carried it even further: he suggested that "the salesman out there on the route is in business for himself." Tr. 900.

has been no challenge of any kind to the noticed finding that: "Continental's baking plants follow an accounting system prescribed by the headquarters office in New York. *Each week they submit a report* that gives the home office in New York a complete breakdown on the *past week's production*, *sales*, percentage of 'returns,' etc. The *bakery also submits a weekly 'profit and loss' statement* [to the home office in New York]. A 'Travelling Auditor' audits the bakeries' books twice a year, and may also make additional visits. The regional cost analyst also checks on the bakeries." [17] In view of this close control over "production," "sales," and "profits" by the home office in New York, and in view of the obvious relationship between volume, profits, and prices, even a finding that the Seattle plant manager initially sets his prices without consultation with the regional manager—a finding we do not believe is warranted—would not change the fact that those prices must be and are approved weekly in Rye, New York.

The other testimony by which respondent Continental has sought to "show the contrary" of the facts officially noticed is that of its Seattle plant manager and six of his Seattle supervisory personnel. Their testimony sought to show in substance that notwithstanding the numerous specifics of control exercised over the Seattle operations by their superiors in the regional and home office, there is nonetheless a substantial residuum of discretion left to them. For example, without denying that all "major" advertising is handled by the home office, including the placing and paying for ads in the Seattle media and the supplying of "point-of-purchase" material to be placed in the grocery stores by Seattle driver-salesmen, they testified that the Seattle plant manager has been delegated authority to place small ads in weekly newspapers in the smaller towns.[18] He can employ "demonstrators" and his salesmen are permitted to supplement the "point-of-purchase" advertising materials received from New York with their own hand-lettered signs and displays.[19] Further, it was shown that the Seattle plant manager has been delegated the authority to make minor variations in the prescribed baking formulas and procedures in order to cater to particular local consumer tastes,[20] and even to experiment

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[17] Opinion of the Commission, p. 17 (emphasis added) [64 F.T.C. 1079, 1120].

[18] See tr. 786–787, where the placing of a small ad in two weekly newspapers ("subscription of 2,500 customers") in the Raymond-South Bend area is reported.

[19] "For example, you take a white card and you might just hit it with some green spray paint and then you give them to your salesmen and he will put on if he is trying to sell French bread, for example, he will put, 'Fresh French. Try a loaf this weekend,' or something of this nature, whatever he happens to come up with." Tr. 878–879.

[20] Some areas "prefer a darker crust color to the one we like in Seattle." Tr. 681.

with new bread varieties [21] in his local area and new package designs for those varieties.[22]

The principal thrust of the testimony certified to us here, however, was toward the allegedly "local" nature of the activities of Continental's driver-salesmen. These 112 "route salesmen" deliver bread to established customers on their "routes" and also attempt to "sell" those potential customers that are not yet buying Continental's products. Since about 20% of their total compensation comes from commissions on sales,[23] these driver-salesmen naturally show considerable individual initiative in trying to increase their sales of Continental's products. They make repeated calls on the local grocer, getting to "know some of his background, like if he likes to bowl or fish * * *. I knew all my customers. I knew their families and I could talk to them * * *. [B]y becoming a personal friend or trying to become a personal friend as close as you can with the grocer," the salesman can make him "more receptive to your speil, so to speak * * *." [24]

The skill of Continental's Seattle salesmen is hardly sufficient to establish that the business of selling "Wonder Bread" in Seattle belongs to the salesmen, as several of respondent's witnesses intimated here, rather than to Continental Baking Company of New York. The fact remains that they are Continental's agents, driving Continental's trucks, selling Continental's bread, collecting Continental's money and turning that company money in each day for transmission to a New York bank. Those essentials, together with the further noticed facts that all of the raw materials used by the Seattle plant are bought and paid for by the home office in New York, are shipped to Seattle by out-of-state suppliers, and that everything done in the Seattle plant is subject to the rigid discipline of the weekly profit and loss statement that goes to New York, have all been conspicuously avoided in the testimony by which respondent Continental has sought to "show the contrary" of the facts noticed by this Commission in its earlier opinion.

Respondent raises one further point in its instant papers: it alleges that, if the Commission should conclude that Continental has not shown the contrary of the facts previously noticed and thus that the price fixing did in fact occur in interstate commerce, "the Commis-

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[21] Tr. 682 (introduction in Seattle of a new "sesame-top bread" after a competitor had brought it out).

[22] *Ibid.*

[23] Tr. 833. "[E]very loaf you sell, you make 7 percent, every extra loaf you sell over that, say, if my business increased $100 in the next week, that means $7 more in my pay check." *Ibid.*

[24] Tr. 803–804.

sion should exercise its discretion to dismiss this proceeding as no longer required by the public interest." [25] In support of this, respondent alleges that the price fixing found by the Commission occurred in 1957–1960; that his finding was based on the activities of the association's then secretary-manager, a man now deceased; that, of the two Continental employees involved in the matter, one has now retired and the other "is no longer employed by Continental"; that the association is now "defunct" and holds no meetings, price-fixing or otherwise; that one of the larger bakers found to have been a part of the conspiracy, Langendorf, has been acquired by a non-respondent baker; and that some of the 63 respondents named in the cease-and-desist order of February 28, 1964, may not have received copies of the order or other papers.

All of these contentions are patently insufficient as a matter of law to require dismissal. As to the last two—whether all of the respondents in this case will be properly bound by our order—those are problems for the Commission and the courts, not Continental; it has long been settled that, while the Commission should and does attempt to deal as comprehensively as possible with widespread law violations, its failure to stop every member of an industry from violating the law does not require it to dismiss proceedings against the others. *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411 (1958); *In the Matter of Pacific Molasses Co.*, FTC Dkt. 7462 (Opinion of the Commission, July 20, 1964), 3 CCH Trade Reg. Rep. Par. 16, 981 [65 F.T.C. 675].

Respondent's present contention that the trade association involved in the price fixing found here is now "defunct" illustrates why, in our earlier decision in this matter, we rejected respondents' request to have the order limited to a prohibition of price fixing accomplished through the particular instrumentality of this association, Bakers of Washington. We pointed out that "an order so limited would leave these respondents free to resume their conspiracy tomorrow, holding conspiratorial meetings at high noon in the most public place in the City of Seattle, so long as they kept the association, Bakers of Washington, out of the matter. Such an order would be no more effective than one limited to a prohibition of price fixing only where it was accomplished by meetings held in a particular place, *e.g.*, at the Athletic Club in Seattle. The order could be avoided by using the telephone instead of having a meeting, or by moving the site of the meeting from the Ath-

[25] "Memorandum in Support of Proposed Findings of Fact, Conclusions of Law, and Exception to Recommendation of Examiner," November 13, 1964, at 26–27.

letic Club to other premises." The same considerations apply here. The dissolution of this particular association has no bearing on either respondents' capacity to fix prices or their demonstrated proclivity for doing so.[26]

Continental's other arguments on the "public interest" question were considered and rejected in our decision of February 28, 1964. An order will issue directing that the cease-and-desist order contained in that decision become effective forthwith.

Commissioner Elman dissented.

Commissioners Reilly and Jones did not participate for the reason that oral argument was heard prior to their taking the oath of office.

FINAL ORDER

The Commission by orders of May 21, 1964 [65 F.T.C. 1308], and June 3, 1964, having reopened this proceeding, reserved ruling on respondent Continental Baking Company's petition for reconsideration, remanded the proceeding to the hearing examiner, and stayed the effective date of the order to cease and desist previously entered herein, for the purpose of permitting respondent Continental Baking Company an opportunity to "show the contrary" of certain facts officially noticed by the Commission in its decision of February 28, 1964; and

The hearing examiner having received further testimony pursuant thereto on July 20 and July 21, 1964, and having certified the record thereof to the Commission on September 24, 1964, together with his recommendation that the Commission affirm its original decision of February 28, 1964 [65 F.T.C. 1079]; and

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[26] If the dissolution of the trade association is being advanced here as evidence of respondents' "abandonment" of the unlawful price fixing, the argument is even more unsound. It is well settled that a discontinuance of an illegal practice only after the law's hand is already on the offender's shoulder furnishes no basis for the dismissal of a case. *Coro, Inc.* v. *Federal Trade Commission*, 338 F. 2d 149 (1st Cir. 1964), 5 CCH Trade Reg. Rep. Par. 71,282. Moreover, the latest testimony of Continental's officials—that received on July 20 and 21, 1964—provides us with scant reason for believing respondents have given up their opposition to competition. Continental's sales manager for the City of Seattle, referring to a competitor's recent offering of a 29¢ loaf when Continental's price was 35¢, testified that he "felt that it was wrong" and that it might cause a "bread war or something." So instead of lowering his own price, he sent Continental's salesmen out to take care of it: "Well, the salesmen individually did quite a job on that. They explained to the grocer the fact that it may lead to bread wars or something of that sort that would not be right and it would cut into the grocer's profit and cut into his [the salesman's] commission, because, after all, they work on a commission basis. They did quite a selling job and I felt it was their getting around and talking to these grocers that finally got this other company to get back up or to discontinue that particular deal, anyway." Tr. 759. So successful was this effort that, in some stores, "they actually had the other fellow thrown out or cut down drastically." Tr. 760.

The Commission, having considered respondent Continental's exception to that recommended decision, together with its proposed findings of fact, conclusions of law, and argument in support thereof, including respondent's argument that certain changed circumstances require a dismissal of the proceeding, and having considered the proposed findings of fact and conclusions of law proposed by counsel supporting the complaint and respondent Continental's reply thereto; and

The Commission having concluded that respondent, after having full opportunity therefor, has failed to "show the contrary" of the facts heretofore officially noticed except as noted in the accompanying opinion; that respondent Continental's proposed findings of fact, conclusions of law, and arguments in support thereof should be rejected except as noted in the accompanying opinion; that respondent's exception to the recommendation after remand and its request that the complaint be dismissed by reason of alleged changed circumstances should be denied; that respondent's petition for reconsideration of the Commission's earlier decision should be denied; and that the order to cease and desist previously entered herein should now be made effective:

It is ordered, That the findings of fact noticed in the Commission's opinion of February 28, 1964, be, and they hereby are, modified in accordance with the accompanying opinion, and that respondent's proposed findings, conclusions, and arguments, except as otherwise indicated in the accompanying opinion, be, and they hereby are, rejected.

It is further ordered, That respondent Continental's exception to the recommendation after remand, request for dismissal on the basis of alleged changes in circumstances, and petition for reconsideration of the Commission's earlier decision be, and they hereby are, denied, and that the order to cease and desist issued February 28, 1964, be, and it hereby is, made effective with the issuance of this order.

It is further ordered, That respondents named in the Commission's order of February 28, 1964, 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 the order to cease and desist issued February 28, 1964.

Commissioner Elman dissenting, and Commissioners Reilly and Jones not participating for the reason that oral argument was heard prior to their taking the oath of office.

IN THE MATTER OF

CLARENCE SOLES TRADING AS MIDWEST SEWING CENTER

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8602. Complaint, Nov. 1, 1963—Decision, Dec. 3, 1964

Order vacating initial decision and dismissing—insufficient evidence—complaint charging a St. Paul, Minn., retail dealer engaged in selling new and used sewing machines with "bait" advertising to obtain leads to potential purchasers, and falsely stating usual selling price of its new machines, thereby misrepresenting the amount of savings available to customers.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Clarence Soles, an individual, trading and doing business as Midwest Sewing Center, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Clarence Soles is an individual trading and doing business as Midwest Sewing Center, with his principal office and place of business located at 504 North Prior Street in the city of St. Paul, State of Minnesota.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of new and used sewing machines to the public.

PAR. 3. In the course and conduct of his business, respondent now causes, and for some time last past has caused, his said product, when sold, to be shipped from his place of business in the State of Minnesota to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of his business as aforesaid, and for the purpose of inducing the purchase of his said products, respondent has made various statements in advertisements in news-

papers of general circulation. Among and typical, but not all inclusive, of such statements are the following:

Singer electric sewing machine in beautiful console cabinet. Sews forward and reverse with all attachments for making buttonholes, zig-zagging, sewing monograms and fancy stitch designs.

Take over seven monthly payments of $6.10, or will discount for cash. Write Credit Manager, 504 Prior Ave. No., St. Paul 4, Minnesota.

Singer electric sewing machine in beautiful three drawer desk. Sews forward and reverse with all attachments for making buttonholes, zig-zagging, sewing monograms and fancy stitch designs. Can be seen in your area.

Take over nine monthly payments of $6.55 or will discount for cash.

Write Credit Manager, 504 Prior Ave. No. St. Paul 4, Minnesota.

PAR. 5. By and through the use of said statements in said advertisements and others of similar import but not specifically set out herein, respondent represented that he was making a bona fide offer to sell used electric sewing machines at the prices specified in the advertising.

PAR. 6. In truth and in fact, respondent's offers were not bona fide offers to sell the said used sewing machines at the advertised prices but were made for the purpose of obtaining leads and information as to persons interested in the purchase of new sewing machines. After obtaining leads through response to said advertisements, respondent's salesmen called upon such persons but made no effort to sell said sewing machines at the advertised prices. Instead, they exhibited the advertised used sewing machines, or ones similar to them, in demonstrating that they were manifestly unsuitable for the purpose intended and disparaged the advertised products in such a manner as to discourage their purchase, and attempted to and frequently did sell much higher priced products.

Therefore the statements and representations as set forth in Paragraphs Four and Five hereof were false, misleading and deceptive.

PAR. 7. In the course and conduct of his aforesaid business, and for the purpose of inducing the purchase of his sewing machines, the respondent's salesmen have made numerous oral statements with respect to prices of his sewing machines and the savings resulting to purchasers.

Typical and illustrative of the aforesaid statements are the following:

The regular retail price is $269.00
Our price to you is $150.00
The machine usually sold for $199.00
Our price to you is $150.00

PAR. 8. By and through the use of the above-quoted statements, and others of similar import not specifically set out herein, the respondent represented that the higher stated prices were the prices at which the merchandise had been usually and customarily sold by respondent at retail in the recent regular course of business in the trade area or areas where such representations were made and that the differences between the higher and lower prices represented savings to purchasers from respondent's usual and customary retail prices.

PAR. 9. In truth and in fact, the higher prices stated orally by respondent's salesmen were in excess of the prices at which the merchandise had been usually and customarily sold by respondent in the recent regular course of business in the trade area or areas where the representations were made, and the differences between the higher and lower prices did not represent savings to purchasers from respondent's usual and customary retail prices.

Therefore, the statements and representations as set forth in Paragraphs Seven and Eight hereof were and are false, misleading and deceptive.

PAR. 10. In the conduct of his business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of sewing machines of the same general kind and nature as that sold by respondent.

PAR. 11. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondent, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Mr. James J. Lewis supporting the complaint.

Mr. Thomas M. Murphy of *Kempe & Murphy*, West St. Paul, Minn., for the respondents.

INITIAL DECISION BY ELDON P. SCHRUP, HEARING EXAMINER

APRIL 16, 1964

STATEMENT OF PROCEEDINGS

The Federal Trade Commission on November 1, 1963, issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act in the interstate sale and distribution to the public of new and used sewing machines.

The complaint charges the respondent with false newspaper advertising in the offering for sale of repossessed sewing machines with small payments owing for the alleged purpose of securing leads to prospective purchasers of new sewing machines. Said sales offers are stated not to have been bona fide but, to the contrary, respondent's salesmen are alleged to have so disparaged the advertised machines as to discourage their purchase and to have then further induced the prospective buyers to purchase other of respondent's sewing machines by false statements and representations as to the respondent's usual and customary higher and regular retail selling prices for the same.

Answer admitting and denying the various allegations of the complaint was filed on December 5, 1963. Said answer further averred that respondent's newspaper-advertised sales offers were bona fide, that an undetermined number of such machines were sold as represented, and that respondent and his agents acted in accord with generally accepted business practices. Based on respondent's accompanying petition to hold the hearing at a site close to respondent's business activities, a certificate of necessity was certified to the Commission on December 20, 1963, recommending the granting of permission to hold a non-continuous hearing for the presentation of the case-in-chief in Madison, Wisconsin, and the defense in St. Paul, Minnesota.

By Commission order issued December 26, 1963, such leave was granted and a hearing was held in Madison, Wisconsin, on February 3, 1964, and in St. Paul, Minnesota, on February 5, 1964, and the case closed of record. The record consists of 135 pages and 11 Commission exhibits. Four purchasers of respondent's sewing machines [1] and the respondent were called to testify during the case-in-chief, and

[1] By stipulation of record between counsel (Tr. 101–103), it was agreed that four additional purchasers from the respondent proposed to be called in support of the complaint's allegations could be dispensed with, and that the evidence of record they would further add, if called, was to be considered as being substantially the same and supplementing that already made of record by the four preceding purchasers from the respondent.

the respondent called but one witness to testify in the presentation of the defense.[2] Respondent did not testify as a witness in his own behalf and offered no exhibits.

All counsel were afforded full opportunity to be heard, to examine and cross-examine all witnesses presented, and to introduce such evidence as is provided for under Section 3.14(b) of the Commission's Rules of Practice for Adjudicative Proceedings.

Proposed findings of fact, conclusions, brief and proposed order to cease and desist were filed by counsel supporting the complaint. Counsel for the respondent filed only a short brief relative to the legal interpretation to be given the testimony and evidence of record. Proposed findings and conclusions submitted and not adopted in substance or form as herein found and concluded are hereby rejected.

After carefully reviewing the entire record in this proceeding as hereinbefore described, and based on such record and the observation of the witnesses testifying herein, the following Findings of Fact and Conclusions therefrom are made, and the following Order issued:

FINDINGS OF FACT

1. Respondent Clarence Soles is an individual trading and doing business as Midwest Sewing Center, with his principal office and place of business located at 504 North Prior Street in the city of St. Paul, State of Minnesota.[3] Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of new and used sewing machines to the public.[4]

In the course and conduct of his said business, respondent now causes, and for some time last past has caused, his said products, when sold, to be shipped from his place of business in the State of Minnesota to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.[5]

2. In the course and conduct of his aforesaid business, and for the purpose of inducing the purchase of his said products, respondent has made various statements in advertisements in newspapers of general circulation. Among and typical of such statements are the following:

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[2] This testimony (Tr. 126–130) was confined to the nature of respondent's banking and financing arrangements with the bank employing the witness.

[3] Admitted, paragraph 1 of answer; respondent's testimony (Tr. 109–110).

[4] Admitted, paragraph 2 of answer; respondent's testimony (Tr. 110–119).

[5] Admitted, paragraph 3 of answer. Respondent made sales of sewing machines in the gross volume of $350,000 in 1962, of which from $100,000 to $150,000 were sold outside the State of Minnesota. (Tr. 111–112)

(a) Singer electric sewing machine in beautiful console cabinet. Sews forward and reverse with all attachments for making buttonholes, zig-zagging, sewing monograms and fancy stitch designs.

Take over seven monthly payments of $6.10, or will discount for cash. Write Credit Manager, 504 Prior Ave. No., St. Paul 4, Minnesota.[6]

(b) Singer electric sewing machine in beautiful three drawer desk. Sews forward and reverse with all attachments for making buttonholes, zig-zagging, sewing monograms and fancy stitch designs. Can be seen in your area.

Take over nine monthly payments of $6.55 or will discount for cash.

Write Credit Manager, 504 Prior Ave., No., St. Paul 4, Minnesota.[7]

3. By and through the use of the said statements in the aforesaid newspaper advertisements,[8] respondent represented that he was making a bona fide offer to sell used electric sewing machines at the prices specified in the advertising.[9]

In truth and in fact, respondent's offers were not bona fide offers intended and made for the purpose and in the expectancy of selling the said used sewing machines at the advertised prices, but were made for the different purpose of obtaining leads and information as to persons interested in the purchase of sewing machines. After obtaining leads through response to said advertisements, respondent's salesmen called upon such persons for an intended different purpose than as set forth to prospective purchasers in respondent's foregoing advertisements, and made no real effort to sell the advertised used sewing machines at the advertised prices. Instead, they exhibited the advertised used sewing machines, or ones similar to them, and showed or demonstrated not only that they were manifestly unsuitable for the purpose intended but further disparaged the advertised machines in such a manner as to discourage their purchase, and, in lieu thereof, attempted to and frequently did exhibit, demonstrate, offer for sale and then sell respondent's higher-priced machines.[10] The statements and representations as set forth in said advertisements were, therefore, false, misleading and deceptive to prospective purchasers.[11]

Respondent's answer to the complaint in this proceeding avers that his newspaper-advertised sales offers of repossessed sewing machines

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[6] CX No. 1 and Tr. 114–115.

[7] CX No. 2 and Tr. 114–115.

[8] CX No. 3 shows such advertisements to have been inserted and published in approximately 157 differently located newspapers in the State of Wisconsin alone. (Tr. 8–9)

[9] Admitted, paragraph 5 of answer as to the meaning to be attributed to the said advertising statements.

[10] Witness Bohmsach at Tr. 12–14, 23–24; witness Blaschka at Tr. 34–35, 45, 50–51; witness Drinkwine at Tr. 59–60, 62–63, 68, 74, 78–80; witness Stippich at Tr. 83–84, 93–94, 99–100; witness Soles at Tr. 109–119, testifying as to his sales methods.

[11] In *Carter Products, Inc.* v. *Federal Trade Commission* (1951) 186 F. 2d 821, it was held: "The law is violated if the first contact or interview is secured by deception even though the true facts are made known to the buyer before he enters into the contract of purchase (citing cases)."

were bona fide and that an undetermined number of such sewing machines were sold as represented in said advertisements. Respondent offered no proof to such effect and the record contains none.[12] Respondent was present during the entire trial of this matter, heard all the witnesses and viewed all the offered exhibits, but remained silent and made no effort to, and did not, present any witnesses or exhibits to contradict the testimony and documentary evidence herein of record in support of the allegations of the complaint. This evidence of record is substantial and supports a finding that respondent's newspaper advertisements were not, in reality, bona fide offers of sale, but, to the contrary, said advertisements, in actuality, were used to obtain leads to prospective purchasers of other of respondent's higher-priced machines. Such is made clearly evident by the record testimony herein concerning the type and apparent old age of the sewing machine first shown[13] by respondent's salesmen to the prospective purchasers responding to respondent's newspaper advertisements. This machine was supplied by the respondent[14] and not expected to be sold, and the respondent's newspaper advertisements were but a ruse to obtain entry and give the opportunity to respondent's salesmen of selling respondent's more modern, higher-priced machines, aided by the sales gimmicks hereinafter set forth and described.

4. Further false, misleading and deceptive, in addition to the content of the respondent's foregoing newspaper advertisements, were state-

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[12] Respondent's only witness, a bank official, testified to his bank's having outstanding about $130,000 of respondent's installment sales contracts of which in 1962 only from 50 to 100 had defaulted, and, as to even this comparably negligible number, it was indicated that all such defaults did not eventually result in repossessions by the respondent. (Tr. 127–129.) No record showing was made that any of this comparably negligible number of used machines which might have been repossessed were ever the subject of respondent's newspaper sales offer advertisements.

[13] Witness Blaschka at Tr. 50–51:

"Q. And the appearance of the machine and the apparent age of the machine, did this influence your decision not to have any interest in it?

"A. Yes, I believe it did.

"Q. Did it appear to be an old or new machine?

"A. It looked old.

"Q. How old, would you say, if you can, within your experience?

"A. Well, I would say it was in the neighborhood of 30 years old.

"Q. Quite an old machine.

"A. Yes, I would say it was pretty close to 30 years old.

"Q. Marked and marred?

"A. Well, I wouldn't say it was marked. It looked good. Either they put a new paint job on it or it was polished up nice.

"Q. But it was an old machine?

"A. You could tell it was real old.

"Q. Then the salesman, when you told him you were not interested in this machine, did he attempt then to continue to demonstrate the old machine, or what did he do?

"A. No, he says, 'I have another machine out in the car', and he walked right out and brought it in."

[14] Tr. 83; 118.

ments and representations herein shown of record to have been made by respondent's salesmen as to claimed usual and customary higher and regular retail list selling prices for other of respondent's sewing machines attempted to be offered for sale in lieu of the said newspaper-advertised machines. Said statements and representations were intended to and did induce prospective purchasers to buy respondent's said other sewing machines. The indicated regular retail list selling prices of the said other machines, when such were described by respondent's salesmen as being new machines, were stated and represented by respondent's salesmen to be substantially higher than the respondent's present asking price for said machines, and it was claimed that respondent usually and customarily sold such new machines to the public at these indicated higher and regular retail list selling prices. Prospective purchasers were thus led to believe that the monetary differences existing between the respondent's said lower asking prices and the claimed indicated usual and customary higher and regular retail list selling prices at which such machines were otherwise sold by the respondent were, in fact, a real savings in such amounts, and prospective purchasers were thereby induced to buy such machines from the respondent.

In other of the sales transactions of record wherein the sewing machines were represented by the respondent's salesmen as being repossessed, much the same inducements to buy from the respondent were present. The purchaser witnesses in this proceeding testified that these allegedly repossessed machines gave the appearance of being new and as having had but little, if any, use other than that which would have accompanied their normal demonstration, and, in the light of the monetary differences between respondent's lower asking prices and the represented and indicated substantially higher and regular retail list prices at which respondent was claimed to usually and customarily sell the new machines, their purchase was a seeming bargain apparently as good as if the machines had been classified as new. Further, and whether the machines being sold in such transactions were stated to be either new or repossessed machines, respondent's salesmen or agents employed still another sales gimmick to induce the purchase of these sewing machines from the respondent. In addition to stating to prospective purchasers that the asking price for a seemingly new machine was reduced because allegedly it had been repossessed, the asking price for such machine was again substantially reduced by a so-called "trade-in allowance" given for the prospective purchaser's old machine, even where the prospective purchaser possessed no old machine to trade in.

Illustrative of the foregoing are the following testimonial excerpts of record:

Q. Did he tell you what the usual and ordinary price of that machine was as charged by Midwest Sewing Center?

A. Well, the only thing—they sell at $269.

Q. And your contract so states?

A. Yes. And that is what is in the direction book, I mean the book I got with the sewing machine, it is printed right in the book.

Q. The $269.

A. Yes.[15]

* * * * * * *

Q. I hand you Exhibit 11, which is the contract for the purchase of the sewing machine from Midwest Sewing Center, and ask you if you can state how much money was paid for the machine you did purchase from Midwest?

A. We paid $50 cash—down by check, and we sent them $100 a month later.

Q. And you paid in full $150 for the machine?

A. Yes.[16]

Q. Was any statement made to you as to the usual value of that machine, the machine you purchased?

A. I know there was a price stated. I can't remember what it was exactly. It is written in the Domestic book I have at home, I know that. It was more than what we wanted to pay for it, anyway.

Q. Was it $10 more than $150?

A. Yes, at least.

Q. It was more than that?

A. I am sure much more.

Q. Over $200?

A. Yes, I am positive of that.

Q. Did the salesman say the machine you bought was repossessed?

A. Yes. He said he had just picked it up, and he said this, that her husband woudn't let her keep it—didn't say any names—so he had to pick it up—well, it would be repossessed then.

Q. Did it show signs of heavy use?

A. No. None of the attachments were unwrapped or anything.

Q. Still in——

A. (Interposing.) In tissue paper, as they should have been if it were new.[17]

* * * * * * *

Q. You had read the advertisements of this used sewing machine, then, in your local paper?

A. Yes.

Q. What then happened after you read it in regard to this machine?

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[15] Witness Bohmsach at Tr. 17 and CX No. 6, with reference to a sewing machine stated to be a new machine.

[16] No trade-in used machine was involved in this transaction.

[17] Witness Stippich at Tr. 88–90. The record shows this witness to have been given the factory warranty by the respondent as being the original purchaser of a new machine. The warranty (CX No. 10) states: "We warrant to the original purchaser of this new Domestic Sewing Machine * * *," and bears the stamp of respondent Midwest Sewing Center as an authorized dealer.

A. We wrote a letter and sent it in and waited a matter of days, I just don't rightly remember——

Q. (Interposing.) Did you send the letter to the Midwest Sewing Center at the address in the advertisement?

A. Yes.

Q. Then what happened?

A. Quite a few days later a young fellow showed up one night and he brought this Singer sewing machine in, and it was quite oldish, I would say it was an old Singer with a motor mounted on it, so it would be electric, and it had its attachments for, as they say there, sewing zig-zag and button holes and what have you. She didn't like it because you had to put all these extra gadgets on there to make it work. So he sewed through the material and showed us how it would work and we saw what we had to do to put these attachments on, and she didn't like that. So then he says, "Well, I have another one out in the car, it is a domestic, and it is supposed to be a repossessed one that somebody couldn't pay for." and he went out and got it and showed it to us, and he plugged it in and sewed with it. It was a portable job, and these people were supposed to have used it just as a portable job.

Q. In demonstrating the machine, what finally happened during the demonstration or after the demonstration? What was the conversation between you two and the salesman preceding what happened? Tell us in your own words.

A. We wanted to know how much it was and he said it sold for $269.95, I guess, and he says, "Seeing that it is a repossessed one that we can get it down pretty lower." So he gave us a trade-in offer of $104.95, which we didn't have any trade-in.

Q. You had no machine?

A. No machine.

Q. And you were told, I believe, the value of the machine you were buying was $269.95?

A. Yes.

Q. And then when you received the machine, did you examine it closely? The salesman, I believe you testified, made a statement that the machine had been repossessed.

A. Yes.

Q. Did it show signs of having been subjected to—had it been used?

A. Well, I would say you couldn't tell too much. It had a little lint maybe down underneath by the bobbin, but outside of that you couldn't tell, there was no scratches or anything on it, it looked pretty good. It was used some, but how much I wouldn't know. It could have been a demonstrator for all I know.[18]

CX No. 7, the conditional sales contract entered into between the respondent and this purchaser witness, discloses on its face that the machine in question, despite being represented as a repossessed machine, was actually sold as a new machine upon which the purchaser was allowed a trade-in of $104.95 on a non-existent used machine. This fictitious trade-in allowance, together with the cash payment of $165 by the purchaser, totaled the so-called "usual and customary regular retail list selling price" of $269.95, claimed by the respondent's salesmen.

[18] Witness Blaschka at Tr. 34–39.

By such a manipulation, this purchaser was led to believe he was getting the illusionary bargain and a saving of the monetary difference between the cash payment of $165 made and the asserted usual and customary regular retail list selling price of $269.95 claimed to be normally obtained by the respondent for a new like machine. In the sale to the witness Stippich described herein at preceding page 8, it will be noted that even this "cover-up" trade-in allowance was not used to reach respondent's claimed usual and customary higher regular selling price for a new like machine.

5. The respondent herein does not contend that the eight witnesses testifying (four by stipulation) in support of the allegations of the complaint are not a fair representative number of respondent's interstate customers located in the State of Wisconsin,[19] but asserts rather that the contentions in this matter must rise or fall with the testimony of the said witnesses.[20] Respondent further does not contend that the alleged practices of "bait and switch" as set forth in the complaint are not violations of the Federal Trade Commission Act but denies that the respondent engaged in such practices.[21] The uncontradicted testimony of the witnesses herein of record is to the contrary of respondent's contentions and amply supports a finding that respondent did engage in the illegal "bait and switch" practices alleged in the complaint.[22]

With regard to the complaint's further allegations that false, misleading and deceptive statements and representations were made by the respondent's salesmen as to the usual and customary regular retail list selling prices for the "switch" merchandise sold the witnesses herein, respondent's contentions relative to the proof of record in such connection are inappropriate. The usual and customary regular retail list prices at which the same or like or similar quality sewing machines were offered for sale and sold by retail sellers other than the respondent in the State of Wisconsin, or any particular trade area therein, is not an issue in this proceeding. The charge of the instant complaint is not that the manufacturer's suggested regular retail list selling prices for the merchandise concerned were not usually and customarily correspondingly obtained by a substantial number of the retail sellers in the relevant market area, but that respondent has falsely inflated his claimed usual and customary regular retail list selling prices and represented them to correspond to and be the same as the manufacturer's suggested regular retail selling prices for the said merchandise.

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[19] Tr. 102.

[20] Respondent's brief, page 6, filed herein on March 19, 1964.

[21] Respondent's brief, again at page 6.

[22] Finding No. 3, footnotes 10 and 11, *supra*.

The thrust of the allegations in the instant complaint are that the respondent thus implemented his "bait and switch" practices in order to sell the "switch" merchandise and induced its purchase from the respondent because of the seeming bargain and the believed savings to the purchasers of the monetary differences existing between the selling prices being asked and the represented higher manufacturer's suggested retail list selling prices for the said merchandise claimed to be usually and customarily obtained by the respondent. Respondent's further claim made in many instances that the lower asking prices offered were because the merchandise had been repossessed was designed to appeal to the credulity of the prospective purchasers as being but a legitimate reason for such lower price offers, with the seeming bargains made all the more inviting by the still further lower asking prices provided by the trade-in allowances given for the prospective purchasers' used vintage machines. The fact that some prospective purchasers actually had no used trade-in machines did not deter the giving of respondent's asking prices as again lowered by fictional trade-in allowances for non-existent machines.

The record herein discloses that three out of the four witnesses purchasing from the respondent (six out of eight by stipulation) or 75% of the representative number of Wisconsin purchasers were told by respondent's salesmen that the like-new appearing machines being offered for sale were repossessed machines.[23] Notwithstanding this supposed reason for the represented price reduction, all the said purchasers were given a new machine factory warranty expressly limited to the original purchaser of a new machine.[24] Further, two out of three of these purchasers had no trade-in machines, the trade-in allowances for which might be said to have been added to respondent's asking prices to show that such total reflected a sum corresponding to the respondent's claimed usual and customary higher manufacturer's suggested retail list new machine selling prices.[25] The testimony of respondent's banking witness would also preclude and discredit the possibility that 75% of respondent's Wisconsin customers could have been offered a repossessed machine as stated by respondent's salesmen.

Respondent, through nine salesmen, sold only in the States of Minnesota and Wisconsin during the 1962 sample year, with retail sales in Wisconsin approximating $100,000 to $150,000.[26] Respondent's banking witness testified:

[23] Tr. 35 ; 61 : 89.
[24] CX No. 10 and Tr. 52–53 : 67 ; 90.
[25] Tr. 35–36 : 88.
[26] Tr. 112–115, 118–119.

Q. Do you have any approximation as to the amount of outstandings you have at this time with Midwest Sewing Center?

A. Approximately $130,000.

Q. During the year of 1962 do you have any idea of approximately how many of these contracts for sales of sewing machines were turned back to Mr. Soles?

A. They were in the neighborhood of between 50 and 100, to my recollection.

Q. Has he ever told you what he does with these machines—with these contracts?

A. After he receives the contracts he has mentioned that he tries to keep the contract and put the contract back into current condition with the customer, continue the payments with the customer, carry them as his own receivable. In failing to do this he mentions he retakes the machine, repossesses the machine and puts it back into his inventory.

HEARING EXAMINER SCHRUP. One point, Mr. Martin. On these contracts, are the customers out-of-state people or are they all local Minnesota people?

The WITNESS. No, they are both Minnesota and out-of-state.[27]

Based on the four representative (eight by stipulation) interstate sales transactions in Wisconsin in the respective net sales amounts of $179, $165, $155 and $150, respondent's Wisconsin sales transactions were in the average amount of $162.25 per transaction.[28] With retail sales volume during 1962 in Wisconsin ranging from $100,000 to $150,000, according to the respondent's testimony,[29] this would represent approximately from in excess of 600 to 900 different sales transactions. Again based on the representative sales transactions in Wisconsin, the record discloses that in three out of four (six out of eight by stipulation) or in 75% of such sales transactions, respondent's salesmen represented that the "switch" merchandise offered for sale was repossessed. Seventy-five percent of the aforesaid total number of from 600 to 900 sales transactions in Wisconsin would permit a range of from 450 to 675 transactions in which, according to the hereinbefore described representative sample sales transactions of record, respondent's salesmen offered the "switch" machines purchased as being repossesed machines. This was manifestly numerically impossible, and the testimony of respondent's banking witness belies any such possibility even if all the respondent's repossessions stated by this banking witness as being from 50 to 100 for both the States of Minnesota and Wisconsin had been offered for sale by the respondent in the State of Wisconsin alone during 1962.

6. In the conduct of his business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of sewing machines of the

[27] Tr. 127–130.
[28] Tr. 16–17 : 35–36 : 61–62 : 88.
[29] Tr. 112, 118–119.

same general kind and nature as that sold by respondent.[30] The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices set forth and described in preceding findings 1 through 5 has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.[31]

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

2. The complaint herein states a cause of action, and this proceeding is in the public interest.

3. The aforesaid acts and practices of the respondent, as herein found in the foregoing Findings of Fact, were, and are, all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That respondent Clarence Soles, individually and trading and doing business as Midwest Sewing Center, or under any other trade name, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of sewing machines or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or indirectly, by newspaper advertisements or otherwise, that any of the foregoing merchandise is being offered for sale when such sales offer is not a bona fide offer to sell said merchandise.

2. Using in any manner a sales plan, scheme or device in the offering for sale of any of the foregoing merchandise wherein false, misleading or deceptive statements or representations as

[30] Tr. 72; 92–93.

[31] "Nor was the Commission obliged to prove injury to the public or loss of business to competitors; when it finds, as it reasonably did here, that unfair practices have been employed by a respondent, it may infer that trade will be diverted from competitors who do not employ such practices." *Deer, et al.* v. *F.T.C.*, (1945) 152 F. 2d 65.

to the quality, condition, usage, age, utility, selling prices or the reason for such selling prices are made, directly or by implication, to sell any of said merchandise or to obtain leads or prospects for the sale of any of the said merchandise.

3. Discouraging the purchase of, or disparaging, any of the foregoing merchandise advertised and offered for sale in order to sell other of the respondent's said merchandise.

4. Representing the usual and customary retail selling prices of the respondent for any of the foregoing merchandise to be in any amount in excess of the actual prices at which it was openly offered for public sale and generally sold by the respondent in the recent, regular course of business.

5. Falsely representing respondent's usual and customary actual retail selling prices, or by any other means misrepresenting the amount of savings supposedly available to purchasers of any of the foregoing merchandise from the respondent.

OPINION OF THE COMMISSION

DECEMBER 3, 1964

By DIXON, *Commissioner:*

This matter is before the Commission on respondent's appeal from the hearing examiner's initial decision, in which respondent was found to have violated section 5 of the Federal Trade Commission Act.[1] Specifically, the examiner found that respondent employed the "bait and switch" promotion scheme by advertising for sale repossessed sewing machines at low prices for the purpose of obtaining names of potential purchasers for newer, higher priced machines, and by effectively persuading customers who responded to its advertisements to purchase higher priced machines. In addition, the examiner found that respondent falsely stated the usual and customary selling price of its new machines, thereby misrepresenting the amount of savings available to customers who purchased these machines at respondent's prices. On this appeal, respondent asserts that the evidence is not sufficient to support either conclusion.

The transcript reveals that respondent inserted advertisements similar to the following in the classified sections of various newspapers in Wisconsin and Minnesota:

Singer electric sewing machine in beautiful console cabinet. Sews forward and reverse with all attachments for making buttonholes, zig-zagging, sewing monograms and fancy stitch designs. Can be seen in your area. Take over seven

[1] 15 U.S.C. 45.

monthly payments of $6.10, or will discount for cash. Write Credit Manager, 504 Prior Ave., No., St. Paul 4, Minnesota.

Complaint counsel produced four witnesses who responded to this or to similar advertisements.[2] Each witness stated that several weeks after writing for information, they were visited by a salesman who identified himself as a representative of respondent. In every instance, the salesman had in his possession an old Singer sewing machine. One witness thought the machine appeared older than one his mother had owned and estimated its age at thirty years. This machine appeared to be an old "foot pedal" type which had been converted to an electric machine by the addition of a motor. Another witness thought the machine shown her was over twelve years old. All witnesses agreed that the machines were not late models, and some referred to them as "older models."

The various salesmen followed the practice of demonstrating the old machines. Although their performance was disappointing to the witnesses, the machines would nevertheless perform the functions detailed in the advertisements. When the witnesses voiced their displeasure with the age or capabilities of these machines, the salesmen offered to show them another model. In all instances, the salesmen then demonstrated a machine manufactured by the White Sewing Machine Company of Cleveland, Ohio. All of the witnesses purchased either the second machine shown to them or a third machine also manufactured by White. These machines appeared to be new and the witnesses were charged an average of $150 for them. Two of the witnesses indicated that they were reasonably satisfied with their purchases, one stated that she would have preferred a Singer, and one was so dissatisfied that she disposed of the machine shortly after purchasing it.

It is the opinion of the Commission that respondent's practice closely resembles the classic "bait and switch" technique,[3] but that there are certain deficiencies in the evidence which prevent an affirmance of the examiner's finding of a violation. In past cases, we have always found that the advertisement in question did not present a bona fide offer of sale of the product therein described. The evidence in this case fails to establish that respondent was not making a genuine effort to sell the

[2] It was stipulated that four additional witnesses, if called, would testify in substantially the same manner as those who actually testified (tr. 102–104).

[3] *E.g., Earl Scheib, Inc.*, Docket No. 8483 63 F.T.C. 1049 (October 22, 1963); *Pati-Port, Inc.*, 60 F.T.C. 35 (1962), *aff'd Pati-Port, Inc. v. Federal Trade Commission*, 313 F. 2d 103 (4th Cir. 1963); *Luxury Industries, Inc.*, 59 F.T.C. 442 (1961); *Clean-Rite Vacuum Stores, Inc.*, 51 F.T.C. 887 (1955).

old Singer machines. To the contrary, the evidence is consistent with the theory that the respondent was making a bona fide offer to sell these machines and that only when it became apparent that no sale of one of them could be consummated was an attempt made to demonstrate other models. There was positive testimony that respondent was in the business of selling, *inter alia*, used Singer machines. There is nothing in the record to show that respondent did not sell these machines whenever possible or that the number sold was insubstantial. Further, the evidence is silent on the question of whether or not these old machines had, as represented in the advertisements, been repossessed. Since it affirmatively appears that these machines had been reconditioned and would perform the functions detailed in the classified advertisements, there has been no showing that the advertisements were not literally correct. Although the advertisements failed to disclose a fact which might be considered material—the age of the machines—this omission standing alone is not a sufficient predicate for a finding that the offer to sell the old machines was not genuine. Moreover, as respondent points out, its salesmen did not disparage or downgrade the old machines in an attempt to "switch" the customer's interest to other models and in fact did not even offer to demonstrate other machines until after the witnesses had voluntarily expressed their displeasure with the older machines.

With the evidence in this posture, we may only conclude that dismissal of the charge is appropriate. However, we wish to emphasize that this decision is not to be interpreted as indicating approval of the practice here described or as a determination that such a practice can never constitute a violation of Section 5 of the Federal Trade Commission Act. For example, an advertisement that fails to disclose a fact which, if brought to the attention of a prospective purchaser, might adversely affect his interest in the article advertised could well be attacked as false and misleading because of the absence of the disclosure (a charge not included in the complaint here); or if the circumstances are such as to support an inference that the offer to sell the product is not bona fide, it could be held to be a part of the "bait and switch" technique. We have reached our conclusion here solely because the evidence was not of sufficient proportions to support such an inference.

In addition, we do not feel that the evidence sustains the examiner's finding that respondent misrepresented the usual and customary selling price of the White machines purchased by the witnesses. The purchasers testified that respondent's salesmen represented that price as $269.50. A "discount" was granted because the machines allegedly were

repossessed,[4] or because the witnesses were permitted to "trade-in" their old machines in exchange for the newer models. However, the record is devoid of other evidence showing the usual and customary price of the newer machines, and there is no persuasive evidence from which we may make a finding that the discounts granted were greatly inflated or were fictitious. Under these circumstances, the examiner's conclusion that respondent misrepresented the usual sales price of its products cannot be affirmed.

For the aforementioned reasons, an order will issue vacating the initial decision of the examiner and dismissing the complaint.

ORDER VACATING INITIAL DECISION AND DISMISSING COMPLAINT

This matter having been heard by the Commission upon the appeal of the respondent from the initial decision of the hearing examiner, dated April 16, 1964, and upon briefs in support thereof and in opposition thereto, and the Commission having concluded for the reasons stated in the accompanying opinion that the evidence of record is insufficient to prove the allegations of the complaint:

It is ordered, That the initial decision of the hearing examiner be, and it hereby is, vacated.

It is further ordered, That the complaint be, and it hereby is, dismissed.

IN THE MATTER OF

FALSTAFF BREWING CORPORATION ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8618. Complaint, Feb. 20, 1964—Decision, Dec. 3, 1964

Order requiring three brewers and their trade association to cease carrying out any planned common course of action to fix and maintain the price of beer, including keg beer, and that said trade association be dissolved.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal

[4] It appears that the White machines which the witnesses purchased had not been repossessed. In most cases, the attachments had not been unwrapped. In addition, the conditional sales contracts indicated that these machines were new, and the purchasers received a manufacturer's guarantee. However, there is some indication that the machines had been used for demonstration purposes by respondent's salesmen and thus in this sense were not completely unused.