

1027

Initial Decision

tomers competing in the distribution of such products with any respondent or any other retailer to whom or for whose benefit the payment or other consideration is made.

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
ALHAMBRA MOTOR PARTS ET AL.

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

*Docket 6889. Complaint, Sept. 17, 1957—Decision, Dec. 17, 1965**

Order, following remand, requiring for the second time, a southern California trade association of automotive parts jobbers and its 60 jobber-members to cease illegally inducing and receiving discriminatory price discounts from manufacturers of automotive parts and accessories in violation of Sec. 2(f) of the Clayton Act; the Court of Appeals, Ninth Circuit, 309 F. 2d 213 (1962), 7 S.&D. 550, remanded cease and desist order dated October 28, 1960, 57 F.T.C. 1007, for further findings.

Mr. Hugh B. Helm and Mr. Roy C. Palmer supporting the complaint.

Lyle, Yudelson and Di Giuseppe, by Mr. Harris K. Lyle, of Van Nuys, Calif., for respondents.

SUPPLEMENTAL INITIAL DECISION ON REMAND OF PROCEEDING BY

JOHN LEWIS, HEARING EXAMINER

NOVEMBER 20, 1964

STATEMENT OF PROCEEDINGS

This proceeding is before the hearing examiner for decision on a remand from the United States Court of Appeals, for the Ninth Circuit. The complaint herein, issued September 17, 1957, charged the respondents herein with having violated subsection (f) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, by knowingly inducing and receiving certain discriminations in

*The cease and desist order of December 17, 1965 relating to warehouse distributor discounts was set aside as to Earl Crawford, Lester L. Congdon, Margaret A. Ludwick, Otis M. Ludwick, E. L. Covey, Edward Gaughn, Carl E. Haase and Emma F. Wright by Commission's order dated May 5, 1966.

Initial Decision

68 F.T.C.

price prohibited by subsection (a) of Section 2 of said Act as amended. Following the filing of an answer by respondents and the holding of hearings before Hearing Examiner Earl J. Kolb, to whom this proceeding was then assigned, an initial decision was filed by said examiner on June 22, 1960, in which it was found that respondents had violated the law as charged. By Decision issued October 28, 1960, the Commission adopted the hearing examiner's initial decision and order as its decision and order. Thereafter the matter came before the United States Court of Appeals for the Ninth Circuit on a petition for review filed by respondents. The court of appeals issued its opinion on October 9, 1962, affirming the Commission's Order in part and setting it aside in part, and remanding the cause to the Commission for further proceedings. A Final Decree consistent with said opinion was filed by the court on November 15, 1962.

By Order issued January 17, 1963 [62 F.T.C. 1483], the Commission reopened this proceeding and remanded it to the original hearing examiner for such further proceedings as were required to comply with the opinion and decree of the court of appeals. Due to the illness and subsequent retirement of said hearing examiner, as well as the death of the then senior counsel for respondents, further proceedings were delayed until the substitution of the undersigned hearing examiner on April 7, 1964. Following the convening of a prehearing conference on May 18, 1964, hearings were thereafter held from May 19 to May 26, 1964, in Los Angeles, California, at which evidence was offered by both sides with respect to the issues remanded by the court of appeals.

Following the close of the reception of evidence, proposed findings of fact, conclusions of law and an order were filed by the parties between August 26 and August 28, 1964, and replies to such findings were filed between September 8 and September 15, 1964. Such findings, including supporting memoranda, have been carefully considered by the hearing examiner. Proposed findings not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.¹

The basic issues which were remanded by the court of appeals for further consideration by the Commission were: (1) Whether the "cost-justification defense" is applicable to certain of the price

¹ Proposed Findings Nos. 18, 19, 24 and 33 of complaint counsel are based, in whole or in part, on exhibits which were rejected as unreliable hearsay. While such exhibits were placed in the rejected exhibit file pursuant to Section 3.14(g) of the Commission's Rules of Practice, for consideration by any reviewing authority, the examiner has placed no reliance on said exhibits.

1039

Initial Decision

differentials received by the cooperative corporation, Southern California Jobbers, Inc., in the operation of its warehouse, and (2) whether respondent Southern California Jobbers, Inc., or its jobber members, are the real buyers from the manufacturers which gave the former a price differential. This initial decision will deal only with these issues. The basic facts concerning respondents' business operations and their engagement in commerce, the nature of the discriminations in price involved, the existence of competition with other business entities, and competitive injury are set forth in the original decision filed by the former hearing examiner, and will not be referred to further herein, except as may be necessary to an understanding and resolution of the remanded issues.

After having reviewed the entire record in this proceeding, including the testimony and other evidence received at the earlier hearings, and based on his observation of the witnesses who testified at the hearings following the remand of this proceeding, the undersigned makes the following:²

FINDINGS OF FACT

Industry Distribution Channels

1. This proceeding involves the distribution of automotive parts in the so-called "after market," *i.e.*, the market involving the distribution of automobile parts for replacement and repair purposes following the original factory installation by automobile manufacturers. Such parts are distributed by the manufacturers thereof principally through warehouse distributors (hereinafter referred to as WD's) and jobbers. Some manufacturers sell only to WD's, while others sell to both WD's and jobbers (Tr. 132, 195, 235, 313, 369, 398, 450, 461, 486, 778, 1058, 1059, 1144, 1146, 1241, 1334, 1336, 1383-1384).³ WD's generally limit their sales to automotive parts jobbers (Tr. 652, 670, 717, 1452, 1706, and 1795). The latter re-distribute principally to garages, service stations, fleet owners and car dealers (Tr. 517, 523, 531, 543, 552, 571, 617, 644, 686, 728, 746, 763, 790, 796, 807, and 820).

2. A WD is, in effect, a wholesaler's wholesaler in the sense that jobbers to whom he sells are also wholesale distributors. The

² There was no objection to the undersigned's substitution as hearing examiner, based on the fact that he had not observed the witnesses who had testified prior to his substitution, or for any other reason (Tr. 990). No issue has been raised which requires an evaluation of the credibility of witnesses who testified at the hearings prior to the undersigned's substitution.

³ All references to the transcript are made with the abbreviated symbol "Tr.," followed by the appropriate page or pages. References to exhibits introduced into evidence by complaint counsel are hereinafter abbreviated as CX, followed by the appropriate exhibit number. References to exhibits introduced by respondents are abbreviated as RX, followed by the appropriate exhibit number.

WD is a fairly recent innovation in the automotive parts chain of distribution. In earlier years most manufacturers sold directly to jobbers. However, in time some of the larger jobbers began to redistribute to smaller jobbers, as well as selling directly to garages, fleets and similar retail-type outlets. In recognition of the function they performed in warehousing and redistributing their merchandise, automotive parts manufacturers gave such redistributing jobbers a so-called functional allowance on the portion of their purchases which was resold through other jobbers at wholesale. As the distributional pattern evolved, some of the redistributing jobbers became known as warehouse distributors and limited their sales entirely to jobbers, receiving a functional discount on all purchases made by them (Tr. 314, 332, 450, 490, 778, 783-784, 1512, 1704, 1717, and 1772). Contributing to the rise of the WD in the parts after-market distributional chain were: (a) The "parts explosion" which occurred in the 1950's, resulting in a tremendous increase in the number and variety of parts, and in the number of jobbers handling them, and (b) the wide dispersal of the parts market and the need for greater warehousing and service facilities than the average manufacturer selling a relatively narrow line of products was able to provide (Tr. 1456, 1736).

3. Parts manufacturers generally supply their WD's and jobber customers with copies of their supply catalogs and schedules of their prices, together with periodic changes made therein. The price lists frequently contain suggested resale prices at the various distributional levels. In some instances the manufacturers require that their distributors resell at the suggested resale prices and permit sales only to franchised or approved customers (Tr. 266, 767, 1063, 1162, 1209, 1236, 1241, 1378, 1386, 1409; CX 159-222).

4. Shipments to WD's and direct jobbers located in the Los Angeles area may be made either from the manufacturer's factory or from supplies maintained by the manufacturer in a warehouse in the area. Some manufacturers operate their own warehouse in the area, while others store merchandise in a public or so-called "fee" warehouse, which receives a percentage (usually 5 or 6%) on sales made out of the warehouse by the manufacturer. Sales are made f.o.b. factory or warehouse, depending on the manufacturer involved. However, most manufacturers have a prepaid freight policy on shipments in excess of a designated amount. Generally, WD's order in sufficient amounts to qualify for prepaid freight, while only a portion of the jobbers do (Tr. 168, 209, 250, 253, 281, 325, 370, 399, 459, 466, 487, 775, 803, 816, 823, 1080, 1202, and 1402).

5. In selling to WD's or direct jobbers, parts manufacturers do so through their own sales personnel or through so-called manufacturer's representatives, who are independent entrepreneurs representing several manufacturers in a given area. The salesmen or sales representatives call on their WD and direct jobber customers periodically to (a) promote the sale of their products, (b) check their stocks to see whether they need replenishment or whether there is obsolete merchandise to be returned for credit, (c) check catalogs and price lists to see that they are up-to-date, (d) advise them of new lines or changes in lines by the manufacturer, and (e) advise on technical problems which may have arisen in connection with the installation of particular parts (Tr. 170, 232, 369, 465, 487, 775, 1057-1059, 1145-1147, 1237, 1332, 1335, and 1383). In addition to calling on WD's and direct jobbers, the sales representatives of some manufacturers also make periodic calls on the jobber customers of their WD's. However, they usually call on such indirect customers less frequently and spend less time with them than they do in calling on the jobbers to whom they sell directly (Tr. 1059, 1078, 1147, 1157-1158, 1237, 1275, 1396, 1553, 1605, 1739-1740, 1854).

6. The WD performs a function similar to that performed by the sales personnel of the manufacturer, except that it is performed in greater depth and with greater frequency. As in the case of the manufacturer's representatives, the sales personnel of the WD call on their jobber customers to check their stocks, catalogs and price lists, to take care of their obsolescent merchandise and to take orders for replenishing merchandise or adding to the lines carried by the jobber. However, since the WD stocks a great many lines which may be sold to the jobber, his sales personnel call on the jobbers more frequently and spend more time with them than is economically feasible for the personnel of a manufacturer selling a single line or a limited number of items. Thus, whereas a manufacturer's sales representative may call on jobbers as infrequently as once a year or an average of four times a year, the WD's sales representative will usually visit their customers at least once a month and, in the case of their larger customers, as frequently as once a week. While some manufacturers do call on the jobber customers of their WD customer, as already mentioned such calls are much less frequent and of shorter duration than those of the WD's sales personnel (Tr. 758, 1074, 1157, 1250, 1275, 1396, 1424, 1553, 1598, 1740, 1855, 1916).

7. WD's assist automotive parts manufacturers in the distribution of their merchandise by making it more readily available to

jobbers. Where the manufacturer does not have a local warehouse, the WD affords the manufacturer a storage point from which merchandise may be more quickly delivered on order of the jobbers. Even where a manufacturer does maintain a local warehouse, the WD's warehouse minimizes the storage demands on the manufacturer's warehouse. In either case, by selling to a WD the manufacturer is able to ship in maximum quantities and to look to a single source for payment. This is in contrast to selling through numerous jobbers where the manufacturer is frequently required to break bulk, and to bill and look to a multiplicity of customers for payment (Tr. 416, 1072, 1086, 1089, 1277, 1346, 1367, 1391, 1733, and 1779). In consideration of the sales, warehousing, and credit services performed by them in the redistribution of automotive parts, WD's receive a so-called functional allowance from the manufacturer. This allowance, in most instances, is 20% of the jobber net list price. The jobber usually pays the same price, whether he buys through a WD or directly (Tr. 248, 313, 416, 451, 461, 491, 1067, 1148, 1241, 1345, 1386, 1548).

The SCJ Operation

8. As found in the original initial decision herein, Southern California Jobbers, Inc. (hereinafter referred to as SCJ), is a California membership corporation formed by a number of automotive parts jobbers in Los Angeles County, each of which owns a share of stock in the corporation. As stated in its Articles of Incorporation filed in 1935, the corporation was formed by its members "for the mutual benefit of ourselves and our businesses." Its general purpose was stated to be "to protect the legitimate new automotive parts jobbers of this County against unfair competition," and its specific purposes were stated to be to, (a) "provide a joint buying and pickup service for the shareholders of this corporation, in order that the shareholders might buy such articles as are used in their business to a better mutual advantage," (b) "operate a system of distribution to the individual businesses of the stockholders of this corporation," (c) "operate, purchase and control a delivery system, restricted in its use to stockholders of this corporation," and (d) "operate such facilities as are necessary for the mutual benefit of the stockholders of this corporation at cost, without intention of making a profit to the stockholders out of the operation of this corporation" (CX 2). Among the services to be provided by the corporation for its stockholders, according to the corporation's current by-laws promulgated in 1956, were "the joint buying, assembling and warehousing of automobile parts and

accessories and the delivery system operated and maintained by the Corporation for and on behalf of the stockholders" (CX 3).

9. Under its by-laws the conduct of the affairs of SCJ is vested in a Board of Directors of seven jobber stockholders elected by the stockholders for a term of two years. The Board of Directors is empowered to establish "quotas which each stockholder must meet during a pre-determined period," and to "make and enforce rules for the enforcement of quotas and for the payment of the indebtedness of each stockholder to the corporation." Among the rules which the Directors are authorized to make is one that "any stockholder who fails to meet the quota established for him or who fails to pay for goods or services in the manner and within the time required by the Directors shall lose the privilege of using the Corporation's facilities for a period of time fixed by the Directors" (CX 3, p. 3).

10. Stockholders of SCJ are required to deposit a sum of money in a "Merchandise Guarantee Fund, such sum to be determined in advance for each stockholder on a fair and equitable basis" by the Directors. The money so deposited is a "prepayment on current merchandise purchased by each stockholder making such deposit." Within five days after receiving a statement showing the amount due the corporation on purchases made by the stockholder, the stockholder is required to remit "a sufficient sum of money to completely pay for his merchandise purchases for the preceding period and restore his deposit in the Merchandise Guarantee Fund to the amount stipulated for the next succeeding period by the Board of Directors" (CX 3, p. 8).

11. As provided in its certificate of incorporation and by-laws, SCJ acts as an instrumentality for the joint buying of automotive parts by its jobber members. By buying in this manner, SCJ receives a better price than the members could obtain if they bought from the manufacturers directly. For a number of years SCJ received a volume discount or rebate from a number of manufacturers, based on the aggregate purchases of all its jobber members. The jobber members ordered the merchandise directly from the manufacturers, which delivered it to the members but billed SCJ. The volume discounts received by SCJ were higher than the discounts that would have been earned by the jobbers on the basis of the quantities purchased by each of them separately. On other purchases of merchandise which it brought into its warehouse, SCJ received a so-called functional discount in a fixed percentage amount, based on the fact that it purported to act as a warehouse distributor in the resale of the merchandise to its jobber members

(Initial Decision of June 22, 1960, Findings Nos. 9-13). The practice of pooling the purchases of its members by SCJ to receive a cumulative volume discount on merchandise which was not brought into its warehouse was characterized as a "brokerage" operation, and was conceded to be illegal by respondents in the review of the Commission's Decision and Order by the court of appeals. This practice has been discontinued by SCJ since the remand of the proceeding. All merchandise on which SCJ now receives a discount is brought into its warehouse and, with the possible exception of purchases from one manufacturer, the discounts received by it purport to be based entirely on the function performed by it as a warehouse distributor, rather than on the volume of its purchases (Tr. 1078, 1083, 1148, 1200, 1289-1290, 1345, 1354, 1386, 1873, 1888-1889, and 2021; and CX 223).⁴

12. The extra discounts and rebates received by SCJ from its manufacturer-suppliers, representing the difference between the warehouse distributor net prices paid by it and the higher jobber prices charged by it to its jobber members, are "impounded" by SCJ. Such impounds are periodically credited to the accounts of the jobber members in proportion to their purchases through SCJ, after deducting each member's proportionate share of the expenses incurred by SCJ in the operation of the warehouse. Such impounds are not actually paid over to the jobbers, but are credited each quarter against the amount owing by the jobber members on purchases made through SCJ (Tr. 34, 559, 1948, 1952). The by-laws provide that the extra discounts and rebates impounded by SCJ "shall be and remain the property of the stockholders of said corporation, and no time shall become the property of the corporation itself" (CX 3, p. 10). While the by-laws also provide that the impounds shall be held by SCJ "for the purpose of properly prorating same among the separate participating stockholders," it is the practice of SCJ to use such funds in the purchase of merchandise, pending the quarterly crediting of same to its members' accounts (Tr. 1952).

13. For a number of years after its incorporation in 1935, SCJ's operations consisted primarily of providing a delivery service for its

⁴ Some manufacturers require that their WD's carry a full inventory of their products or a specified amount thereof, but the amount of the functional discount is not geared to any given quantity of sales, as in the case of the usual graduated volume discounts (CX 101, 117-A, 118-A, 143-A, 190, 222). There is testimony in the record to the effect that, in addition to a functional allowance of 10% received by SCJ on the engine bearing line purchased from Federal-Mogul-Bower Bearings, Inc., SCJ receives an additional volume rebate from this manufacturer of up to 10% (Tr. 1242, 1267-1271). However, other testimony in the record introduced by counsel supporting the complaint indicates that SCJ only purchases two of this manufacturer's lines and receives a straight 20% functional allowance on both (CX 223, p. 23).

1039

Initial Decision

members. However, around 1955 it opened a small warehouse and began to engage in the warehousing of parts for its members. In May 1957 it moved into a new and larger warehouse, and began to do a substantial business as a warehouse distributor, purchasing automotive parts for its own account and reselling them to its jobber members (Tr. 363, 596, 874, 878, and 363). As noted by the court of appeals, SCJ's brokerage sales, which had been its principal source of income up to 1956, amounting to \$1,888,000 in that year as compared to \$390,458 in warehouse sales, began to decline thereafter and were overtaken by its warehouse sales in 1958, amounting to \$1,762,342 as compared to brokerage sales of \$1,367,099. In the first ten months of 1959 brokerage sales were \$1,088,821, compared to warehouse sales of \$2,013,610 (Tr. 878-880).

14. Following the remand of this proceeding there has been a further change in SCJ's operations. It has ceased all so-called brokerage activity and now purports to act principally as a warehouse distributor in purchasing automotive parts from manufacturers and reselling them to its jobber members. On August 1, 1962, it moved into a new and larger warehouse having approximately 37,200 square feet of space, compared to 14,000 square feet in its former warehouse. It now employs 37 employees in its warehouse operation and 10 employees in its trucking division, compared to 25 employees in its former warehouse and trucking operations (Tr. 2042, 874). In 1963 its warehouse sales amounted to \$3,502,211 (CX 225). During the first quarter of 1964 its inventory amounted to approximately \$574,000 (Tr. 2044; CX 226). In terms of warehouse space and inventory, SCJ's operation compares favorably with that of other WD's in the southern California area.⁵

15. At the present time SCJ is carrying approximately 75 lines of automotive parts in its warehouse, compared to 40 warehouse lines at the time of the earlier hearings (Tr. 2073; CX 226). As noted by the court of appeals, the lines handled by SCJ are determined by the Board of Directors after recommendation by the organization's Merchandising Committee, consisting of 4 to 8 jobber

⁵ Set forth below is a comparison of SCJ's warehouse and inventory with that of other WD's in the Los Angeles area (Tr. 1458, 1522, 1574, 1711, 1714, 1797, 1843, 1852):

Name of WD	Warehouse Size (Sq. Ft.)	Value of Inventory
SCJ	37,200	\$574,000
Mopex	17,000	250,000
Chanslor & Lyon	70,000	876,000
Crum & Lynn	30,000	300,000
Featherstone	42,000	750,000
Car Controls	15,000	485,000

members who interview representatives of manufacturers interested in selling their line to SCJ. Before deciding whether to take on a particular line, the Board generally canvasses the members by questionnaire to determine whether they will support the line. After the decision has been made to carry a line, the membership is notified in writing of this fact. From time to time the membership receives a booklet containing the names of the manufacturers whose lines are being carried and the amount of the discount or rebate which the organization will receive and which will be impounded for later payment to the members (Tr. 101, 519, 528, 539, 556, 589, 601-603, 836-837, 840, 1989, 1998; and CX 7, 223, 292-344).

16. As previously mentioned, the by-laws of SCJ empower the Board of Directors to establish quotas with respect to the amount of merchandise which each stockholder must purchase. Pursuant to this provision, the Board of Directors established a requirement that each member purchase 6% of his total volume through SCJ.⁶ However, so far as appears from the record, no member has ever been deprived of his privileges in SCJ by reason of failing to comply with the established quota (Tr. 102). SCJ relies primarily on the powers of persuasion of its officials, and the enlightened self-interest of its membership, to support the lines carried by the organization (Tr. 901-903, 1958, 1962; CX 74-A, 294). In almost all instances the members purchase from SCJ an amount in excess of the established quota.⁷

17. At the present time SCJ has 66 active jobber-stockholder-members (not counting branches operated by some members), compared to a membership of 59 at the time of the earlier hearings (Tr. 2074; CX 224). The financial requirement for membership in the organization has increased from \$4,450 to \$9,000. The latter amount includes a payment of \$1,250 for a share of stock in SCJ compared to \$800 at the time of the earlier hearings), and the balance is split between the Merchandise Guarantee Fund and a building fund (Tr. 1918-1919). In addition, stockholders are required to make quarterly payments of \$125 into the Merchandise

⁶ This quota was in existence at the time of the earlier hearings in this proceeding in 1958. There is no indication in the record of the present hearings as to whether this quota has ever been modified.

⁷ The record establishes the following percentage of purchases through SCJ by jobber members who testified in this proceeding 35%, 30%, 10%, 25-26%, 15-18%, and 15-20% (Tr. 516, 526, 533, 553, 574, 591, 963). In one instance a member purchased only 2 to 3% of his requirements from SCJ. However, this member was engaged principally in the sale of machine and tractor parts to building contractors, and only partially in the sale of automotive parts (Tr. 542, 547). It was stipulated that the testimony of the jobbers who were called as witnesses in this proceeding was typical of the other members of SCJ (Tr. 601).

1039

Initial Decision

Guarantee Fund, which is used as operating capital (Tr. 2082-2083). The court of appeals noted in its opinion that SCJ's facilities are available only to its jobber members, but found that "any jobber in the Los Angeles area who desired to become a member of SCJ is permitted to do so." The record actually establishes some tendency on the part of SCJ in earlier years to exclude jobbers from areas where there were already a sufficient number of SCJ members. However, there is no substantial evidence that in recent years it has been unduly restrictive in accepting new members, aside from the not unreasonable requirement in the by-laws that applicants be able to demonstrate their financial responsibility.⁸

18. In selling automotive parts to its jobber members SCJ purports to act as a WD. It purchases the merchandise from the manufacturers with whom it deals at the WD price, which is generally the jobber price less 20%. The merchandise is billed to and paid for by SCJ monthly, except for merchandise which is sold on a consignment basis or in which there are longer periods of payment agreed upon. The members order the merchandise on order forms provided by SCJ or telephone in their orders to the SCJ warehouse. The members are billed monthly for their purchases by SCJ, and make monthly payment to SCJ (Tr. 53-56, 88, 112, 514, 556, 834-835, 847, 858, 933, 1952-1954). SCJ advises its members of new lines which are added, and encourages them to purchase these lines, as well as the lines which it is currently carrying. Since March 2, 1964, SCJ has employed a full-time salesman. Prior to that time its general manager spent the major portion of his time calling on the jobber members and encouraging them to handle its lines or to increase their purchases from it. The officers, directors and members of the Merchandising Committee also assist in encouraging members to carry SCJ's lines. In addition, four or five sales conferences are held with members during the year. SCJ also distributes catalogs and price lists supplied by its manufacturers, to the extent that the manufacturers do not make such catalogs and price lists directly available to the jobbers. It also advises its members concerning obsolescent items and arranges for

⁸ Under SCJ's by-laws, the acceptance of new members is subject to approval of the Board of Directors, based on the recommendation of the Membership Committee (CX 3, pp. 9-10). Evidence consisting of the minutes of stockholders' meetings in 1945, 1948, 1955 and 1956 indicates that it was the policy to accept applications only from jobbers located in territory not covered by the present membership (CX 43-E, 48-B, 69-C and 76-A). However, the record also indicates that there are a number of members who compete with other SCJ members in their territory (Tr. 122, 562, 564). There is also the uncontradicted testimony of SCJ's general manager that no applications for membership have been turned down in recent years (Tr. 598, 897). The fact is that 10 new members have been accepted in the past four years (Tr. 2076).

their return to the warehouse for credit purposes Tr. 835, 838-840, 932, 1492, 1927, 1958-1961, 2051, 2087-2090).

19. In addition to its services in connection with the warehousing of automotive parts and the resale thereof to its members, SCJ also maintains a delivery service. It operates nine trucks which are used not only to make delivery of merchandise ordered from its warehouse by the members, but to pick up and deliver merchandise purchased by its members from the local warehouses of manufacturers with whom the members deal directly or from the warehouses of other WD's. SCJ seeks to operate its delivery service on a self-sustaining basis. Members are charged a flat fee for each package delivered irrespective of size. At the end of the year members receive a prorata refund if the delivery service collection exceed costs, or are billed for the difference if costs exceed delivery receipts (Tr. 113-114, 514-515, 595-596, 841-846, 946-949, 1948, 2046-2051).

20. As already mentioned, the functional discount or allowance received by SCJ is generally 20% from the jobber price. However, in a few instances the discount is as high as 25 or 26%, and in a few as low as 10% (CX 223). In some instances the discount is subject to a reduction of from 5 to 10% on purchases or shipments made from the manufacturer's local warehouse in Los Angeles (CX 223, pp. 12, 22, 32, 45 and 61). The average amount of the warehouse distributor's allowance received by SCJ is 20% (Tr. 1964). This is substantially the same amount as the functional allowances received by other WD's in the Los Angeles area (Tr. 658, 674, 720, 1460, 1548, 1714, 1796, 1842).

21. In 1962 and 1963 the cost of operating the SCJ warehouse was 6.04% and 5.78%, respectively (CX 294, Minutes of Special Meeting of Stockholders, August 16, 1963). The cost of operating the SCJ warehouse has never exceeded 7%.⁹ The difference between the average discount of 20% received by SCJ and its warehouse costs of approximately 6% has been distributed by it to the jobber members in accordance with the charter and by-laws (Tr. 2096-2098). Most public or fee warehouses in the Los Angeles area charge a fee of 5 to 6% on merchandise stored by manufacturers for resale in the area (Tr. 1445, 1825). However, such warehouses do not generally break bulk and repack for shipment to smaller jobbers. Consequently the warehouse costs of WD's (which do break bulk) are generally higher than are the charges of fee ware-

⁹ This does not include the costs of the trucking division which, as previously mentioned, operates on a self-sustaining basis, with the members paying for the deliveries made to them on a per package basis.

1039

Initial Decision

houses (Tr. 1480 and 1825-1826). The warehouse costs of representative WD's in the Los Angeles area range from about 7% exclusive of managerial and administrative costs at the warehouse level, to as high as 12½ to 13% including such costs (Tr. 1562, 1634, 1730). Of the average functional discount of 20% received by WD's in the Los Angeles area, they expend between 17% to approximately 18½% in the operation of their business as a warehouse distributor, and have a net profit of between 1½% to 3% before taxes and somewhat less after taxes (Tr. 1460, 1631, 1730, 1826, 1842).

Issue of Who Is Purchaser

22. The conclusion of the original hearing examiner in this proceeding, concurred in by the Commission, that respondents had violated Section 2(f) of the Clayton Act by inducing an illegal discrimination in price, was predicated on a finding that the jobber members, rather than SCJ, were the real purchasers from the manufacturers of the commodities handled in the warehouse operation. If SCJ had been found to be the purchaser there would have been no discrimination in price since it received no better price than other WD's, and hence there would have been no initial violation of Section 2(a) and no derivative violation of Section 2(f). The examiner held that the jobber members were the real purchasers since he found that SCJ was "nothing more than a device for obtaining * * * warehouse discount," and that its "functional classification as warehouse distributor is basically artificial."¹⁰

23. The circuit court was of the opinion that the issue of whether SCJ or its jobber members were the purchasers had not been adequately dealt with, either in the proceedings before the Commission or in the Commission's brief on review, attributing this party to the fact that SCJ's warehouse operation had been regarded by the Commission as an "occasional" method of doing business and as "virtually ancillary to the brokerage business." The court did not agree that the warehouse operation was either "occasional" or "ancillary." However, it refrained from determining the issue of who was the purchaser since it found necessary to remand the proceeding for further consideration of the cost-justification defense, with respect to which a ruling by the Commission favorable to respondents would dispose of the proceeding without regard to who was the purchaser. While purporting to remand the case to the Commission principally for the purpose of having it

¹⁰ Initial Decision, par. 3, 57 F.T.C. 1007, 1019.

reconsider the cost-justification issue, the court also directed that at the same time "the issue of the status of SCJ as the buyer and direct recipient of the price differential should be further considered."¹¹

24. While not making a firm ruling on the issue of who was the purchaser, the court of appeals did suggest in its opinion that none of the earlier group buying cases relied upon by the Commission was dispositive of the issue since none of them "involved a warehouse operation or a redistribution discount," but only an order-office, brokerage-type of service.¹² The court also suggested that in the resolution of the issue appropriate consideration should be given to the "economic and legal significance" of the fact that "this group buying organization performed substantially the same economic function as other warehouse distributors who received the same discount."¹³

25. The position of complaint counsel with respect to the issue of who is the purchaser is two-fold: (1) That "SCJ does not come near to performing the same functions that legitimate warehouse distributors perform," and (2) that "even if SCJ performed a legitimate warehouse distributor function * * * this still would be no defense."¹⁴ Respondents' position, in essence, is that SCJ does substantially perform the functions of a warehouse distributor and that it must, therefore, necessarily be regarded as the purchaser and as entitled to receive a functional discount.¹⁵

26. As has already been found, in the automotive parts after market a warehouse distributor is, in essence, a wholesaler who buys for his own account, warehouses the merchandise and resells it to other wholesalers known as jobbers. In the process he performs a number of functions for the manufacturers whose lines he represents, including the promotion and sale of their lines, servicing the jobber accounts by keeping their manufacturer-supplied catalogs and price lists up-to-date, arranging for the return and replacement of obsolescent merchandise, and relieving the manufacturer of the responsibility for billing and carrying the credit on numerous small accounts. The contention of complaint counsel that SCJ does not perform the functions of a warehouse distributor is

¹¹ 309 F. 2d 213 at 221.

¹² *Id.* at 221 n. 17, and 219 n. 11.

¹³ *Id.* at 220.

¹⁴ Proposed Findings of Complaint Counsel (hereinafter referred to as CPF), pp. 276-277.

¹⁵ Memorandum in Support of Respondents' Proposed Findings (hereinafter referred to as RM), pp. 11-15; and Respondents' Memorandum in Reply to Proposed Findings of Complaint Counsel (hereinafter referred to as RRM), pp. 26-29.

1039

Initial Decision

based on their claim that the record establishes, (a) that SCJ does not perform the normal selling, promotional and service functions of a warehouse distributor, (b) that it does not fully assume the credit functions of a warehouse distributor and (c) that it does not warehouse merchandise in the same manner as a bona fide warehouse distributor.¹⁶ The validity of these claims are hereinafter discussed in turn.

Selling and Servicing Function

27. The contention of complaint counsel that SCJ does not perform the normal selling, promotional and service functions of a WD is based, in large part, on their claim that SCJ does not have an adequate sales force to properly perform these functions. Counsel note that for many years SCJ did not have any salesmen in its employ, and that since March 1964 it has employed only one salesman, on a six-month trial basis, to serve its 68 jobber members.¹⁷ Counsel suggests that in order to do a proper job of selling to and servicing jobber accounts a WD should employ at least one salesman for every 25 customers.¹⁸ Respondents dispute the contention that a single salesman cannot properly service more than 25 accounts, pointing out that a number of the WD's upon whose testimony complaint counsel rely actually had a considerably higher ratio of accounts handled per salesman employed.¹⁹ Counsel supporting the complaint suggest that respondents are engaging in a numbers' game by "arbitrarily divid[ing]" the number of accounts on a WD's books by the number of salesmen employed to ascertain the number of salesmen required to serve a given number of accounts.²⁰ While this may be true to some extent, complaint counsel are themselves guilty of a similar error by seeking to equate the proper performance of a selling function with the employment of any particular number of salesmen. The number of salesmen which WD's employ varies widely, depending on the frequency with which the distributors consider it necessary to call on their accounts and

¹⁶ CPF, p. 276.

¹⁷ Although complaint counsel refer to SCJ as having 68 members, the record discloses that it actually has 66.

¹⁸ CPF No. 24, p. 107; No. 29, p. 169.

¹⁹ RM, pp. 3-4. The witness who testified that one salesman could not handle more than 25 accounts, actually employed one salesman for each 40 customers to whom his company sold (Tr. 1556, 1581). Another WD witness testified that one salesman could only serve 30 to 35 accounts, but actually employed one salesman for each 58 customers (Tr. 1812, 1829). Other WD's had ratios of salesmen to customers of 1 to 68 and 1 to 120 (Tr. 1764, 1853).

²⁰ Reply Memorandum of Complaint Counsel (herein referred to as CRM), pp. 4-5.

the type of accounts being serviced.²¹ In fact, there are some WD's who do not employ any sales personnel, although there may be officials or other personnel within the organization performing a selling function (Tr. 1244-1245, 1346-1347).

28. The argument of counsel supporting the complaint regarding the necessity for the employment of salesmen to function as a WD overlooks the fact that because of the nature of its organization SCJ does not necessarily require the typical sales organization of a so-called independent WD in order to do an adequate selling job. Because the SCJ members have their money invested in the organization they are, to a considerable extent, "presold" and less effort is required in selling to them than to the non-affiliated customers of other WD's (Tr. 1648, 1961-1962). Furthermore, the general membership of SCJ, as well as its officers, directors and members of the various committees all engage in a selling effort for the common good, albeit on a volunteer basis.²² In addition to this effective volunteer staff, the paid general manager spends a substantial portion of his time in selling activity.²³ In any event, the crucible of a WD's effectiveness in performing a selling function, from the point of view of the manufacturer whose lines he is carrying, is not how many salesmen he employs but whether he is achieving a satisfactory volume of sales of the manufacturer's products. In this respect, most of the manufacturers who were called as witnesses by complaint counsel were in agreement that SCJ handled a satisfactory volume of their products, and that it adequately took care of obsolescence and the maintenance of the manufacturer's catalogs and price lists (Tr. 224, 271, 477, 507-508, 1110, 1122-1123, 1272-1273, 1300, 1305, 1375, 1422, 2037.²⁴

²¹ The testimony of the WD who claimed that a salesman could only service 25 accounts was premised on the salesman's calling on these accounts once a week or at least twice a month, depending on their volume (Tr. 1556). However, another WD testified that it was sufficient to call on active jobber accounts every 30 days and that one salesman could handle 100 accounts on this basis (Tr. 1853-1854).

²² As the president of SCJ described it in his testimony (Tr. 1958):

We have probably the largest sales force in the industry, because each member is a salesman in his own right * * * The board of directors acts as a sales organization as far as SCJ is concerned, because they are continually pleading with the members to buy certain lines; the executive committee has a direct duty to attempt to sell the SCJ members the lines that are warehoused in SCJ; the merchandising committee as such also is a sales agency as far as SCJ is concerned, and they put no end of pressure on different members to buy merchandise, and this year I as president also am acting as a sales representative for SCJ, because I have already made a number of calls on members and have asked them to buy more lines.

²³ Prior to the employment of a salesman, the general manager devoted 50 to 75% of his time to selling activity, and now devotes about 25% of his time to such activity (Tr. 2051).

²⁴ There were two instances in which there was some apparent dissatisfaction with SCJ's performance, although not necessarily with its sales efforts. In one instance, despite some alleged dissatisfaction with SCJ, it was SCJ which took the initiative in discontinuing the handling of the line because the manufacturer was having production difficulty (Tr. 1878). In the other instance, despite the manufacturer's alleged dissatisfaction with SCJ, resulting in the manufacturer's withdrawal of his line, the manufacturer later sought to renew relations with SCJ but the matter was held in abeyance due to the manufacturer's production difficulties (Tr. 1906).

1039

Initial Decision

29. Complaint counsel also contend that SCJ's selling function differs from that of other WD's in the southern California area because it limits its sales to its 68 jobbers, whereas other WD's are limited only by the geography of the area served by them and sell to from 400 to 500 jobber accounts each. This limitation, it is contended, "deprives their [SCJ's] manufacturer-suppliers of creative selling and a broadened penetration of the market for new accounts."²⁵ There can be no doubt that insofar as SCJ restricts its sales to its members, its operation differs from that of ordinary WD's selling to nonaffiliated jobbers. To this extent it does not engage in so-called "creative selling," insofar as that term contemplates sales to new accounts not affiliated with SCJ. However, it does not engage in creative selling to its own members, to the extent that it seeks to induce them, and does induce them, to increase their purchases and to add to the lines handled by them.²⁶ As far as the manufacturer-supplier is concerned, the important consideration appears to be not the number or geographic distribution of his WD's jobber accounts, but the volume of sales he receives through those accounts (Tr. 1227, 1272, 1344, 1422, 1582, 1767, 1830, 1963). In this respect, as has been heretofore indicated, it is clear that SCJ's performance is satisfactory to most of the manufacturers whose lines it represents (Tr. 1110, 1123, 1272, 1300, 1422, 2037).

30. While SCJ performs a satisfactory selling function for its manufacturer-suppliers, it should be noted that it performs it in a way which prevents other WD's from substantially competing with it in sales to its jobbers. Most of the independent WD's in the Los Angeles area regard one another as competitors and try to sell to one another's jobber customers. However, they regard SCJ either as not a competitor or as a "different kind of a competitor" (Tr. 1483) because they are unable to compete effectively with it in the sales of the brand lines which SCJ carries. While the independent WD's are able to compete with one another for the patronage of each other's jobber customers on the basis of salesmanship and better service, the rebates which the SCJ members receive from it are an inducement of such magnitude that it effectively precludes other WD's from selling to them any brands which SCJ carries, except on a temporary, emergency basis (Tr. 685, 725, 754, 1483-1485, 1564-1565, 1611, 1754-1755, 1820-1821, 1855-

²⁵ CPF No. 25, p. 113; No. 26, p. 126.

²⁶ Complaint counsel have sought to suggest that so-called "creative selling" is limited to sales made to new accounts (1071, 1157). However, it is clear that it also encompasses the increasing of sales to existing accounts and persuading such accounts to take on additional lines (Tr. 1469-1471, 1516, 1746-1747).

1856, 1863-1864). As one WD described the situation: "[T]hey get a percentage back on their volume * * * that we're not able to give them; so if they bought from us they'd have holes in their head" (Tr. 1857). The rebates which the SCJ members receive from their organization also makes them "good, tough competition" to the nonaffiliated jobber customers of the independent WD's which do not receive such rebates (Tr. 1756).

Credit Function

31. The second respect (in addition to its alleged lack of performance of the selling and servicing function) in which complaint counsel contend that SCJ does not operate in the normal manner of a WD is with respect to its performance of the so-called "credit function." Counsel's contention that SCJ does not perform the credit function of a WD is apparently based on two considerations, (a) that a substantial portion of SCJ's purchases are made on a consignment or extended-credit basis which, it is claimed, are not the "customary terms to the trade," and (b) that SCJ's credit burden with respect to its "68 blue chip jobber-members" is not comparable to that of a normal WD selling to some 400 to 500 independent jobbers.²⁷ Respondent contends that the record fails to establish that SCJ purchases on a basis which is not comparable to that of other WD's, and that the fact it limits its sales to a select group of jobbers is immaterial.²⁸

32. WD's normally purchase merchandise on the basis of paying for it by the tenth of the month following the purchase, in order to qualify for the 2% so-called "cash" discount. However, there are occasions when manufacturers grant extended credit terms, permitting one-third payment on a 30-60-90-day basis, and allowing the WD to still qualify for the 2% cash discount. In some instances terms are extended for 120 days or even longer. The practice of permitting extended-term payments is sometimes referred to as "dating." Manufacturers frequently accord this privilege to WD's with their original order, or in connection with large quantity purchases, or when the manufacturer is engaged in a special promotional campaign and expects the WD to extend dating privileges to his jobber customers (Tr. 1575-7, 1753-4, 1804, 1845-6, 1944, 2025). Certain lines, such as piston rings, are traditionally sold by manufacturers on a consignment basis, with the distributor not being obligated to make payment for the merchan-

²⁷ CPF No. 10, p. 49, and No. 35, p. 217.

²⁸ RM, p. 7; RRM, pp. 7, 20.

1039

Initial Decision

dise until after he makes sales out of the consigned stock (Tr. 1162, 1574, 1752, 1804, 1846).

33. The record does disclose, as complaint counsel contend, that during 1964 SCJ purchased merchandise from 24 of its suppliers on an extended term or "dating" basis, and that it purchased merchandise from 7 suppliers on a consignment basis. It also appears that a substantial proportion of the purchases in SCJ's five top lines were made on a dating basis (Tr. 1941-1945; CX 226).²⁹ However, the record discloses that other WD's in the Los Angeles area likewise purchased merchandise on a dating or consignment basis. There is no substantial evidence that SCJ was afforded any greater privileges with respect to credit terms than were other WD's (Tr. 1574-1577, 1752-3, 1804-5, 1845-6, 2025-2028).³⁰

34. Complaint counsel's further argument, demeaning the credit function of SCJ because it serves only 68 jobbers compared to 400 to 500 jobbers normally served by WD's, is of questionable validity. In the first place, it is debatable whether SCJ's jobbers may be classified as "blue chip," even allowing for the fact that a jobber must satisfy certain minimum financial requirements to be a member of SCJ.³¹ Furthermore, while the total number of SCJ's members may be considerably smaller than that served by other WD's in the area, the credit which it carries for its members (based on the total amount of their purchases) is comparable to that of other WD's.³² Whether there is any difference in the cost saving to the manufacturer, as suggested by complaint counsel, by reason of the fact that SCJ is carrying the credit on a lesser number of accounts than other WD's is a matter that can be reserved for later consideration in connection with the cost justification defense, but does not affect the question of whether SCJ is substantially performing the normal credit function of a WD with respect to its jobber members.

²⁹ In most instances, the extended payment privilege applied to only a portion of SCJ's purchases of a particular line, generally less than half of the purchases from the manufacturer. For example, only \$2,097 out of total purchases of \$49,031 from Eis were on a dating basis. In some instances the proportion of purchases on a dating basis was less, while in others it was more (CX 226).

³⁰ No reliable figures of purchases on a dating or consignment basis by other WD's were introduced in evidence by complaint counsel. While some of the WD witnesses claimed that their purchases on a dating or consignment basis only represented a small fraction of their inventory, in at least one instance it was conceded to be as much as one-third of the WD's inventory (Tr. 1753).

³¹ Although complaint counsel sought to suggest (generally by leading questions) that SCJ jobbers were "blue chip," there is persuasive evidence that its membership includes many of the smaller jobbers, as well as some of the larger ones (Tr. 1822, 1857).

³² For example, in 1963 SCJ's total sales to its members amounted to \$3,502,000, compared to approximately \$1,000,000 by Mopex and \$1,750,000 by Crum & Lynn (Tr. 1501, 1791; CX 225).

34A. While there may be no substantial difference between the credit function of SCJ and other WD's in terms of the volume and quality of the credit carried, as suggested by complaint counsel, it should be noted that the nature of SCJ's credit responsibility does differ somewhat from that of other WD's. Because of its quota system and the natural incentive of its members to buy from it (based on their investment in it and on their sharing in its profits) SCJ is fairly well assured of being able to dispose of the merchandise which it ostensibly purchases on its own credit. Furthermore, the members indirectly assume a substantial part of the credit burden since they advance a substantial portion of the funds with which SCJ makes its purchases, and SCJ is permitted to use the members' impounded funds on an interim basis. In contrast with this, independent WD's have no assurance, outside of normal business expectations based on salesmanship and service, that they will be able to resell the merchandise which they purchase on their own credit. They must also rely on their own capital to carry and pay for the merchandise until they receive payment therefor from their customers.

Warehouse Function

35. Complaint counsel's contention that SCJ "doesn't even perform a true warehousing function" is based on two considerations: (a) That it does not "stock a typical warehouse distributor's inventory," and (b) that many items reportedly warehoused are not actually placed in the warehouse inventory, but are transshipped to the jobbers as soon as they are brought into SCJ's receiving dock.³³ It is respondents' position that, (a) SCJ's inventory is comparable to that of other WD's and is satisfactory to its manufacturer-suppliers, and (b) that there is no evidence of any nonwarehousing of merchandise purchased by SCJ.³⁴

36. The position of complaint counsel that SCJ does not stock a typical warehouse distributor's inventory is based on the claim that it stocks "only quick-turning, short lines and only the most popular items of long lines, relying upon some 200 local manufacturers' warehouses * * * for slower moving parts and heavy parts."³⁵ The record fails to support this claim. In terms of the volume of merchandise carried, SCJ's inventory is comparable to that of other WD's in the Los Angeles area.³⁶ Each of SCJ's manufacturer-

³³ CPF No. 29, p. 169; and No. 28, p. 142.

³⁴ RRM, pp. 14-16.

³⁵ CPF, p. 169.

³⁶ See n. 5, *supra*.

suppliers called as witnesses by complaint counsel on the remand of the proceeding was satisfied with its inventory of their products (Tr. 1113, 1272, 1292, 1374, 1421). In terms of the diversity of items carried, the record discloses that SCJ carried 86 different lines in 1963 and 76 lines in 1964 (CX 225, 226). There is no evidence that SCJ's inventory differs from that of other WD's, in terms of the number of lines or in terms of the nature of such lines, as being "short" or "long" or "slow moving" or "heavy." The only evidence cited by complaint counsel in support of their contention regarding the inadequacy of the SCJ warehouse is the inconclusive testimony of a single WD witness regarding an alleged lack of sufficient shelf space in the SCJ warehouse shortly after it was opened.³⁷ However, there is no substantial evidence that SCJ did not maintain an adequate stock of merchandise in the warehouse, irrespective of whether it was maintained on shelves, in bins or in piles on the floor. Furthermore, there is no evidence of any inadequacy in the warehouse after it became fully operational.

37. Complaint counsel's second contention, regarding the inadequacy of SCJ's warehouse operation, contains the suggestion that while SCJ has technically ceased its brokerage operation and the "drop shipping" of merchandise, it is accomplishing the same result by bringing sizeable quantities of merchandise into the warehouse just long enough to unload it and reship it in other trucks to the jobber members. This merchandise is referred to as "no situs inventory," *i.e.*, "transitory inventory that passes through the warehouse immediately upon rerouting to the true customer or buyer."³⁸ It is contended by complaint counsel that SCJ is not performing a normal warehouse distributor's function with respect to such merchandise. The record contains no substantial direct evidence that any significant portion of the merchandise sold by SCJ to its members is handled on a "no situs" basis. However, complaint counsel seek to have the examiner infer that this is the fact from the allegedly high rate of turnover of merchandise in the SCJ warehouse. The merit of this claim is hereinafter discussed.

38. The record discloses that the inventory turnover of other WD's in the Los Angeles area ranges from three times to five times a year, with the average being about four times (Tr. 1459, 1570,

³⁷ The witness in question spent about 30 minutes in the warehouse and office on a guided tour by the general manager, about six months after the warehouse had opened. Based on an admittedly "quick glance" it was his impression that SCJ did not "stock as much as we do in shelving," and that a "lot of the merchandise was still on the floor" (Tr. 1638-1640, 1643).

³⁸ CPF No. 28, p. 143.

1642, 1732, 1801, 1843).³⁹ The highest turning items are spark plugs and oil filters which usually turn over six to eight times, and locally rebuilt generators which turn over about ten times a year (Tr. 1571, 1642, 1732, 1801, 1843). None of the independent WD's experienced a turnover in excess of ten times on any item handled by it. SCJ's inventory turnover in 1963 was slightly in excess of seven times, and was thus somewhat higher than the average turnover of other WD's of four times. While the inventory turnover on most of the items handled by SCJ in 1963 was under 10 times a year, on 17 of the items it exceeded 10 times, with six of these being in excess of 20 times and two in excess of 30 times (CX 225).⁴⁰ SCJ's explanation for its high turnover on certain items is that it purchased these items from local manufacturers or from manufacturers with local warehouses, thus enabling it to order in smaller quantities and replenish its inventory weekly (Tr. 2009). While several of the WD witnesses called by complaint counsel agreed that the turnover rate could be increased by purchasing from local suppliers, they did not believe it was possible to increase it as much as 20 times, and one of them was of the opinion that such a high turnover could be achieved only by delivering the merchandise to the jobbers without warehousing it (Tr. 1802, 1843, 2129). Respondents' witnesses conceded that in some instances the merchandise might remain in the warehouse for only a brief period. However, they claimed that every item purchased by SCJ came physically into the warehouse, where it was "unpacked, received and then repacked, rebilled and goes out to the member" (Tr. 1939, 2021).

39. While the matter is not entirely free from doubt, the examiner cannot say, merely from the circumstantial evidence of a high turnover rate on some items, that SCJ is not performing a bona fide warehousing function.⁴¹ The bulk of the items handled by SCJ come within the range of the normal turnover rate of WD's in the Los Angeles area. While SCJ's over-all turnover of seven times is somewhat higher than that of other WD's, it is not so disproportionate as to clearly require the conclusion that it is handling any

³⁹ No reliance is placed on the inventory turnover figure in CX 346, cited by complaint counsel in support of Proposed Finding No. 18, p. 88. As indicated at n. 1, *supra*, this exhibit was rejected and cannot properly be used to support any findings.

⁴⁰ The 1963 inventory turnover figure on all items handled by SCJ has been computed by the undersigned by dividing total sales of \$3,502,211 by the total average inventory of \$492,037.

⁴¹ The only direct evidence cited by complaint counsel of merchandise coming into the SCJ dock and being shipped out immediately involves principally merchandise picked up at other warehouses by SCJ trucks for the convenience of its members, and not the lines handled by SCJ. The testimony cited does involve one line handled directly by SCJ, but the witness' testimony related to a period in late 1962, subsequent to which SCJ discontinued all drop shipments of merchandise (Tr. 1644-1646).

1039

Initial Decision

sizeable portion of its inventory on a "no situs" inventory basis. It may be that on some items SCJ's warehousing operation is purely technical and pro forma, and to this extent it may even be in violation of the order heretofore issued in this case. However, this does not gainsay the fact that it is performing a bona fide warehouse function on the bulk of the items which it purchases.

Conclusion As To Who Is Purchaser

40. Viewing the record as a whole, it is the conclusion and finding of the examiner that SCJ is substantially performing the functions of a warehouse distributor. Its method of operation does differ in some respects from that of other WD's, especially in the respect that it deals with a fairly narrow group of jobbers and does not require as substantial a formal selling organization as other WD's because its members are largely pre-sold. It also enjoys certain advantages over other WD's, in competing for the business of its jobber members, because the rebating of its profits to its members effectively forecloses other WD's from making any substantial sales to them of the lines carried by SCJ. However, looking at its operations from the point of view of whether SCJ is substantially performing a warehouse distributor's function for the manufacturers whose lines it carries, it must be concluded that it does.

41. The question next raised is whether the fact that SCJ is performing the functions of a warehouse distributor necessarily requires the conclusion that it must be regarded as the purchaser from its manufacturer-suppliers. As previously noted, it is the position of complaint counsel that, even assuming SCJ is performing a warehouse distributor's function, its jobber members must be regarded as the true purchasers under the Clayton Act. Respondents contend that since SCJ is performing the functions of a WD, it must be regarded as the purchaser from its manufacturer-suppliers, despite the fact that it is a cooperative of jobbers who participate in its management and control through officials elected by them. Respondents argue that while SCJ may be merely a trustee of the earnings realized from the discounts received by it, it is subject to the protection of Section 4 of the Robinson-Patman Act in returning its earnings to its members.

42. In the opinion of the examiner the fact that SCJ may be substantially performing the functions of a warehouse distributor is not necessarily determinative of the question of who is the real purchaser or, putting it another way, of whether an illegal price discrimination exists. The performance of certain useful trade functions, while a relevant consideration in the disposition of a cost

justification defense, raises no new dimension in connection with the question of whether an illegal price discrimination exists because of the payment of a so-called functional discount. As stated in *Forster Mfg. Co. v. FTC*, 335 F. 2d 47, 53 (1st Cir. 1964): "The [Clayton] Act does not sanction 'functional' discounts as such." The reason for this is that to sanction price differences based on function "would add a defense to a *prima facie* violation of Section 2(a) which is not included in either Section 2(a) or Section 2(b)." *Mueller Co.*, 60 FTC 120, 127, *aff'd*, 323 F. 2d 44 (7th Cir. 1963).

43. Certainly, if a single company performing a warehouse distributing function competed with jobbers not performing that function, the fact that it was performing a bona fide warehouse function would not confer any cloak of immunity on the payment to it of a functional discount. *Mueller Co.*, *supra*; see also *E. Edelman & Co.*, 51 FTC 978, 988, 1005, *aff'd*, 239 F. 2d 152 (7th Cir. 1956), *cert. den.*, 355 U.S. 941.⁴² The examiner fails to see how any greater immunity is gained from the fact that, instead of a single company performing a dual distribution function, a number of companies join together and seek to jointly perform one of the distributional functions. To say that the creature of the multiple companies is a separate customer because of the function it performs and that hence there is no discrimination in price, is to place form above substance, and to permit them to do in combination what they clearly could not do separately.

44. In the opinion of the examiner the controlling element in determining the issue of who is the customer and whether a discrimination in price therefore exists is not the nature of the function performed by SCJ, but the nature of the relationship which exists between it and its jobber members. Viewing the record as a whole, it is clear that SCJ is merely the collective embodiment of its jobber members. It came into being to provide its members with a "joint buying and pickup service" and so that its members "might buy such articles as are used in their business to better mutual advantage." The conduct of its affairs is vested in a board of directors elected by the members and it operates through various committees consisting of its members. The funds with which it operates are provided principally by the members. The discounts which it receives at all times "remain the property of the [member] stockholders," and are ultimately distributed to them in proportion to their purchases after deduction of expenses. SCJ sells only to its members and performs no corporate function other than to serve

⁴² The *Edelman* case involved the payment of a discount to warehouse distributors performing a dual distribution function, as well as to cooperative buying groups.

its members. Since SCJ is merely the creature of its members, is wholly controlled by them, and has no purpose other than to serve them, it is clear that it is the members, not SCJ, who are the real purchasers in contemplation of the Clayton Act. *National Parts Warehouse*, Docket 8039, 63 F.T.C. 1692 (1963); *Dayton Rubber Co.*, Docket 7604, 66 F.T.C. 423 (1964).⁴³

45. The fact that in the situation here present "the problem is one of vertical integration" does not necessarily require the conclusion that it is "not price discrimination," as suggested in the *National Parts Warehouse* dissenting opinion (p. 1743) cited by respondents. As previously indicated, the law does not confer any special immunity on functional discounts granted to the vertically integrated operation of a single business entity. No greater immunity arises from the fact that the vertical integration involves multiple business entities. Furthermore, to the extent it may be material, "the advantage accruing to [SCJ's] jobber [members] constitutes the kind of competitive advantage which the Robinson-Patman Act was intended to forbid" (*National Parts Warehouse* dissenting opinion, p. 1742), since they were enabled to obtain a competitive advantage over independent warehouse distributors at SCJ's functional level and over independent jobbers at their own functional level. While SCJ comes closer to performing the functions of a warehouse distributor than did the group organizations in the group buying cases cited by the court of appeals herein,⁴⁴ the examiner does not understand that the element of function, rather than that of control, was the key to the piercing of the corporate veil in those cases and to the recognition of the members as the true purchasers. The Seventh Circuit's decision in *Central Retail Grocers v. FTC*, 319 F. 2d 410 (1963), cited by respondents, likewise has no bearing on the issues herein since it involved the question of whether the price concession received by a cooperative organization was "in lieu of brokerage" within the meaning of Section 2(c), and not whether the cooperative's central organization was the real purchaser. Nor is Section 4 of the Robinson-Patman Act of any comfort to respondents since that section "does not confer on cooperative associations any blanket exemption from the Robinson-Patman Act [but] only protects a cooperative association

⁴³ It may be noted that in the *National Parts Warehouse* case the jobber members conceded that they would have had to be regarded as the true purchasers if the warehouse distributing operation had been carried on as a corporation wholly-owned by them or as a general partnership. However, they sought refuge in the fact that they were merely limited partners in the warehouse operation, which was purportedly controlled by a separate general partner who was not a jobber. In the instant case even this pro forma distinction does not exist.

⁴⁴ 309 F. 2d at 219 n. 11, and 221 n. 17.

from charges of violating the Act premised upon the association's method of distributing earnings. * * * [It] does not permit a cooperative to violate Section 2(f) even though its savings through receipt of discriminatory prices are passed on to its members." *American Motor Specialties Co. v. FTC*, 278 F. 2d 225 (2d Cir. 1960), *cert. den.* 364 U.S. 884 (1960); *Mid-South Distributors v. FTC*, 287 F. 2d 512 (5th Cir. 1961), *cert. den.*, 368 U.S. 838 (1961).

Issue of Cost Justification

46. Complaint counsel concede that the services performed by "legitimate" warehouse distributors for their manufacturer-suppliers "save said manufacturer-suppliers money," and that the performance of such services "cost justifies their functional discount."⁴⁵ However, counsel contend that the functional discounts received by SCJ are not cost justified because SCJ's manufacturer-suppliers perform substantially the same services for the SCJ members as they perform for direct-buying jobbers. They also contend that respondents must have been aware of the lack of cost justification since they could not possibly have "expect[ed] to cost justify a 20% differential with a 6% cost factor."⁴⁶ Respondents contend that the record establishes SCJ "performs the same functions as other warehouses," and that warehouse distributors "do save substantial sums" for manufacturers. Accordingly, they contend that complaint counsel have failed to sustain the burden of establishing a lack of cost justification with respect to the functional discounts granted to SCJ, let alone that respondents were aware of this fact.⁴⁷ The rejoinder of complaint counsel to the argument of respondents, based on the comparability of SCJ's services to those of independent WD's, is that they "cannot see what this has to do with cost savings," since the "resolution of the cost justification issue requires a comparison of the services provided by manufacturers to independent direct-buying jobbers, with the services provided to SCJ jobbers * * *."⁴⁸

47. Complaint counsel are correct when they argue that there can be no savings in cost to a manufacturer if he performs substantially the same services for SCJ's jobber members as he performs for direct buying jobber customers. However, since complaint counsel concede that the services performed by independent WD's do result

⁴⁵ CPF No. 23, p. 100; and No. 30, p. 190.

⁴⁶ CPF, pp. 278-279.

⁴⁷ RM, pp. 2 and 10.

⁴⁸ CRM, pp. 9-10.

in savings which are cost justified to the manufacturer, then it is perfectly logical for respondents to emphasize the comparability of the services performed by SCJ with those of independent WD's. If such services result in a savings in cost to the manufacturer when performed by an independent WD then, presumably, they would result in a savings in cost when performed by SCJ unless, of course, it can be shown that the manufacturers furnished certain additional services for the SCJ jobbers which they did not ordinarily perform for the jobber customers of independent WD's.

48. Despite complaint counsel's ostensible quarrel with respondents' approach, based on the alleged comparability of the services performed by SCJ with those performed by independent WD's, complaint counsel's effort to establish a lack of cost justification is actually based on a combination of the reverse of respondents' position (*i.e.*, on an alleged lack of comparability of SCJ's services to those of a normal WD) and their own position (*i.e.*, that the comparison must be made with the services performed by manufacturers for direct-buying jobbers). In effect, they seek to show that since SCJ is not fully performing the selling, servicing, credit and warehousing functions of a normal WD, its manufacturer-suppliers are required to perform them for the SCJ jobbers in the same manner that they do for direct-buying jobbers, and that therefore the manufacturers realize no substantial cost saving in selling to SCJ. In addition, complaint counsel seek to show that certain of SCJ's services, especially its delivery service, are performed for the benefit of its members and do not result in any savings in cost to their manufacturer-suppliers.

Savings in Selling and Servicing Costs

49. Complaint counsel's contention that manufacturers selling to SCJ do not achieve any significant saving in selling costs is based on a three-fold argument, (a) that SCJ does not have an adequate sales force to properly perform a selling and servicing function for the manufacturers, (b) that because of this the manufacturers' sales representatives actually call upon the SCJ jobbers to sell to and service these accounts, and (c) that there is no saving in selling expenses because the manufacturers' salesmen are paid a commission on the basis of their sales to the SCJ members. The examiner has already discussed the argument that SCJ does not have an adequate sales force and has found that it performs a satisfactory selling function for its manufacturer-suppliers. The

argument of complaint counsel that it is necessary for the manufacturers' salesmen to call on SCJ's jobber members is based on the testimony of three supplier witnesses, who testified to having made calls on the SCJ jobbers.⁴⁹ However, complaint counsel overlook the testimony of these and other supplier witnesses that the SCJ jobbers were not treated any differently than the jobber customers of their other WD's (on whom the manufacturers' salesmen also called) and, more importantly, that these salesmen usually called less frequently and spent less time with their indirect accounts (including the SCJ jobbers) than they did with their direct jobbers who were not served by a WD (Tr. 1074, 1275, 1290, 1363, 1396, 1412, 1424). While it is true, as complaint counsel contend, that the salesmen of some manufacturers receive a commission based on the purchases of the SCJ members in their territory,⁵⁰ this does not gainsay the fact that there is a substantial reduction in selling expenses achieved by selling through a WD, since the manufacturers are enabled to cover more accounts with fewer salesmen and to concentrate their efforts on jobber accounts which are not served by WD's (Tr. 416, 1073, 1112, 1215, 1294, 1424).

50. Complaint counsel contend that SCJ does not save its manufacturer-suppliers any money in connection with the handling of catalogs and price lists since, (a) the catalogs and price lists are published by the manufacturers, not SCJ, and (b) SCJ relies on the manufacturer's sales force to keep the catalogs and price lists up-to-date in the places of business of the SCJ jobber customers.⁵¹ Complaint counsel are correct that SCJ does not publish catalogs and price lists for the use of its jobber-members. However, with one exception, neither do any of the other WD's in the Los Angeles area. It is the general practice for the manufacturers to publish and distribute their own catalogs and price lists. In some instances the manufacturers limit the distribution of these to their WD's and direct jobbers, and rely on the WD's to redistribute copies to their own customers. In other instances manufacturers also mail copies of their catalogs and price lists to the jobber customers of their WD's (Tr. 1095-1097, 1207-1209, 1261-1263, 1281, 1297, 1377, 1409, 1463, 1541). In either situation, the WD has the responsibility for checking their jobbers' copies of the manufacturers' catalogs and price lists to see that they are up-to-date and complete, and to replace them if they are not. To this extent, they relieve the manufacturers' sales representatives from having to perform

⁴⁹ CPF No. 13, pp. 64-69.

⁵⁰ CPF No. 12, pp. 57-63.

⁵¹ CPF No. 36, pp. 219-223; No. 37, pp. 224-230.

this work (Tr. 1282, 1409, 1517, 1542, 1707, 1811, 1850). The record discloses that SCJ performs the same function of maintaining the catalogs and price lists of their jobber members as other WD's (Tr. 539, 556, 840, 1118, 1282). To the extent that the performance of this service by WD's results in a cost saving to their manufacturer-suppliers, SCJ affords their suppliers the same savings as do other WD's (Tr. 1118, 1282, 1297-1298, 1377-1378, 1433).

Saving in Credit Costs

51. Complaint counsel contend that the credit burden carried by SCJ for its 68 jobbers is not comparable to that of independent WD's in the Los Angeles area, who usually carry the credit burden of 400 to 500 customers.⁵² While not entirely clear from their argument, it is apparently complaint counsel's position that there is a lesser saving in credit costs to a manufacturer where a WD serves 68 accounts than where he serves 400 to 500 accounts. As has heretofore been found, the total amount of credit carried by SCJ for its 68 jobbers is comparable to that carried by other WD's serving a larger number of accounts.⁵³ Whether the cost saving to the manufacturer is substantially less because of the number of accounts involved is something as to which there is no evidence in the record.

Saving in Warehouse Costs

52. Complaint counsel contend that SCJ does not save its manufacturer-suppliers any money by maintaining a warehouse, since many of such suppliers maintain warehouses in the Los Angeles area and that "the warehousing by SCJ was a mere duplication of services performed by the * * * local manufacturers' warehouses."⁵⁴ The argument of complaint counsel suffers from several infirmities. In the first place, the record does not establish that all or even the majority of SCJ's requirements comes from warehouses maintained by manufacturers in the Los Angeles area.⁵⁵ Furthermore, with respect to some of the lines carried by SCJ the record discloses that where shipments are received by it from the Los Angeles warehouse of a manufacturer there is a proportionate re-

⁵² CPF No. 35, p. 217.

⁵³ See Paragraph 34, *supra*.

⁵⁴ CPF No. 39, pp. 246-249.

⁵⁵ There is evidence that four of the manufacturers called by complaint counsel on the remand of the proceeding maintain a warehouse in Los Angeles. There is also evidence adduced at the earlier hearings that five other manufacturers whose lines SCJ is still handling had a Los Angeles warehouse. However, the record is silent as to how many of the others of SCJ's 76 suppliers operate a Los Angeles warehouse.

duction in the rate of commission received by SCJ.⁵⁶ Finally, it is by no means clear that there is no saving in cost to a manufacturer who maintains a warehouse in the Los Angeles area. There is credible evidence in the record from complaint counsel's own witnesses that even in such a situation the WD's warehouse enables the manufacturer to realize certain economies by maintaining a smaller stock than would otherwise be required in his own warehouse and by handling merchandise in bulk lots (Tr. 1085-1091, 1120, 1340, 1367, 1424, 1734). While it may be that there is some diminution in the cost saving to a manufacturer who maintains a local warehouse, complaint counsel have failed to establish that the amount of such reduction is substantial and that it affects the bulk of the lines carried by SCJ.

Saving in Delivery Costs

53. Complaint counsel contend that SCJ does not save its manufacturer-suppliers anything in freight costs, and that the fleet of trucks operated by it are for the benefit of its members, not the manufacturer-suppliers.⁵⁷ As heretofore found, most manufacturers sell to their direct customers f.o.b. their factory or warehouse, but prepay freight on orders in excess of a certain weight or dollar amount (Tr. 254, 282, 466, 1092, 1206, 1256, 1358, 1406, 1465, 1538, 1745). Most WD's and many direct jobbers qualify for prepaid freight by reason of the size or volume of their regular orders (Tr. 1092, 1257, 1259, 1358, 1406, 1745). SCJ's regular orders from its manufacturer-suppliers are generally large enough to qualify for prepaid freight. However, where the manufacturer maintains a local warehouse in the Los Angeles area SCJ usually picks up its orders at the warehouse in its own trucks (Tr. 1093, 1259, 1293, 1358, 1408). This represents a saving in freight costs to the manufacturer, inasmuch as it would ordinarily have to pay for the cost of delivery to SCJ under its prepaid freight policy (Tr. 1112, 1259, 1432). Complaint counsel contend that this is not a saving over the cost of selling to direct jobbers since such jobbers generally do not order in sufficient quantities to qualify for prepaid freight and are therefore required to pay for the cost of delivery. While it is true that many direct jobbers do not qualify for prepaid freight, there are a number that do order in sufficient quantities to obtain free delivery of the merchandise (Tr. 1092, 1257). To this extent, some of SCJ's manufacturer-suppliers do realize a saving in the cost of delivery over their cost of delivery to direct-buying jobbers.

⁵⁶ CX 223, pp. 12, 22, 32, 45, 61.

⁵⁷ CPF No. 40, p. 250; No. 41, p. 255.

Conclusion as to Cost Justification

54. As heretofore noted, complaint counsel concede that the average functional discount of 20% is cost justified in the case of the independent WD's in the Los Angeles area. There is no actual testimony in the record as to what the actual saving in cost to a manufacturer is by selling through a WD. However, the manufacturer witnesses called by complaint counsel were generally of the opinion that there was a substantial saving in cost achieved by selling through a WD, and some estimated that it was at least as much as the amount of the discount.⁵⁸ The only evidence cited by complaint counsel which is in any way indicative of an order of magnitude of the savings achieved by manufacturers is the testimony of the WD witnesses that they expended between 17 and 18½% of the average functional discount of 20% received by them.⁵⁹ In the opinion of the examiner these figures are not necessarily indicative of the extent of the savings to a manufacturer since the amount of a distributor's expenditures or costs are not necessarily correlative with the amount which is saved for a manufacturer.⁶⁰ However, based on the combined testimony of the manufacturer and WD witnesses in the record, and in the absence of any countervailing evidence, it may be inferred that the functional discounts paid to independent WD's are substantially cost justified, as contended by complaint counsel.

55. The record establishes that SCJ performs many of the functions of a WD, including the warehousing of merchandise purchased from manufacturers, selling and promoting the sale of such merchandise to their jobber members, servicing the jobber members by handling the obsolescence program of their manufacturers and keeping the manufacturers' catalogs and price lists up-to-date, buying the merchandise on its own credit, making timely payment to the manufacturers therefor, and billing and collecting amounts due from its jobbers. As far as its manufacturer-suppliers were concerned, these services performed for them by SCJ were comparable to the cost-saving services performed by other WD's (Tr. 390, 416, 1110, 1272, 1290, 1367, 1415). Since the discounts to the other WD's were, as complaint counsel concede, cost justified, there is no reason to believe that the perform-

⁵⁸ See testimony cited by complaint counsel in CPF No. 23, pp. 100-106; see also Tr. 416, 1072, 1074, 1294, 1367, 1371, 1415.

⁵⁹ See testimony cited by complaint counsel in CPF No. 30, pp. 192-200.

⁶⁰ In *Purolator Products, Inc.*, Doc. 7850, 65 F.T.C. 8 (1964), the Commission held that a purchaser's costs were irrelevant in a 2(a) proceeding. See also concurring opinion, p. 293, in *Monroe Auto Equipment Co.*, Doc. 8543, 66 F.T.C. 276 (1964).

ance of substantially similar services by SCJ did not result in a comparable saving in cost to the manufacturers selling through SCJ. Even assuming that in some respects SCJ's services did not quite measure up to those of the other WD's, there is certainly no substantial evidence that the SCJ deviations were so disparate as to seriously impair its cost-saving utility to its suppliers.

56. The only evidence cited by complaint counsel suggestive of any lack of cost justification is the fact that SCJ expends only about 6% out of the average 20% discount received by it, compared to 17 to 18½ expended by other WD's. Complaint counsel raise the question of how respondents "could * * * ever expect to cost justify a 20% differential with a 6% cost factor."⁶¹ The short answer is that the differential between SCJ's costs and those of other WD's (whose discounts complaint counsel concede are cost justified) does not necessarily establish any lack of cost justification in the case of SCJ. Such differential may well be accounted for by SCJ's character as a cooperative, whose members are largely presold and who perform voluntary services which other WD's have to pay for. In any event, as previously noted, what it costs a distributor to sell his supplier's products is not necessarily determinative of what he saves a manufacturer in selling through a distributor.⁶²

57. Complaint counsel seek to draw an analogy between the factual situation here and that in the *National Parts Warehouse* case, which counsel suggest "fits our case here * * * like a glove."⁶³ While it is true that in that case the Commission cited the 8% operating cost of NPW as a factor indicative of the members' awareness of the lack of cost justification, the factual setting there was entirely different from that in this case. The Commission there found that NPW was performing only a warehouse function since the selling and servicing functions, to the members' knowledge, continued to be performed by the suppliers, and it further found that even the 8% expended by NPW was in excess of the manufacturer's warehouse cost of about 5% (based on the use of a fee warehouse). In the instant case the evidence discloses that SCJ does perform a selling and servicing function equivalent to that of other WD's. Furthermore, it affirmatively appears that a fee warehouse does not necessarily perform the services which a manufacturer would have to perform in serving smaller jobbers who do

⁶¹ CPF No. 30, p. 190 and p. 279.

⁶² See Par. 54, *supra*.

⁶³ CPF, p. 283.

not buy in bulk, and it also appears that the warehousing costs of a WD performing these services for a manufacturer may run as high as 12%. Accordingly, it cannot be concluded merely from the fact that SCJ's costs were only 6% that its functional discounts were not costs justified, and that the members were aware of such lack of cost justification.

58. Complaint counsel's final argument is based on what they apparently contend is a concession by respondents that SCJ's discounts were paid because of "the combined volume ordered through their warehouse."⁶⁴ The significance of this argument is not entirely clear to the examiner, but apparently it is the position of complaint counsel that by conceding they received the discounts because of their combined volume, respondents have also conceded that the discounts were not paid because of any functions performed by them, and therefore they must have been aware that the discounts were not cost justified. Assuming that this is the position of complaint counsel, it has no basis in the record. While SCJ's president (on whose testimony complaint counsel rely) did acknowledge the importance of "volume" to a manufacturer, he did not rule out the fact that SCJ received its discounts because of the functions it performed for the manufacturers. Any doubt as to why SCJ was receiving its discounts is dissipated by the testimony of the manufacturer witnesses called by complaint counsel, which makes it clear that they were paid because its suppliers considered SCJ was performing the functions of a WD (Tr. 390, 506, 1121, 1272, 1290). The testimony of these witnesses also confirms the testimony of SCJ's president about the importance of volume to a manufacturer, since they were in agreement that there is no advantage in selling through a WD if he merely goes through the motions of performing certain functions and does not achieve a satisfactory volume of sales of the manufacturer's products (Tr. 1227, 1272, 1305, 1422, 1588).

CONCLUSIONS

1. The respondent jobber members of Southern California Jobbers, Inc., are the real purchasers, within the meaning of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, of merchandise purchased by respondent Southern California Jobbers, Inc. for resale to said jobber members.

2. Complaint counsel have failed to establish either that the price differentials granted to Southern California Jobbers, Inc.,

⁶⁴ CPF No. 42, p. 258; and see also p. 287.

on purchases on which it performed a warehouse and distribution service were not cost justified, within the meaning of Section 2(a) of the Clayton Act, as amended, or that respondents knew or should have known that such differentials were not cost justified.

3. Complaint counsel have failed to establish that respondents knowingly induced or received a discrimination in price prohibited by Section 2(a) of the Clayton Act, as amended, insofar as any discrimination in price induced or received by them involved purchases on which respondent Southern California Jobbers, Inc., performed a warehouse and distribution service.

4. Although the complaint does not specifically challenge the receipt by respondents of discriminatory prices, discounts, allowances or rebates in connection with the operation of a warehouse and distribution service by Southern California Jobbers, Inc., it has been heretofore found by the Commission that respondents received two different types of price advantage, viz, "brokerage" and "warehouse." The order heretofore entered by the Commission was affirmed by the court of appeals except as to price discounts received "on purchases on which petitioners perform a warehouse and distribution service." Since it has been determined that no violation of law has been established with respect to the latter type of purchase, it is concluded that an order should now be entered dismissing the complaint in this respect.

ORDER

It is hereby ordered, That the complaint herein be, and the same hereby is, dismissed insofar as it purports to challenge the receipt by respondents of any discrimination in price based on the performance by them of a warehouse and distribution service.

OPINION OF THE COMMISSION

DECEMBER 17, 1965

BY MACINTYRE, *Commissioner*:

This is a case instituted under Section 2(f) of the Clayton Act, as amended, involving a buying group of automotive parts jobbers selling in the after market in the southern California area.

The so-called after market involves the distribution of automobile parts for replacement of original factory parts installed by the manufacturer. The chain of distribution begins with the manufacturer, who may sell parts to automotive parts jobbers either directly or indirectly through warehouse distributors. Many manufacturers sell simultaneously both to jobbers purchasing directly from them (direct jobbers) and to warehouse distributors. A warehouse distributor is essentially a wholesaler, who in general con-

finer his sales to jobbers. Jobbers also are wholesalers but they distribute automotive parts on another level of distribution. They principally resell automotive parts to garages, service stations, fleet owners and car dealers. A manufacturer, in distributing and selling his products to direct buying jobbers or warehouse distributors, may utilize either his own sales personnel or manufacturers' representatives who are independent concerns in many instances representing a number of manufacturers in a particular trade area.

As a general rule, warehouse distributors are granted a functional redistribution discount known as a warehouse distributor discount, which is usually a 20 percent reduction from the net price to the jobber. The jobbers, whether they purchase directly or indirectly from the manufacturer, generally pay the same price for the automotive parts purchased. Warehouse distributors as a rule do not compete with jobbers in sales to the retail trade, such as garages, service stations, etc. In distributing automotive parts to jobbers, warehouse distributors warehouse the merchandise, sell the goods, and over and above the function of taking orders for purchases from the jobbers, perform various service functions for their customers, including the giving of technical advice, the checking of inventories and other services to ensure orderly distribution of the manufacturer's product. Warehouse distributors in the Los Angeles area expended approximately 17 to 18½ percent of the functional redistribution discount received by them in distributing automotive parts to their jobber customers, and earned a net profit of between 1½ to 3 percent before taxes.

The complaint charged that respondents knowingly induced and received price discriminations illegal under Section 2(a) of the Clayton Act, as amended. The proceeding encompasses respondents' inducement and receipt of discriminatory prices in the form of both retroactive volume discounts on goods purchased in an order-desk type operation and warehouse distributor discounts of approximately 20 percent on goods purchased through the group's warehouse. The Commission, on October 28, 1960, adopted the initial decision of the hearing examiner, finding the charges in the complaint sustained and issued its order to cease and desist. Respondents conceded that the receipt of the retroactive volume discounts in the so-called brokerage transactions were illegal but appealed the Commission's order in the Court of Appeals for the Ninth Circuit insofar as it related to their receipt of warehouse distributor discounts. The court affirmed and enforced the Commission's order to the extent that it related to the brokerage operation, but set it

aside and remanded the case insofar as the warehouse distributor's discount was concerned.¹

The court indicated it was not satisfied that the Commission had in its findings given adequate attention to two questions, namely, whether in connection with the receipt of the warehouse distributor discounts the buying group, SCJ, did not perform a function equivalent to the service rendered manufacturers by warehouse distributors and whether this function saved the manufacturers money. Nor was the court satisfied that the Commission had dealt adequately with the question of the identity of the buyer, namely, whether SCJ or its jobber members were the purchasers in connection with the transactions for which the warehouse distributor discounts were received. In the eyes of the court, both issues were critical. If the discounts to the respondents were cost justified, this would be a complete defense to a charge of violating Section 2(f). If SCJ rather than its members was the actual purchaser, then, the court indicated, there would be no cognizable price discrimination between it and warehouse distributors in the area and, secondly, the member jobbers could not be held as recipients of the illegal discounts.² The court apparently felt in its consideration of these issues that the Commission had placed undue emphasis on the brokerage aspect of the case, which was not in issue at the time of appeal. The Commission's findings, that these price differentials had the requisite effect on competition, were not disturbed.

The Commission, on January 17, 1963, re-opened this matter for further proceedings consistent with the court's opinion, viz., to permit a determination on the basis of further evidence whether SCJ or its members are the real purchasers from those manufacturers granting respondents price differentials in the form of a warehouse distributor discount and whether the cost justification defense is available in the case of the price differentials received by SCJ in the form of such discount.

Hearings were held from May 18 to May 26, 1964, at which both sides offered evidence with respect to the issues under consideration on remand. On November 20, 1964, Hearing Examiner John Lewis issued his supplemental initial decision, dismissing the complaint

¹ *Alhambra Motor Parts, et al. v. Federal Trade Commission*, 309 F. 2d 213 (9th Cir. 1962).

² The complaint specifically charges that SCJ was the agent of its members in these transactions and the case was tried on that basis. This, of course, does not mean that a price discrimination cognizable under the Act must necessarily under all circumstances be between customers competing at the same level of distribution. E.g., see *Standard Oil Co. v. Federal Trade Commission*, 173 F. 2d 210, 212, 217 (7th Cir. 1949), *rev'd on other grounds*, 340 U.S. 231 (1951).

so far as it related to the receipt by respondents of the warehouse distributor discounts. In this connection, he found, while SCJ's members were the actual purchasers in the transactions under consideration, that complaint counsel had failed to meet their burden on the issue of cost justification. The case is now before the Commission on the appeal of complaint counsel from that decision, the answer of respondents in opposition thereto, and the brief in support of the appeal by the Automotive Warehouse Distributors Association, Inc., as *amicus curiae*, as well as oral argument.

This proceeding is one of a number of Commission cases dealing with the practices of automotive parts buying groups. Admittedly, at the time it came before the Ninth Circuit this was a case of first impression, since it challenged the legality of a warehouse distributor discount received by a buying group on goods purchased through the group's warehouse. In short, the Commission had before it for the first time a case involving an automotive buying group where the group purported to do more than simply act as an order desk or bookkeeping operation. The court of appeals, as noted, pointed out that the Commission in its first decision had not really come to grips with that problem. Since the order of remand, the Commission has decided another buying group case, which in many similar respects is squarely in point, namely, *National Parts Warehouse, et al.* [63 F.T.C. 1692].³ The issue of whether an operation of this kind saved auto parts suppliers costs sufficient to justify the warehouse distributor discount in the case of a buying group was specifically considered in that proceeding. The Commission, in *National Parts Warehouse*, went into some detail on the distributional services afforded by that buying group as well as to the selling effort expended by manufacturers with respect to the group and its members in comparison to jobbers purchasing directly. We found in that case the warehouse distributor discounts were not cost justified and that respondents knew, or should have known, that fact. This ruling was recently affirmed by the Court of Appeals for the Seventh Circuit.⁴ As a result of the hearings on remand in this proceeding, the Commission is now in a position to make detailed findings on similar facts in this case on like issues.

The threshold issue before the Commission at this time is the question of whether SCJ or its members are to be regarded as the

³ Docket No. 8039 (1963) [63 F.T.C. 1692], *aff'd*, 346 F. 2d 311 (7th Cir. 1965).

⁴ *General Auto Supplies, Inc. v. Federal Trade Commission*, 346 F. 2d 311 (7th Cir. 1965).

customers of respondents' automotive parts suppliers within the scope of Section 2 of the Clayton Act, as amended. The applicable principles governing that determination in the case of transactions involving receipt of a warehouse distributor discount by a buying group of automotive parts jobbers have been set forth in *National Parts Warehouse*.⁵ If the buying group acts as the agent of its members in the challenged transactions, then as to those purchases the buyer-seller relationship is necessarily established between the jobber respondents and their suppliers. Here, as in *National Parts Warehouse*, the record documents the agency relationship of the group to the membership with respect to those transactions on which the warehouse distributor discount was received. The fact that a buying group may perform some functions identical or similar to those performed by independent warehouses is not determinative of the identity of the true purchasers in these cases.⁶ In this connection, we held, in *National Parts Warehouse*:

* * * [I]t may be true that NPW actually performs the same warehousing function that "other" warehouse distributors perform. But we do not see how that affects the question of whether NPW is a "purchaser" in its own right, or a mere agent of its owner jobbers. The mere ownership and operation of physical facilities cannot convert an agent into a principal. It is the fact that these jobber partners of NPW own it outright, and "control" the flow of its income from the partnership coffers to their own pockets, that establishes the principal-agent relationship, and makes them responsible for its acts. The clothing of their creature with the trappings of a "warehouse distributor" does not cause the parties to cease being principal and agent, and become, instead, "seller" and "buyer."

The record adduced in this proceeding satisfies these criteria in full measure. It is SCJ's sole purpose to provide opportunities for mutually advantageous purchasing and a pickup service for the members. SCJ makes no sales whatsoever to jobbers not belonging

⁵ *Supra* n. 3.

⁶ Although they filed no appeal on the point, respondents urge strenuously that the examiner erred in holding that SCJ's members were the purchasers in the transactions under consideration. They rely on the fact that SCJ orders the merchandise, receives shipment and handles the orders of the stockholder jobbers, etc. These circumstances are not determinative of the issue. The crucial consideration is that SCJ was brought into being and continues to exist for the basic purpose of securing discounts for the members from the jobber price which their competitors are forced to pay and that the jobber members are responsible for these operations. This is what keeps SCJ going. Respondents may have eschewed drop shipments direct to the members at the conclusion of the first stage of this proceeding. To hold for that reason, however, that they should not be considered purchasers from those suppliers granting them the warehouse distributor discount would in effect ignore the realities of the case. In matters of trade regulation affecting the public interest, the Commission should look to the substance rather than to the outward aspects of the proceeding. *Cf. Simpson v. Union Oil Co.*, 377 U.S. 13 (1964). Similarly, "the corporate entity may be disregarded when the failure to do so would enable the corporate device to be used to circumvent a statute." *Joseph A. Kaplan & Sons, Inc. v. Federal Trade Commission*, 347 F. 2d 785, 787 (D.C. Cir. 1965).

to the group.⁷ The extra rebates and discounts received by SCJ in behalf of its members are at all times the property of the respondent jobbers. The bylaws further provide that the earned rebates and extra discounts shall be credited to each member jobber after deduction for amounts owed for merchandise or service and less the members' prorated share of SCJ's expenses.⁸ In short, as a practical matter the respondent corporation has no discretion over the prices it "charges" its members and the respondent jobbers by reserving to themselves the absolute right to receive SCJ profits have assumed the responsibility for the transactions from which such profits are derived. Since all of SCJ's activities are for the benefit of its members, the respondent jobbers, rather than SCJ, are necessarily the recipients of the discounts in question and the principals in the sales on which such discounts are allowed. Further, SCJ is owned by the members and controlled by them through the board of directors they elect and it operates through committees staffed by the members, including the merchandising and membership committees. Under the circumstances, it is clear that SCJ does not function as a separate business entity in these transactions. Rather, its activities are those of an agent for which its principals, the members, bear responsibility. The record as a whole, accordingly, compels the conclusion that the respondent jobbers are customers of their suppliers, granting them the warehouse distributor discount within the scope of Section 2 of the Clayton Act, as amended. It is interesting in this connection to note that respondents' suppliers in effect recognizing the realities of the situation, in general devoted as much of their sales representatives' time to SCJ's members as to jobbers purchasing directly without the intervention of an intermediary.

Turning to the question of cost justification, we have recently held on similar facts in the *National Parts Warehouse* case that where auto parts manufacturers sell directly to jobbers, as well as

⁷ In this connection, SCJ's claim to separate identity as a warehouse distributor seems weaker than that of National Parts Warehouse, which in 1961 made 6 percent of its sales to jobbers outside the group. *General Auto Supplies, Inc. v. Federal Trade Commission*, *supra* n. 4.

⁸ The bylaws, as amended April 1956, specifically provided that the discounts impounded by SCJ were at no time to become the property of the buying group corporation. By Laws, Article XXIII, paragraph 5. (CX 3, p. 10.) This article was apparently amended at a stockholder meeting on 13 March 1964, more than a year after the order of remand and approximately two months before the supplemental hearing. (See CX 295.) As amended, the proviso stipulated that all net profits shall be credited to each stockholder in proportion to his purchase of a particular line and that such profits are to be impounded by the group for the purpose of properly distributing those among the members. The profits are to be credited after deduction for merchandise, services, and the member's proportionate share of SCJ's expenses. As a result, since SCJ has no discretion in returning its profits to the members, such profits, after the revision of the bylaws, as before, are the property of the jobbers comprising the group.

to jobbers comprising a buying group, then the comparison of distributional expense is to be made between the sales to direct buying jobbers on the one hand and the group's jobber members on the other.⁹ The examiner, in effect ignoring the holding of *National Parts Warehouse* on this point, found, on the basis of general testimony and his interpretation of some proposed findings by complaint counsel, that the discount to warehouse distributors was cost justified.¹⁰ He further found that SCJ performed functions more or less equivalent to those of warehouse distributors, and that hence the challenged discounts to SCJ were also cost justified. This is the underlying rationale of the initial decision. In his findings, the examiner did touch here and there upon a comparison of the selling and distributional effort required for direct buying jobbers and respondents, but on a reading of the initial decision as a whole it is apparent that he did not give adequate consideration to this issue. As a result, the initial decision will be vacated. The Commission has made its own findings on these points, which are attached to this opinion.

In a comparison of the costs to manufacturers of selling to respondents and to direct buying jobbers, the areas to be considered, among others, are sales expense, such as compensation to sales personnel, freight and delivery cost, the expense of publishing and distributing catalogs and price lists, and billing and credit expense.

Turning to the item of sales expense, the record shows that manufacturers' salesmen or sales representatives performed substantially the same functions for direct buying jobbers and SCJ members alike. Over and above the function of taking orders from buyers, the salesmen of auto parts suppliers call on direct buying jobbers, SCJ members and jobber customers of warehouse distributors to perform a service function, including promoting the sale of the product, checking on inventory and stock, advising on new lines, providing information on changes in the manufacturers' lines and giving advice on technical problems which may have arisen. The performance of these services is essential to the manufacturer in order to ensure the orderly distribution of his products. If the warehouse distributor does not have adequate personnel for

⁹ *Supra* note 3, at 24 [63 F.T.C. 1692, 1730].

¹⁰ The proposed findings relied upon by the examiner do not constitute, and should not be considered as constituting, evidence. These findings were not stipulations of fact. In general, while proposed findings are helpful both to the examiner and the Commission, neither should abdicate their function of independently evaluating the record on important points. *Cf. U.S. v. El Paso Natural Gas Co., et al.*, 376 U.S. 651 (1964). In view of our findings and decision disposing of this proceeding, there is no need for resolving the meaning of the proposed findings in dispute.

such activities, the manufacturer has to perform the same services for the warehouse distributor's customers that he performs for the direct distributors. SCJ had no salesman to furnish such services in the period under consideration in 1963 and at the beginning of 1964. In fact, respondents did not have a salesman on their roster to call on the member jobbers until more than a year after this proceeding was re-opened on January 17, 1963, and some two and one-half months prior to the hearings on remand. Furthermore, respondents' deal book distributed to the members gives the name of the manufacturers' representatives so that the individual jobber belonging to SCJ can call on them for help. Finally, the record shows that sales representatives of manufacturers granting respondents the warehouse distributor discount of some 20 percent spend approximately as much time with the individual SCJ members as with direct buying jobbers. Respondents' witness, Fred Chadwick, district manager of Standard Motor Products in the Los Angeles area, summarized the situation in response to the hearing examiner's questions as follows:

HEARING EXAMINER LEWIS: How often do you call on those jobber customers, direct and indirect, you or your salesmen?

THE WITNESS: I, myself?

HEARING EXAMINER LEWIS: You or your salesmen.

THE WITNESS: Oh, it would depend a great deal on their potential volume, the dollar and cent volume.

HEARING EXAMINER LEWIS: What would be the range of calls?

THE WITNESS: I would say roughly, you can't set any set pattern, but I would say that we make one call for every \$500 distributors net over a long period of time. Initially on a new account we would call on them more frequently.

HEARING EXAMINER LEWIS: It doesn't make any difference if they are a direct customer or a customer of one of your warehouse distributors?

THE WITNESS: No difference whatsoever.

HEARING EXAMINER LEWIS: How about the warehouse distributors [sic] who are members of SCJ, do you call on them more or less frequently than any other jobbers?

THE WITNESS: No.¹¹

In addition, manufacturers also make calls on SCJ as a group on various occasions such as open houses, which also require expenditure of time and effort by their sales personnel.

¹¹ Tr. 2030-31.

In the case of freight and delivery cost, again the record shows there are no significant differences between expenses incurred in selling to SCJ and direct buying jobbers. Most manufacturers sell to their direct customers f.o.b. from the factory or warehouse, granting prepayment of freight on orders in excess of a certain weight or dollar amount. Although the record discloses some differences with respect to different suppliers, it generally appears that SCJ would qualify for prepaid freight more frequently than direct buying jobbers. As in *National Parts Warehouse*,¹² it appears that as a general rule suppliers realize no savings on delivery costs selling to the respondent buying group as opposed to direct buying jobbers, and it may well be that they incur higher costs.¹³

With respect to the publication and distribution of price sheets and catalogs, the record shows that the suppliers print them and distribute them by direct mail both to SCJ jobber members and direct buying jobbers. The direct buying jobbers and SCJ members are treated exactly alike in this respect and, as a result, there can be no savings here. Further, representatives of certain manufacturers testifying in this proceeding stated that as part of the service function their sales representatives call upon direct buying jobbers and SCJ members alike to check catalog price sheets to make sure that they are up to date. Again, the record indicates there are no significant differences in this respect between direct buying jobbers and the respondent members of SCJ.

With respect to the item of centralized billing, this is clearly a minor expense, wholly incapable of affecting the issue in question to any significant extent. *National Parts Warehouse*.¹⁴ The item of credit expense is also a relatively insignificant expense which would not affect the question of whether the warehouse distributor discounts are cost justified as between SCJ and direct buying jobbers.

Respondents contend that their warehousing operations must be recognized as saving their suppliers money and that such activities are necessarily within the scope of the cost justification proviso. To be cognizable under that defense, however, the warehousing function performed by respondents must be one which suppliers ordinarily perform for their nonfavored customers. Those ware-

¹² *Supra* n. 3, at 25 [63 F.T.C. 1692, 1731].

¹³ In the case of purchases from local warehouses, those customers who pick up from the warehouse are not granted prepaid freight. However, even under those circumstances, it appears that SCJ's truck pickup services would not save suppliers significant amounts of money, since generally direct buying jobbers who are in the proximity of the supplier's local warehouse, as is SCJ, would also pick up their requirements at the local warehouse.

¹⁴ *Supra* n. 3, at 26 [63 F.T.C. 1692, 1732]. *American Motor Specialties Co.*, 55 F.T.C. 1430, 1446 (1959), *aff'd*, 278 F. 2d 225 (2d Cir. 1960), *cert. denied*, 364 U.S. 884 (1960).

housing services on the part of a favored customer which are over and above those the supplier performs as a usual matter for his nonfavored customers are essentially extra services performed by the buyer for himself.¹⁵ In short, unless the buyer's warehousing operation relieves the supplier of a service he ordinarily performs for the nonfavored customers, the purchaser cannot claim that such services result in savings to the supplier within the scope of the cost justification defense. To hold otherwise would permit a buyer to receive compensation for selling to himself.¹⁶ However, it is unnecessary to decide that issue here, for the record shows that in any event respondents' warehousing operations has not relieved their suppliers of warehousing expense to any appreciable extent.

With respect to warehousing, the record shows that certain of SCJ's auto parts suppliers maintain warehousing facilities in the Los Angeles area, which may be either in the form of space in a commercial fee warehouse or in a factory owned warehouse. Fees of commercial warehouses in the area range in the neighborhood of 5 to 6 percent of sales. Accordingly, even if this item in its entirety is allowable under the cost justification defense, it is obviously insufficient to justify the purported functional discounts ranging up to 20 percent or more received by the respondent buying group in behalf of its members.¹⁷

It is the policy of respondents to patronize those manufacturers that maintain local warehouses or manufacture locally, since this enables the respondent buying group to replenish its stock weekly, if necessary. To the extent that respondents purchase from the manufacturer's local warehousing, their warehousing facilities duplicate those of the manufacturer. Under these circumstances, SCJ's warehousing operation cannot be deemed to save the supplier significant amounts of storage costs and expense and the expenses of the suppliers' local warehouse are as attributable to respondents as they are to any other customers utilizing those facilities. In

¹⁵ *E.g.*, where respondents and direct buying jobbers both purchase auto parts from a supplier's local warehouse, respondents' subsequent warehousing of such merchandise is an extra service for their own convenience over and above that furnished by the suppliers to their nonfavored customers. Under these circumstances, as far as the warehousing function is concerned, there is no difference in sales or delivery method entailing a cost differential to the supplier in sales to respondents and nonfavored jobbers buying direct at the higher prices.

¹⁶ See *National Parts Warehouse, et al.*, *supra* n. 3, at 27, 30 [63 F.T.C. 1692, 1732, 1733, 1735].

¹⁷ The record is not entirely clear to the extent to which manufacturers' local warehouses break bulk and repack merchandise. This is immaterial, however, in comparing the cost of selling to direct buying jobbers and to respondents. In those instances where the direct buying jobber purchases from the suppliers' local warehouses, he, like respondents, will also be buying in bulk if that is the policy of the warehouse. The fact that SCJ may subsequently break bulk will not make the transactions with SCJ less expensive for the manufacturer than sales to the direct buying jobber under these circumstances.

fact, the record shows that in some instances SCJ is served entirely by the local warehouse of the particular supplier.

Furthermore, the high turnover in many lines handled by the respondent group indicates that respondents' warehousing of auto parts in many instances was of a *pro forma* nature, unlikely to afford such suppliers with significant savings. For example, in the case of the fifty lines with the highest turnovers out of some seventy lines handled in 1963 by SCJ, the turnover was in excess of eight times and twice the average turnover of warehouse distributors. These lines, it should be noted, involved some 84 percent of respondents' sales volume in 1963. In many lines the turnover was significantly higher.¹⁸ Accordingly, this data justifies the finding in the case of such high turnovers that the warehousing actually performed by SCJ was of a minimal nature and unlikely to save the supplier significant amounts of money, even if the supplier had no local warehouse.

The examiner laid stress on the fact that some five of the respondents' suppliers reduced the warehouse distributor's discount if the respondent group utilized the manufacturer's local warehouse facilities in making the purchase. One of the suppliers reducing the discount under such circumstances was Standard Motor Products. The record shows that Standard granted a 26 percent discount if the parts were purchased from the factory, which was reduced to 21 percent if bought from Standard's Los Angeles warehouse.¹⁹ Clearly, under no circumstances would whatever warehousing SCJ performs come close to cost justifying the 26 percent discount. As a matter of fact, the record further shows that in 1963 the rebate actually received from Standard on the average was in the neighborhood of 23.7 percent. As a result, it must be inferred respondents' purchases were 'partly direct from the factory and partly from the local warehouse. Under the circumstances, the record shows no substantial differences in the way in which Standard dealt with direct buying jobbers and respondents insofar as the warehousing of products was concerned. At best, the possible cost savings resulting from respondents' warehouse operation, even if in fact direct jobbers competing with respondents made all their purchases from Standard's local warehouse, would not be significant in light of the amount of the discount involved.

¹⁸ See Table 2, Findings, p. 1127.

¹⁹ Previously Standard had granted respondents a 20 percent discount on so-called brokerage transactions in 1959 and 1958. See Finding 10 in the Commission's first decision in this proceeding. *Alhambra Motor Parts, et al.*, 57 F.T.C. 1007, 1016 (1960), *vacated in part and remanded*, 309 F. 2d 213 (9th Cir. 1962).

1039

Opinion

The testimony of two of the manufacturer witnesses graphically summarizes the import of the record on the question of comparative sales and distributional expenses in the case of respondents and direct jobbers. In this connection, A. W. Flee, area manager of the American Hammered Division of the Sealed Power Corporation, testified:

Q. Well, just answer this yes or no, please.

Do you know of any specific areas where American Hammered saves any money in selling to SCJ instead of to direct distributors?

A. No.²⁰

Fred Chadwick, district manager of Standard Motor Products, Inc., respondents' witness, was equally direct:

Q. Are you saying the sales expense of Standard Motor Products is not reduced by selling to SCJ or a warehouse distributor?

A. No, it is not reduced.²¹

The respondents organized SCJ for the purpose of securing price concessions from their suppliers and their records show that they knew that they were getting a lower price than other jobbers not so favorably situated. Certain SCJ jobbers, the record shows, had purchased directly from a manufacturer before he commenced granting them the warehouse distributor discount through SCJ. As a result, and from their trade experience generally, SCJ's member jobbers must have been aware of the fact that their suppliers were spending approximately the same effort in distributing and selling automotive parts to them as in the case of those jobbers competing with them who purchased directly. In short, complaint counsel has met the test formulated by the Supreme Court on this issue. They have come forward with evidence showing that whatever the differences in quantities and methods by which respondents and direct buying jobbers were served:

* * * such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, and that the buyer knowing that these were the only differences, should have known that they could not give rise to sufficient cost savings. * * *²²

And as to proof of the requisite knowledge on the part of the buyers, the Court also stated:

²⁰ Tr. 1230-31.

²¹ Tr. 2036-37.

²² *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 80 (1953).

* * * A showing that the cost differences are very small compared with the price differential and could not reasonably have been thought to justify the price difference should be sufficient.²³

The record meets this test and no formal cost study is required.²⁴

Along with consideration of the issue of cost justification there has been also considerable discussion in this proceeding of the functions performed by SCJ and their legal significance in the context of this case. A review of the applicable law is accordingly in order at this point. The law is clear that functional discounts are not sanctioned as such. *Forster Mfg. Co., Inc., et al, v. Federal Trade Commission*.²⁵ The legality of a price difference in the form of a functional discount must be evaluated in terms of its competitive impact. To exempt all functional discounts irrespective of their effect on competition would add a defense to a *prima facie* violation of law not contemplated by the Act. *Mueller Co., Docket No. 7514*.²⁶ The law does permit payments by the seller for services or facilities furnished in connection with the resale of goods as long as such payments are made in accordance with the requirements of Section 2(d).²⁷ In this case there is evidence that other jobbers were not offered the opportunity to receive payment for services rendered. The record shows direct buying jobbers may buy in case lots as do respondents, but direct buying jobbers are not compensated for breaking case lots.²⁸ In this case, to hold that the rendering by SCJ jobbers of "special services *ipso facto* gives [them] a separate functional classification would be to read Section 2(d) out of the Act." *General Foods Corp., 52 F.T.C. 798, 825 (1956)*.²⁹

²³ *Ibid.*

²⁴ *National Parts Warehouse, supra* n. 3, at 24 [63 F.T.C. 1692, 1730].

²⁵ 335 F. 2d 47 (1st Cir. 1964).

²⁶ 60 F.T.C. 120, 127 (1962), *aff'd*, 323 F. 2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964).

²⁷ *General Foods Corp., 52 F.T.C. 798, 825 (1956)*. *Cf. Mueller Co. v. Federal Trade Commission*, 323 F. 2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964).

²⁸ Milligan, tr. 1368-69.

²⁹ The Supreme Court, in *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505, 520 (1963), has stated in pertinent part:

"* * * Congress intended to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned."

The members of SCJ benefiting from the warehouse distributor's discount under consideration here, of course, compete with jobbers not so favorably situated. In this connection, the Commission, setting forth its position on functional discounts, recently stated:

"(* * * a seller may grant a lower price to wholesalers than to retailers to the extent that such wholesalers resell to retailers. If such wholesalers also sell at retail they may not properly be granted a price lower than the prices granted to competing retailers on that portion of the goods

And, further, the Commission may disregard ambiguous labels cloaking discriminatory discounts to favored customers.³⁰

Although not dispositive of this case, it seems clear that respondents do not really perform the central function of a warehouse distributor, which is to sell. If one fact is undisputed in this proceeding, it is that the respondent buying group makes absolutely no sales to jobbers outside of SCJ. In addition, a buying group without a salesman, it is evident, simply cannot free the manufacturer of the service function which is an integral part of selling, no matter how diligent the officers of the buying group.³¹ The suppliers testifying in this proceeding may well have been satisfied with respondents' purchase volume, but in the light of these record facts it seems clear that respondents were, in effect, paid for selling to themselves or granted the discounts because of the volume of their purchases, rather than for the distributional function performed by them.

While there was no direct evidence on the point, certain testimony indicates that the cost savings, if any, to the manufacturer by virtue of a warehouse distributor's services are not necessarily the criteria governing the size of that discount. Rather, it seems that the discount is granted in particular instances because of the label placed on the customer, not necessarily because of cost savings resulting from the services performed by the purchaser. For example, as already noted, direct buying jobbers may also buy in bulk and break up case lots, but they are not granted a discount for that service. In this connection, John Milligan, a manufacturer's representative, explained that the jobber was not compensated as is a warehouse distributor if he ordered in case lots and performed the function of breaking such packages. This witness expressly conceded that in this respect there was no difference in cost between a warehouse distributor and a jobber buying in case lots.³² Nevertheless, the direct buying jobber who purchases in case lots will not be compensated by a discount, because unlike SCJ he does not wear the proper label.

they sell at retail.)" Trade Practice Rules, Fresh Fruit and Vegetable Industry (April 15, 1965), p. 3, n. 3.

By the same token, respondent jobbers should not be granted a functional discount on goods which they resell in competition with other jobbers to retail outlets such as service stations, garages, etc.

³⁰ *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 475 (1952).

³¹ Compare *National Parts Warehouse*, *supra* n. 3, at 27, 28 [63 F.T.C. 1692, 1733].

³² Milligan, tr. 1368-69.

Other testimony from certain supplier representatives in this proceeding leads to the same conclusion. They seemed unable to correlate the amount of the warehouse distributor's discount with distributional expenses saved the manufacturers as a result of the functions for which compensation was paid. For example, William Webster, of Federal Mogul Bearings, stated as follows:

Q. In terms of a percentage of the selling price of your product, sir, can you state how much your company has saved by the operation of Southern California Jobbers, Incorporated?

A. No, sir, I can't.³³

John Costello, regional manager for the Republic Gear Company, in response to the hearing examiner's question, said he was unable to state whether it was a policy of his company in establishing the functional discount to fix it with reference to cost savings that his company realized because of the services performed by the warehouse distributor. The witness testified he was unable to answer that question because these discounts were set at the home office in Michigan.³⁴ These discounts, however, are an industry-wide phenomenon. A regional manager of an auto parts supplier could be expected, therefore, to have some idea of the correlation between the discount and cost savings realized as a result of the functions performed by the beneficiaries of such price differentials if they are in fact set on that basis.³⁵

As already noted, the question of whether the challenged discounts had the requisite effect on competition is not in issue under the order of remand. However, the evidence which came into the record at this stage of the proceeding supports the Commission's original finding that the warehouse distributor discounts granted respondents may have an adverse effect on competition in the distribution of automotive parts in the replacement market. As we originally found, the distribution of automotive parts is a highly competitive business which involves small margins of profit. In this connection, their net profit, according to the testimony of the respondent jobbers, is from 1 to 4 percent after taxes. The competitive impact of the warehouse distributor discounts granted to respondents on the order of 20 percent or more in the light of this fact is obvious.

³³ Tr. 1267.

³⁴ Tr. 1390.

³⁵ As one commentator noted, by granting a functional discount the seller is essentially buying distribution and the rate of the discount may well be influenced by other factors in addition to costs which in any case may be only roughly known. Fleming, *Group Buying Under The Robinson-Patman Act: The Automotive Parts Cases*, VII Buffalo L. Rev. 231, 248 (1957).

As we held in a similar proceeding:

* * * after the extensive litigation of this very point in the various "automotive parts" cases, this industry above all others would be quite clear that a price advantage several times greater than the average jobber's total net profit margin cannot fail to injure competition in the end. * * *³⁶

The basic facts of the automotive parts industry in the light of which the competitive impact of price discriminations of this nature must be gauged are by now well established.³⁷ It can no longer be disputed that this industry is characterized by keen competition and small margins of profit, and that in this context substantial discriminations in price will have the requisite adverse effect on competition.³⁸ The evidence in this case further shows that the price differentials favoring respondents over their competitors reselling to the same trade in the form of the warehouse distributor discount are a stable price discrimination and substantial in amount. Under these circumstances, the probability of injury to competition must be inferred.³⁹ The record here evidences that the warehouse distributor discounts on which some \$686,000 were returned to the jobber members as a net rebate in 1963 after expenses are as systematic a discrimination as respondents' so-called brokerage operation, which has already been condemned. The magnitude of these price differentials is not subject to question. No further evidence is required to document the necessity of Commission action.

A further relevant consideration in determining the public interest in this proceeding is the size of SCJ and its constituent members. The jobber stockholders of SCJ, according to the district manager of Standard Motor Products, are larger than the jobber customers of a number of warehouse distributors operating in the Los Angeles area. Collectively, the respondent jobbers are one of this manufacturer's largest accounts.⁴⁰ The testimony on remand of warehouse distributors operating in this market was also generally in agreement that the jobbers constituting SCJ were in fact substantial.

The complaint alleges that the adverse effect on competition from the discriminatory prices received by SCJ will be felt on the

³⁶ *National Parts Warehouse, et al.*, *supra* n. 3, at 17, 18 [63 F.T.C. 1692, 1725, 1726].

³⁷ See *The Dayton Rubber Co.*, *supra* n. 10, at 5 [66 F.T.C. 423, 455]; *Purolator Products, Inc.*, Docket No. 7850 (1964), *aff'd*, *Purolator Products, Inc. v. Federal Trade Commission*, 352 F. 2d 874 (7th Cir. 1965), and cases cited therein, a tp. 8 [65 F.T.C. 8, 27].

³⁸ For example, see *E. Edelman & Company, v. Federal Trade Commission*, 239 F. 2d 152, 154, 155 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958).

³⁹ See *Rowe, Price Discrimination Under the Robinson-Patman Act* (1962), p. 181.

⁴⁰ Tr. 2033-35; 2040.

sellers' and manufacturers' level of distribution, as well as on the level of the respondent jobbers and their competitors. The record on remand tends to substantiate this allegation. The evidence rather clearly suggests that once a manufacturer has granted the warehouse distributor discount to the group, he in effect has secured a captive market which it may be very difficult, if not impossible, for his competitors to penetrate. In this connection, a warehouse distributor in the area testified, and this is apparently the general experience, that he is in a position to sell to SCJ's members only if the respondent group does not have a particular line or if he sells a competing line, if that line has such customer acceptance that the respondent jobbers must stock it.⁴¹ In short, all things being equal, if a manufacturer's line has not been accepted by SCJ by virtue of the discriminatory discount granted, he will be unable to sell to the respondent group's members. By the granting of the warehouse distributor discount, SCJ's suppliers have in effect walled off in the southern California area a market worth some \$3,500,000 in 1963. Should the practice become prevalent in the industry, it cannot but have severe effects upon the competitive structure of manufacturing and distribution of auto parts over and above the effect on jobbers competing with the members of SCJ and other buying groups.

Further, the record makes it clear that the warehouse distributor discounts granted SCJ must also have an adverse impact on the competitive fortunes of the jobber customers of warehouse distributors. This, in turn, undoubtedly has the tendency to impair the business of these wholesalers; obviously, the economic well-being of a warehouse distributor and his customers are intertwined. Again it is clear that if as a result of such discriminatory practices the auto parts suppliers granting such price differentials can segmentize a substantial part of the market in the case of a buying group such as SCJ, this will impair the ability of warehouse distributors to sell competing lines. This in turn may well mean that auto parts suppliers dependent for their distribution on warehouse distributors will be at a further disadvantage in striving for their share of the market with those auto parts suppliers favoring SCJ and other similar buying groups with a discriminatory grant of the warehouse distributor discount challenged here.

In conclusion, respondents' reliance on Section 4 of the Robinson-Patman Act is misplaced. The Commission does not seek to prevent the distribution of earnings by cooperatives as authorized by that

⁴¹ Humphries, tr. 1620, 1621.

statute.⁴² But the statutory exemption extends only to the distribution of such earnings which are the fruits of lawful activity.⁴³ The statute does not, as respondents' argument implies, confer upon organizations such as those of respondents blanket exemption from the Robinson-Patman Act nor "does [it] permit a cooperative to violate Section 2(f) even though its savings through receipt of discriminatory prices are passed on to its members."⁴⁴

Finally, turning to the order in this case, it appears that a number of the respondent stockholder jobber members of SCJ have severed their connection with the group since the first set of hearings were held in 1959. No findings were made by the hearing examiner or proposed by counsel setting forth whether these jobbers no longer connected with SCJ had left the group before or after the Commission's order of remand on January 17, 1963. The Commission has determined that the order, insofar as it relates to the warehouse distributor discount, should run against those jobbers named as respondents by the complaint who were members of the group after the order of remand. This seems the most equitable result, since the determination as to the legality of the receipt of warehouse distributor discounts must primarily be made on the basis of the evidence adduced on remand. Accordingly, the order accompanying this opinion provides that those respondents named in the complaint who subsequently severed their connection with SCJ prior to the order of remand on January 17, 1963, may request that the Commission dismiss the complaint and order as to them insofar as they relate to the receipt of warehouse distributor discounts.

Commissioners Elman and Jones dissented and have filed dissenting opinions.

DISSENTING OPINION

DECEMBER 17, 1965

By ELMAN, *Commissioner*:

I

The starting point in this case—which immediately distinguishes it from all other auto parts group-buying cases decided by the

⁴² The Act states in pertinent part:

"Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchasers or sales from, to, or through the association."

⁴³ *The Competition Of Cooperatives With Other Forms Of Business Enterprise*, H. Rep. 1888, 78th Cong., 2d Sess. (1946), p. 38.

⁴⁴ *American Motor Specialties Co., Inc., et al. v. Federal Trade Commission*, 278 F. 2d 225, 229 (2d Cir. 1960), *cert. denied*, 364 U.S. 884 (1960).

Commission, including the recent *NPW*¹ case—is that SCJ is not a sham or a phony device for obtaining unjustified price concessions. SCJ is a legitimate warehouse distributor performing the same marketing and distribution functions as other warehouse distributors. All other warehouse distributors receive a discount from the manufacturers—usually a 20% reduction from the net price to the jobber—as compensation for performance of these functions; and the Commission does not raise, and never has raised, any question about it. In this case, the Commission holds for the first time that a legitimate warehouse distributor cannot lawfully receive the functional discount that all other warehouse distributors receive, even though it performs the same warehouse-distribution functions they do.

The basis of the Commission's decision is clear and simple: SCJ is a cooperative owned by jobbers. Because its members are jobbers selling in competition with other jobbers, SCJ is treated by the Commission as if it were a jobber. The fact that it is a legitimate warehouse distributor, and that jobbers do not perform the functions that SCJ performs as a warehouse distributor, is ignored by the Commission. The inevitable result of the decision is that SCJ and other cooperatives like it will have to go out of business as warehouse distributors. A warehouse distributor cannot continue in business if it is not compensated for performing its marketing and distribution functions.

The implications of the Commission's decision are most disturbing. I am sure that the Commission has no such desire or purpose, but the inevitable effect of its decision here will be to cripple the operation of cooperative organizations generally. In many industries—the food industry is perhaps the most familiar example—small businessmen have voluntarily joined together to pool their investments and to establish and patronize their own cooperative enterprise. Faced with the competition of large national chains and other mass buyers, small retailers—in an effort to reduce their costs—have formed cooperatives to engage in collective buying, warehousing, and distribution functions. A wholesale organization owned cooperatively by a group of retailers is no less a *bona fide* wholesaler because of its cooperative ownership. Why, then, should the cooperative be compelled to pay a higher price for its merchandise than other wholesalers on the same level of distribution? Why should there be such a price discrimination against cooperatives, which destroys their very reason for existence?

¹ *National Parts Warehouse*, Docket No. 8039 (decided December 16, 1963) [63 F.T.C. 1692], *aff'd sub. nom. General Auto Supplies, Inc. v. F.T.C.*, 346 F. 2d 311 (7th Cir. 1965).

A cooperative may be able, because of its manner of operation, to eliminate or reduce distribution costs. For example, a cooperative may be able to achieve substantial savings by eliminating promotional or other selling activities not required by its customer-members. But is it not the goal of the antitrust laws that economic resources be utilized to utmost advantage, and that the resultant savings be passed on to the consuming public? To increase efficiency and decrease costs of distribution is in the public interest. Cooperative organizations which can achieve these public benefits should be encouraged, not discouraged, by antitrust enforcement agencies.

Needless to say, the formation of a middleman cooperative is not welcomed by other unintegrated middlemen who thereby lose the business of the cooperative's members. Unintegrated warehouse distributors prefer to be insulated from the competition of the cooperative—and it is they who have been the only complainants in cases like this. While the Commission, in order to justify a conclusion of illegality, finds injury to so-called direct-buying jobbers, there is no reason to believe, on the basis of this record or the records in other auto parts cases, that in reality these direct-buying customers of the manufacturer are not well able to take care of themselves competitively. Any injury to direct-buying jobbers is merely theoretical and—as in this case—entirely undocumented on the record. The real economic injury which may result from the operation of a cooperative warehouse distributor like SCJ is a loss of business by competing unintegrated warehouse distributors.

Thus, the question before the Commission, as I see it, is whether we should satisfy the desire of unintegrated warehouse distributors to be shielded from the competition of cooperatives which can perform warehouse—distribution functions more efficiently and economically. Or, to put it another way, the question is whether jobbers in the automotive parts industry—and, ultimately the public—are to be forever compelled to pay the higher costs of an existing stratified distribution system, and to be denied the price savings and other benefits that a cooperative organization can produce.

II

In reversing the Commission's first decision in this case, the Court of Appeals was principally troubled by the Commission's apparent disregard of the "great deal of evidence indicating that the warehouse operation of SCJ constituted a functional equivalent of the service rendered for manufacturers by other warehouse dis-

tributors, and constituted a function which the manufacturers otherwise would have had to provide at their own expense" (*Alhambra Motor Parts v. F.T.C.*, 309 F. 2d 213, 217). It was primarily to receive the benefit of the Commission's "accumulated experience" in assessing the "economic and legal significance" of these critical facts, which distinguish this case from *NPW* and the earlier group-buying cases,² that the Court of Appeals remanded this case to the Commission. But, on the Commission's view of the law, it is immaterial whether "the warehouse operation of SCJ constituted a functional equivalent of the service rendered for manufacturers by other warehouse distributors." No matter how effectively SCJ performs this warehouse-distributor function, today's decision will put this cooperative, and others like it, out of business. In my view, the Commission has not only made bad law (on the basis of bad economic policy) but has disregarded the mandate of the Court of Appeals.

On remand, the hearing examiner confirmed the full validity of the Court of Appeals' premise that SCJ genuinely performed substantial distribution services equivalent to those performed by other warehouse distributors. He found that "looking at its operations from the point of view of whether SCJ is substantially performing a warehouse distributor's function for the manufacturers whose lines it carries, it must be concluded that it does" (Initial Decision on Remand, p. 1061).

As Commissioner Jones has demonstrated, it is essential to define the economic function for which the manufacturer has chosen to compensate the conventional warehouse distributor. While the Commission conceives of that function as a well-defined set of tasks, the facts in this and other cases before the Commission indicate that the warehouse-distribution function is neither precise nor sharply defined in the industry, and that firms qualify as "warehouse distributors" even though they perform only some, not all, of the various tasks that other warehouse distributors perform. The fundamental question is not how particular warehouse distributors operate, but whether, whatever the particular mode of operation, they fulfill the broad distribution function for which the manufacturer is prepared to compensate them.

In marketing his product, every automotive parts manufacturer must take into account a single important fact: the primary prob-

² See, e.g., *Mid-South Distributors v. F.T.C.*, 287 F. 2d 512 (5th Cir. 1961), *cert. denied* 368 U.S. 838; *American Motor Specialties v. F.T.C.*, 278 F. 2d 225 (2d Cir. 1960), *cert. denied* 364 U.S. 884; *E. Edelmann & Co. v. F.T.C.*, 239 F. 2d 152 (7th Cir. 1956), *cert. denied* 355 U.S. 941.

1039

Dissenting Opinion

lem of distribution in this industry is to satisfy the demand of the repair market for instant availability of thousands of parts.³ No matter how superior a manufacturer's product, and no matter how intensively it has been promoted, if the part is not available when needed, a sale will be lost to a competing manufacturer whose part is available. The ordinary retailer's facilities are too limited to maintain the kind of inventory necessary to satisfy this need. He must look to some source which has the facilities for making available a broad number of product lines adequate to satisfy everyday needs quickly. This function is ordinarily performed for the retailer by the jobber. Usually, however, the jobber's storage facilities are also quite limited. To maximize his ability to meet the demand for ready availability, it is preferable if he too had some central supply point which by virtue of even broader and deeper inventories and adequate delivery facilities can reduce or eliminate the delays and burdens involved in ordering the great variety of necessary parts directly from many different manufacturers. This basic function is performed by the warehouse distributor.

The performance of this function is of crucial importance to the manufacturer. To the manufacturer, the value of selling through a warehouse distributor is not merely that it relieves him of the substantial costs and burdens, including credit risks and billing, of entering into numerous, small transactions with the jobber. Nor does the warehouse of the warehouse distributor represent merely a place where the manufacturer can stock an inventory of his product. It is essentially a central supply point, assembling the variety of parts necessary to satisfy quickly the everyday needs of jobbers. The greater the depth and breadth of the inventory stocked by the warehouse distributor and the greater its facilities for providing instant availability, the more attractive a central purchasing point it becomes for the jobber, and therefore the more desirable a marketing outlet it becomes for the manufacturer. This redistribution function performed by the warehouse distributor enables the manufacturer to obtain a greater sales volume than could be obtained through sales to direct-buying jobbers only. Representation of his product on the shelves of a warehouse distributor is thus a critical factor in the manufacturer's ability to market and promote his product.⁴

To varying degrees, the warehouse distributor also supplements the sales activities of the manufacturers. Some of the testimony

³ Davisson, *The Marketing of Automotive Parts* 6 (1954).

⁴ *Id.* at 758-59, 774, 779-81.

seems to show that the manufacturer incurs the same selling effort in selling to a direct-buying jobber as in selling to a customer of a warehouse distributor or a jobber member of SCJ. However, as Commissioner Jones points out, this testimony cannot be taken literally or in isolation from the context of the entire record. It would lead to the unacceptable conclusion, in contradiction to the great bulk of evidence in the record, that the services performed by both the warehouse distributor and SCJ have no value to the manufacturer. Because of the vast number of accounts serviced, the manufacturer may not be able to provide the intense cultivation of its accounts which might otherwise be desirable. The warehouse distributor in supplementing the manufacturer's selling efforts may enable the manufacturer to achieve a greater sales volume from its indirect accounts, which the manufacturer unaided might not achieve.

The degree and manner in which warehouse distributors perform this function varies considerably. The record here shows that some conventional warehouse distributors have no salesmen; another has only one salesman to sell to 120 customers. Indeed, it is unrealistic, in defining the nature of the sales assistance provided by the warehouse distributor, to segregate the central marketing facility provided by the warehouse distributor from activities more conventionally referred to as selling. One probable advantage of selling through any warehouse distributor, regardless of the amount of actual selling activity he performs, is that the manufacturer gains access to a relatively stable group of jobber-customers of the warehouse distributor, who are bound to a particular warehouse distributor by habit or convenience.⁵ As this record shows, others are bound to warehouse distributors by more formal ties, such as franchises. These indirect buying jobbers are thus to some extent "pre-sold." And, as I have already pointed out, the central marketing facility of the warehouse distributor, by providing the essential instant availability, is a crucial selling aid to the parts manufacturer. As several manufacturers testified, the function of the warehouse is not limited to inventory but might be properly classified as promotional.

Viewed against this background, the hearing examiner was unquestionably correct in concluding that SCJ performs substantially the same function as other warehouse distributors, and that these services it provides the manufacturer are equivalent in value to those rendered by the conventional unintegrated warehouse dis-

⁵ *Id.* at 780.

tributor. SCJ's warehouse maintained an inventory sufficiently broad and deep to perform the essential central marketing function and to provide the instant availability so important to the promotion of the manufacturer's product. By virtue of its large fleet of trucks, its capacity to provide instant availability appears to have surpassed that of most conventional warehouse distributors.⁶

SCJ also performs the selling functions. Since the beginning of 1964, SCJ has had a full-time salesman. In addition, its general manager, officers, directors and each of its members engaged in sales activities to promote lines carried by SCJ. SCJ may not have had to perform the sales function in precisely the same way, or to the same extent, as some conventional warehouse distributors did. By its very nature, the cooperative form of organization reduces the costs of selling which would otherwise be incurred by the middleman, since its members are to some extent presold.⁷ But SCJ surely does not lose its status as a legitimate warehouse distributor because it performs more efficiently and economically than others do. There is no dispute, too, that SCJ also performed the central billing and credit functions of the conventional warehouse distributor. Looking at results, SCJ performed a function whose character and value to the manufacturer was substantially equivalent to that performed by the conventional warehouse distributor. Accordingly, I entirely agree with Commissioner Jones' conclusion (p. 1112): "Performing the same functions as warehouse distributors, SCJ was entitled to receive the same discount."

III

In remanding the case, the Court of Appeals asked three specific questions: (1) In view of the fact that SCJ performed a genuine economic function, was it appropriate to pierce the corporate veil and label its jobber members as "the purchasers" within the meaning of Section 2(a) of the Robinson-Patman Act? If SCJ, rather than its jobber members, was the purchaser, then the Court of Appeals was of the view that there would have been no discrimination in price between purchasers, and hence Section 2(a) would be inapplicable. (2) Since SCJ performed substantially the same economic function as a conventional warehouse distributor, could

⁶ While SCJ made many of its purchases from manufacturers' local warehouses, so did conventional warehouse distributors. SCJ's warehouse did not duplicate the manufacturers' local warehouse. It performed an entirely different function. At all events, it supplemented rather than duplicated the inventory space maintained by the manufacturers.

⁷ As I indicated earlier, even this difference may be more theoretical than real since the jobber customers of conventional warehouse distributors are also presold to an important degree. See p. 1094 *supra*.

the Commission satisfy its burden under Section 2(f) of proving that the SCJ members had reason to believe that the discounts they received were illegal, *i.e.*, that they were not cost justified?⁸ (3) Was the distribution to the jobber members of the net gain from the functional discounts received by SCJ within the apparent protection of Section 4 of the Robinson-Patman Act?⁹ In view of these threshold questions, the Court of Appeals did not consider the question of whether the discounts paid as compensation for the functions performed by SCJ were likely to cause competitive injury.

While the court in remanding the case directed the Commission to deal with these specific issues, the court's basic concern, it is clear, was not with any narrow legal errors that the Commission might have committed. The purpose of the remand, as I read it, was much broader in scope: essentially the court was asking that the Commission use its "accumulated experience" to assess the "economic and legal significance" of the fundamental fact which differentiated this case from all previous group-buying cases—that the function performed by SCJ was the substantial equivalent of that performed by conventional warehouse distributors, and that the discount it received was no different from the discount received by conventional warehouse distributors as compensation for the performance of those functions. In the circumstances, a narrow construction of the remand order of the Court of Appeals would be inappropriate. The order of remand is, of course, no bar to such broad review.¹⁰

As Commissioner Jones and the hearing examiner point out, since SCJ performed the same function as conventional warehouse distributors, SCJ and its members were entitled to assume that

⁸ The Commission's burden under Section 2(f) was defined in *Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61, 80, as follows:

"* * * The Commission need only show, to establish its prima facie case, that the buyer knew that the methods by which he was served and quantities in which he purchased were the same as in the case of his competitor. If the methods or quantities differ, the Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings * * *."

⁹ Section 4 of the Robinson-Patman Act provides:

"Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association."

¹⁰ See *e.g.*, *Sun Oil Co.*, F.T.C. Docket No. 6641 (Order of March 25, 1965), where the Commission dismissed the complaint without ruling on the merits of the issues specified in the order of the Court of Appeals reopening the case after the Supreme Court's decision in *F.T.C. v. Sun Oil Co.*, 371 U.S. 505. *Cf. F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374; *S.E.C. v. Chenery Corp.*, 332 U.S. 194; *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134; *Northeast Airlines v. C.A.B. (III)*, 345 F. 2d 488 (1st Cir. 1965).

payment of the conventional warehouse distributor rebate to SCJ was cost justified—or at least they had no reason to think otherwise. The precise amount of the savings to the manufacturer was not shown, but the Commission's conclusion on this record that they were not equal to the amount of the discount is based on speculation, not record facts, or facts which reasonably could have been known to SCJ members. Commissioner Jones is entirely right in concluding that the Commission's burden under Section 2(f) has not been met.

This analysis, while it may dispose of the present case, does not, however, answer the basic question of the legality of granting cooperatives like SCJ the warehouse distributor's rebate. I would not allow the vital economic issues involved in this case to turn on the differing standards of proof under Sections 2(a) and 2(f). It is very unlikely, as the Commission points out (p. 1086, n. 35), that the functional discount whether paid independent warehouse distributors or SCJ will be, or could be, cost justified. A discount paid as compensation for the performance of a genuine economic function will, in addition to the cost savings to the manufacturer, reflect a reasonable rate of return for the distributor who has invested in the facilities necessary to perform the function for the manufacturer. Yet, as currently interpreted by the Commission, the cost justification proviso would make no allowance for such a return. Second, in an industry like the automotive parts industry where a manufacturer's success in marketing his product depends so uniquely on inducing others to perform broad redistribution and marketing functions, cost-savings are likely to be only one factor determining the size of functional compensation. The ultimate price necessary to induce performance of the desired functions is almost certain to exceed the manufacturer's cost-savings in utilizing a particular channel of distribution (Davisson, *op. cit. supra* note 3, at 910-14, 938-52).

Of paramount importance, however, for cooperatives in this industry and elsewhere is the fact that satisfying the rigorous standards of proof of the cost justification proviso is so difficult and entails such risks that a requirement that functional compensation to cooperatives be cost justified will only discourage experimentation with that channel of distribution altogether.¹¹

This, indeed, has been precisely the effect which the Commission's decisions have had in the automotive parts industry. Invariably, compliance with the Commission's orders has meant the

¹¹ See Dirlam & Kahn, *Fair Competition: The Law and Economics of Antitrust Policy* 132-33 (1954); Edwards, *The Price Discrimination Law* 344-47 (1959).

cessation of experiment with forms of distribution which bypass conventional middlemen. The predictable effect of this decision, as was the actual effect of the Commission's decision in *National Parts Warehouse*, will be to drive the cooperative out of the warehouse distribution business altogether. The result will be to perpetuate a stratified system of distribution, in which the unintegrated warehouse distributor is given a privileged sanctuary, protected from any competition from cooperatives.

The Commission is well aware of the substantial contributions to competition which cooperatives have made in other areas. In the food industry particularly, cooperative organizations have been a principal means of enabling small retailers to compete with giant chains. Today's decision threatens to drive these cooperatives out of business. In reaching its decision here, the Commission ignores a fundamental question: Was the Robinson-Patman Act intended to impose upon this industry, or any other, a rigid, unchangeable pattern of distribution, and to discourage legitimate efforts to reduce the costs of such a stratified system of distribution through the formation of cooperatives?

The Commission summarily rejects respondent's reliance on Section 4 of the Robinson-Patman Act, stating that "the statutory exemption extends only to the distribution of such earnings which are the fruits of lawful activity," and that it does not confer upon cooperatives a "blanket exemption from the Robinson-Patman Act" (p. 1089). But this simply begs the question—which is whether cooperatives enjoy, by virtue of Section 4, a limited and partial exemption, operative where the distribution to its members represents an earned functional compensation equal to the compensation given conventional middlemen for the performance of the same function. In my view, while its precise meaning is unclear,¹² unless Section 4 provides such an exemption it has no meaning at all. If every rebate earned by a cooperative and distributed to members must meet all the tests of the Robinson-Patman Act, regardless of how genuine a function the cooperative performs, Section 4 would have been unnecessary. Under the Commission's view, Section 4 merely says: "If the rebate is lawful, it's lawful." I

¹² [T]he legislative history reflects a pervasive but ineptly codified intention to preserve the benefits enjoyed by co-op members through favorable buying arrangements. At their initiative, a classification provision was deleted which would have treated co-op affiliated retailers the same as unaffiliated retailers for measuring their legal entitlement to trade discounts. Still, the final statutory test contained only equivocal assurances for the *distribution* of a co-op's benefits to its members, but failed to delineate the extent to which co-ops could continue to obtain purchasing advantages for their membership." Rowe, *Price Discrimination Under the Robinson-Patman Act* 428 (1962).

think this is the very case in which Section 4 was intended to confer a limited exemption from the Robinson-Patman Act.

IV

In my view, the Commission's fundamental error lies in its conclusion, on the basis of this record, that the difference between the price to SCJ and the price to direct-buying jobbers injured, or is likely to injure, competition in the sense with which Congress was concerned when it enacted the Robinson-Patman Act.

Congress, in enacting the Robinson-Patman Act, was concerned with the anticompetitive effects of the big buyer's ability to coerce preferential prices, to the disadvantage of smaller buyers. The hard-core case it envisions is fairly simple. *A* and *B* are two firms operating at a particular functional level, *A* differing from *B* only by virtue of the fact that it is larger than *B*. Solely because *A* is larger than *B* it can coerce sellers to sell to it at a lower price than to *B*; it is obviously more desirable to sell to a larger buyer. But *A* can use such a price advantage to drive *B* out of business, or discipline it should it compete too hard. Competition will be injured. To prevent that result the price to *A* and *B* must be the same, unless, of course, the advantages inherent in selling to a large purchaser like *A* effect cost savings to the seller, in which case the price to *A* may be reduced to the extent of such savings.

But the circumstances of the present case do not fall within this simple model. First, the distinction upon which the price advantage of the SCJ jobber members rests is not size. Their price advantage derives from their membership in a cooperative organization which performs, and is consequently compensated for the performance of, genuine and valuable economic functions which would otherwise be performed by conventional warehouse distributors. Nor is the value to the manufacturer in selling to SCJ limited to the kinds of cost savings which inhere in sales to big buyers; rather, it lies in the performance by SCJ of a critical marketing and distribution function.

Second, the favored SCJ jobbers are not, so far as appears, large companies, even by this industry's standards.¹³ SCJ as a whole

¹³ SCJ's total sales in 1963 were only \$3.5 million. This represented about 50% of the 68 jobber members' total requirements, which would indicate that the average sales of individual jobber members of SCJ are little more than \$100,000 per year. According to Davisson, *The Marketing of Automotive Parts* 760 (1954), auto-parts wholesalers (*i.e.*, jobbers and warehouse distributors) having annual sales of \$100,000 to \$500,000 are medium-sized. The members of SCJ would rank at the bottom of the medium-sized firms according to this scale. It is typical of the Commission's activities in this area that even where, as here, it would have been a simple matter to make a factual determination of the size of the average SCJ member, it must instead rely on vague testimony to the effect that SCJ members are generally "substantial."

may appear to be a relatively large aggregation of resources for the industry, but a cooperative, which involves no pooling of profits or losses, cannot be equated to a fully integrated firm of the same size. It is hardly realistic to regard the 68 jobber members of SCJ as the kind of "large buyers [who] gained discriminatory preferences over smaller ones by virtue of their greater purchasing power" (*F.T.C. v. Henry Broch & Co.*, 363 U.S. 166, 168), and who can by virtue of their size use their price advantage to club or intimidate their competitors. We do not know whether SCJ members are any larger than competing direct-buying jobbers, who are supposedly injured by the rebates paid SCJ. The present record reveals nothing about the direct-buying jobber segment of the industry. We do not know whether these firms are big or little, multiplying or declining, competitively weak or strong.

The circumstances in this case differ in yet another, and certainly the most important, respect from the simple model. Competition is not, as in our simple model, competition at one level only. It encompasses competition at the warehouse distributor level as well. And we cannot legitimately confine our examination of competition to competition at the jobber level only. The consequence of denying SCJ the functional compensation paid to unintegrated warehouse distributors, and limiting its compensation solely to those costs which, under the standards of the Robinson-Patman Act, can be shown to have been saved to the manufacturer, is to prevent SCJ from competing with these other warehouse distributors. That competitive effect, no less than the effect on competing jobbers, should not be ignored by the Commission.

Competition, in the antitrust sense, may be truly injured by a policy of law enforcement which preserves intact an inefficient, uneconomical and stratified system of distribution, and prevents the elimination of unnecessary middleman costs through the organization of cooperatives.¹⁴

¹⁴ As Corwin Edwards, a distinguished former Chief Economist of the Commission, has pointed out in this context:

"Students of marketing generally agree that progress in distribution has lagged behind progress in manufacturing, that distributive methods are often wasteful, and that the opportunities to improve the efficiency of distribution are substantial. Accordingly, it is important to encourage rather than discourage experiment with distributive methods and distributive channels. Among the possibilities that might be explored are change in the number of successive intermediate distributors and in the vertical extension of each, change in the kind and amount of distributive service rendered, and change in the number and variety of different distributive channels used. Prior to experiment, it would be rash to assert that the best system of distribution for industry generally or for a particular industry would be attained by an increase or decrease in vertical integration, by greater or less specialization in distributive function, by uniform or diverse methods of distribution. What is needed is opportunity to try various methods in competition with one another." Edwards, *The Price Discrimination Law* 344 (1959).

The Commission wholly fails to make a realistic appraisal of the impact which its decision will have on competition in this broader and fundamental sense. It chooses instead to rest its appraisal upon speculative hypotheses which it makes no attempt to verify in the light of actual competitive conditions. Thus, the Commission assumes, solely on the basis of a mechanical verbal formula, that the price advantages accruing to SCJ jobber members are likely to cause injury at the jobber level. The dogma is that in an industry "characterized by keen competition and small profit margins" substantial price differences will necessarily injure competition (p. 1087). The Supreme Court has told this Commission not to follow such a mechanical approach in determining competitive effects under the price discrimination law. "In appraising the effects of any price cut * * * both the Federal Trade Commission and the courts must 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.

Here the Commission's dogma is in direct conflict with reality. For price competition at the jobber level of this industry, as the Commission is well aware from its experience with other cases in this industry, far from being "keen," is virtually nonexistent. The record here tells no different story. Representatives of the complaining warehouse distributors themselves informed the Commission that there is no price competition because all jobbers sell at the jobber list price established by the manufacturer.¹⁵ Nor have we any reason to believe that non-price competition, any more than price competition, plays an important role in the auto parts business, at least at the jobber level. So far as appears, jobbers in this industry do not compete vigorously with one another in any respect, but stay within their own territories and service their own customers.¹⁶ This is a plausible hypothesis, at least, given the unique degree of control that the manufacturers exercise over every level of distribution. The manufacturers seem interested not in vigorous intrabrand competition, price or otherwise, but in the orderly, and indeed regimented, distribution of their products.

The Commission purports to protect "competition" at the jobber

¹⁵ Brief of Automotive Warehouse Distributors Association, Inc., As Amicus Curiae in Support of the Complaint, pp. 46-48.

¹⁶ "As far as I can say, we in Sapiro Auto Parts Company more or less mind our own business, and we are not interested in what Clinton Squares Auto Parts gets, or what they do, because there seems to be enough business in the territory for all of us, and we all get our share of the business, and we all make our profit." Quoted in *Moog Industries, Inc.*, 51 F.T.C. 931, 957 (dissenting opinion), *aff'd* 238 F. 2d 43 (8th Cir. 1956), *aff'd*, 355 U.S. 411.

level. But the real problem with which any agency charged with enforcing the antitrust laws should be concerned here is that there is at the present time no real "competition" at the jobber level, that "small profit margins" may very well be the principal inhibition on jobber competition, and that it is vital to find ways of stimulating and restoring competition at the jobber level. Rather than condemning, as injurious to competition at the jobber level, the price advantages obtained through the economies and efficiencies of cooperative organizations, those advantages should be looked upon as a hopeful means of invigorating competition.

The Commission's "finding" of competitive injury at the manufacturing and warehouse distributor level is based on sheer surmise. There is simply no evidence in the record demonstrating injury to competition at either of these levels. The Commission hypothesizes that (1) a manufacturer who sells his line to SCJ substantially forecloses other manufacturers from selling to SCJ jobber members, and that (2) conventional warehouse distributors are also foreclosed from making sales to SCJ jobber members, because in both instances SCJ members prefer to purchase from the cooperative. These conclusions simply reflect the Commission's failure to appreciate the role of cooperatives. The very purpose of every cooperative is to make it advantageous for its members to purchase from the cooperative rather than from traditional middlemen. The Commission in finding that advantage, without further analysis, to be the cause of competitive injury is in effect laying down a *per se* rule that cooperatives are inherently illegal. Was this the intention of Congress in enacting the Robinson-Patman Act? And how can one reconcile this with Section 4 of the Robinson-Patman Act?

By their very nature, cooperative organizations have an advantage over the traditional middleman operating at a single level of distribution; and its members necessarily have an advantage over non-member competitors at the lower level of distribution. But these advantages cannot be condemned as anticompetitive unless we are also to assume that Congress intended a "quiet life" for particular classes of distributors and intended to prohibit the advantages which cooperatives can produce. Changes in methods of distribution, such as those flowing from the formation of cooperative organizations like SCJ, are certain to have an impact upon more traditional distributors at various levels of the distribution system. But the Robinson-Patman Act is not an adequate tool for assessing the competitive consequences of these changes. Professor Edwards has pointed out:

The narrow concept of injury to competition is inappropriate in appraising the impact of changes in distributive channels. Moreover, where channels of distribution are changing, the effect of the change on competition in the market sense cannot be understood without analysis of the forces at work at two or more levels, including the selling side of the market as well as the buying side. The principal advantage of the law of price discrimination in the policy of price discrimination, as compared with the Sherman Act [or Section 5 of the Federal Trade Commission Act], is that it isolates a relatively small body of facts and permits action about them before their ultimate ramifications are explored. In considering the impact of changes in distributive methods, this characteristic is, on balance, a defect. Sound public policy calls for more comprehensive analysis.¹⁷

Professor Edwards' analysis has particular application to the cooperative organization. Cooperatives, in their normal operation, promote competition and advance the goals of the antitrust laws. In some circumstances, they are the only remedy for the kind of undesirable competitive imbalances between large and small buyers which the Robinson-Patman Act, because of its narrow scope, cannot reach. For example, if suppliers choose to offer a single price and sell only to those who purchase in large quantities, the Act would not help those smaller purchasers who could not buy directly from the supplier in the required volume. Members of this latter group, for their own competitive survival, may be compelled to join together in a cooperative organization to qualify for the lower price. In the automotive parts industry, the economies of distribution and marketing achieved by cooperatives such as SCJ may substantially invigorate competition at the jobber level.

At the same time, the organization of cooperatives is unlikely to produce anticompetitive effects. Cooperatives entail only limited and partial integration—individual members remain separate entities free to compete with one another, and neither pool profits nor share in expenses. Cooperative organization does not, therefore, confer upon members the kind of market power likely to enable them to use the economic advantages derived from membership in the cooperative to injure competition. Moreover, the kind of advantage possessed by members of cooperatives can readily be made available to all. It is for these reasons, wholly ignored by the Commission, that Congress in Section 4 of the Robinson-Patman Act made special provision for cooperatives which, like SCJ, perform genuine marketing functions that not only are valuable to their members but serve the public interest in promoting efficiency and economies of distribution, thereby enlarging rather than restricting competition.

¹⁷ Edwards, *op. cit. supra* note 14, at 347-48.

Dissenting Opinion

68 F.T.C.

DISSENTING OPINION

DECEMBER 17, 1965

BY JONES, *Commissioner*:

I do not agree with the majority's conclusion that SCJ has violated Section 2(f) of the Robinson-Patman Act because, in my judgment, SCJ performed a valid warehouse distributor function and was entitled to assume therefore that it was entitled to the same discount which its suppliers paid to other warehouse distributors.

I

The Commission has been involved with the problems posed by the emergence of buyer groups in the auto parts replacement market for the past decade. To date, it has uniformly decided that the payment of a warehouse distributor discount to the jobber buying groups involved in these cases constituted an illegal price discrimination.

The facts respecting the operation of the buyer groups in all of these cases except the recent NPW decision,¹ are readily distinguishable from SCJ's operations. The operations of SCJ are substantially similar to those of the buying group involved in the NPW case², as to which the Seventh Circuit has just affirmed the Commission's conclusion that the receipt by NPW of a warehouse distributor discount violated Section 2(f) of the Robinson-Patman Act. The Seventh Circuit agreed with the Commission's conclusion in that case, first, that the essential purpose of a warehouse distributor was to sell and that NPW did not sell and, second, that NPW's discount was not cost justified and that NPW's members should have known this.

The facts as carefully detailed by the Hearing Examiner, in my judgment, demonstrates quite clearly that while the essential purpose of a warehouse distributor may be "to sell," selling on the part of warehouse distributors involves a comprehensive function embracing a series of selling services consisting of centralized billing, credit, warehousing and sales services. The record in this case

¹ *General Auto Supplies, Inc. v. Federal Trade Commission*, Dkt. 8039 (1963), *aff'd*, 346 F. 2d 311 (7th Cir. 1965).

² The differences in their operations relate to their drop shipments, their sales to nonmembers and their membership policies. Thus, 20% of NPW's purchases were made on a drop-ship basis, whereas by the time of the second hearing in the instant case, SCJ had discontinued all drop-ship orders; SCJ's membership was apparently open to jobbers generally (Tr. 598, 897, 2076), which was not true in the case of NPW. On the other hand, NPW sold to nonmembers, which SCJ did not do.

demonstrates that SCJ in its capacity as a warehouse distributor performed this comprehensive selling function in all respects in a manner substantially identical to unintegrated warehouse distributors. The record in this case also clearly demonstrates that these warehouse distributor functions effect substantial savings to manufacturers. Accordingly, irrespective of what the record facts showed in NPW, I am of the opinion that SCJ did in fact perform a bona fide warehouse distributor function, that this function effected substantial cost saving for its manufacturer suppliers and that SCJ members accordingly were entitled to believe that the discount which they received was justified by these cost savings.

There is no dispute on the record that respondent was established by a group of automotive parts jobbers for the express purpose of obtaining the benefits of the discount paid to warehouse distributors in order to lower their costs of purchasing parts. It is equally undisputed that respondent continued to modify and refine its organization and operations as the case law respecting buying groups developed through the Commission's decisions in these automotive parts cases and in respondent's own case before the Commission. As a result, respondent stands before us today as a corporation which owns a good-sized warehouse, maintains a full-time salesman, carries some 75 lines of auto parts, does no drop shipments, and places orders and takes delivery at its warehouse of the parts subsequently sold to the garage and service station trade by its members. Respondent does not sell parts to nonmembers; it carries only those auto parts lines approved by a majority of its members; its members continue to purchase some of their auto parts requirements from other warehouse distributors or directly from suppliers and, most important, the discounts which it receives on its parts purchases from the manufacturers continue to be credited directly to its members' accounts after appropriate deduction of its expenses have been made. Respondent is apparently open to other jobbers desiring to belong (Tr. 598, 897, 2076).

Thus SCJ's operations are conducted on two distributive levels. At the buying level, vis-a-vis the suppliers, SCJ performs all of the functions typically performed by warehouse distributors in this industry. At the selling level, its members are engaged in the sale of parts to the service stations, garage owner retail consumer trade in competition with other jobbers not affiliated with SCJ.

The majority of the Commission, after deciding that SCJ members are the real purchasers of the auto parts sold by manufacturers

to SCJ,³ assert that resolution of the remaining issue as to whether payment by those manufacturers of a warehouse distributor discount to SCJ constituted an illegal price discrimination must be determined by a comparison of these manufacturers' selling costs to SCJ members and to direct buying jobbers who did not receive a comparable discount (Op. p. 1078). In its comparison of these costs, in the areas of sales expense, freight and delivery costs, expenses of publishing and distributing catalogues and price lists and billing and credit, the majority treats as wholly irrelevant and insignificant the fact that these costs, with the exception of billing and credit, are incurred by manufacturers in connection with *all* of their ultimate jobber customers whether they purchase from the manufacturers directly or indirectly from a warehouse distributor or as part of a warehouse distributor buyers group such as SCJ. "Billing and credit" costs which are not incurred by manufacturers in their sales to SCJ and regular warehouse distributors but only as respects direct purchasing jobbers, are disregarded as "minor" and as "relatively insignificant" (Op. p. 1080). Warehousing is suggested to be a service performed for the buyer rather than the seller and in any event if this is not true it is dismissed by the majority as an item which does not relieve manufacturers of expense to "any appreciable extent" (Op. p. 1081). The record facts reflecting the services performed by warehouse distributors and by SCJ on behalf of manufacturers are wholly ignored in the majority opinion.

By viewing the record in this manner, the majority reaches the conclusion that the manufacturers' costs of selling to SCJ and to direct purchasing jobbers are identical and hence by accepting a warehouse distributor discount SCJ was receiving an illegal price discrimination which it knew or should have known could not be cost justified.

My study of the record and of the applicable case law convinces me that the majority decision is in error. Moreover, the purport of the majority decision would seem to discourage—if not prevent entirely—companies which function on one level of distribution from assuming the functions of companies on another level of distribution and from being compensated for the performance of those

³ I agree with the majority that SCJ must be regarded as competing with direct purchasing jobbers and with the jobber customers of warehouse distributors. While I do not believe it is necessary to pierce the corporate veil and rule that SCJ was not the real purchaser, I have little problems in reaching the same result since the first genuine commercial sale after the purchase of the goods by SCJ was by the individual jobber member of SCJ to the garage and service station trade. Hence, if there is competitive injury here from the difference in price paid for the purchase of these parts, it will be felt by the competitors of the SCJ members at the time they resell these parts to the trade.

functions to the same extent as those companies on the other functional level whose services they have copied and assumed. I do not believe that such a result was ever intended by the framers of the Robinson-Patman Act. I am convinced that such an interpretation of its prohibitions on price discrimination would render that Act wholly out of step with today's competitive marketing problems and in no way serves the competitive objectives which that Act was designed to attain.

II

Warehouse distributors grew up originally in response to a crying need by manufacturers, particularly the smaller ones, for a means of servicing all of the myriad of jobbers which emerged as a result of what has been referred to as the "parts explosion." This "parts explosion" resulted in a tremendous increase in the number and type of parts being demanded, in a wide geographic dispersion of jobbers handling them, and in the consequent need for increased warehousing and servicing facilities in order to meet the needs of these jobbers.

Warehouse distributors performed four principal functions for manufacturers: sales and servicing of jobber customers, centralized billing; credit and collection, and the storage or warehousing (including breaking bulk and repacking) of the manufacturers' lines of parts.

The manufacturer and warehouse distributor witnesses testified that these four major functions performed by warehouse distributors effected genuine cost savings to manufacturers in dealing with those jobber customers who purchased through warehouse distributors (Tr. 1086, 1089-91, 1116-1121, 1215-17, 1277, 1294 (Cf. 1303), 1340, 1346, 1389, 1424, 1430, 1457, 1461, 1552-53, 1734-36, 1774, 1778-79, 1833). The evidence also demonstrates clearly that while SCJ is not an exact duplicate of a warehouse distributor, it nevertheless performed a bona fide warehouse distributor function in all significant respects. A brief discussion of each of these warehouse distributor functions will demonstrate the validity of this conclusion.

The warehouse distributor and manufacturer witnesses at the hearing testified that one aspect of their sales functions frequently involves the creation of new business and more importantly the sale of their manufacturers' lines to existing customers.

With respect to the creative selling function of warehouse distributors, it is clear that SCJ expends little time or effort on acquiring or maintaining members, since its existing members are

largely presold by the fact of having joined SCJ and there is no indication that SCJ actively solicits new members. Yet even in this respect, the record indicates that not all regular warehouse distributors engage in creative selling. Some nonintegrated warehouse distributors have only franchised customers, so that to this extent their customers, like SCJ's, are also substantially presold (Tr. 1155). Yet this does not militate against their being validly classified as warehouse distributors and receiving the warehouse distributor discount. Therefore, the fact that SCJ does not perform to any extent this aspect of selling cannot deny it the right to the warehouse distributor discount.

These same manufacturers and warehouse distributor witnesses also testified that to a large extent their major sales efforts were directed towards urging their existing customers to carry their manufacturers' lines (Tr. 1747). Here the record demonstrates that SCJ performs this same function and is active in promoting the lines of the various manufacturers among its members. SCJ members do not purchase all of their requirements from SCJ, and the manufacturers' lines carried by SCJ are not fixed. Thus the manufacturers look to SCJ to do a selling job of a type for them in the sense of persuading its members to carry their line or to increase their purchases of a line, and SCJ does in fact function on this level, canvassing its members on the lines which SCJ should carry and persuading members to increase their purchases of a given line which other members may wish SCJ to handle (Tr. 1937-40, 1958). The fact that prior to the hearing on remand SCJ did not employ salesmen but relied on the selling activities of its manager and on other officials of its own members in no way indicates that in fact its sales activities are minimal. Testimony in the record indicates that the employment of salesmen is not crucial to the carrying out of the sales functions of warehouse distributors. The record demonstrates that there are warehouse distributors besides SCJ who also do not have salesmen and who rely instead on their warehouse manager and company officials to carry out their sales functions just as did SCJ (Tr. 1154, 1244-45, 1346-49). Moreover, one warehouse distributor stated that in his experience, SCJ "sells well" (Tr. 1452). Finally, the record makes it clear that SCJ and regular warehouse distributors do function almost identically as respects the sales and servicing which they perform vis-a-vis their jobbers' customers or members. SCJ, like regular warehouse distributors, distributes to its members manufacturers' catalogs and price lists where those are not distributed directly by

manufacturers to all jobbers; SCJ advises its members on obsolete lines and performs other selling services of this nature.

On the second of the traditional functions performed by warehouse distributors—that of warehousing—the record shows that SCJ's warehouse, inventory and number of lines carried was comparable in size and amount to those of other warehouse distributors, smaller than some and larger than others (Tr. 1375, 1383, 1454-58, 1514-22, 1702, 1797, 1843).

It is not true, as the majority seems to suggest, that warehousing is a function performed for the benefit of the buyers. One of the essential elements in the marketing of auto parts is to provide quick local delivery and to this end local warehouses are crucial. In fact, this need to be close to the demand gave rise to the warehouse distributor distributive level in the first place. To the extent that warehouse distributors or local fee warehouses exist, this warehousing operation reduces the size and number of warehouses which manufacturers must themselves establish.

Nor does the existence of local fee warehouses or SCJ's extended use of them detract from the warehousing function which it performed. The warehouse distributors and manufacturers who testified stated that both SCJ and regular warehouse distributors use local warehouses when necessary (Tr. 1137-40, 1205, 1256, 1357-58, 1404). The fact that regular warehouse distributors preferred not to make steady use of these warehouses because of the reduced discounts paid on such sales undoubtedly explained in part their lower turnover on their inventories when compared with SCJ. But the record indicates that SCJ also incurred a similar reduction in discount when it used a local warehouse. I have no way of determining whether SCJ's higher turnover rate on its inventory was due to its greater use of local warehouse facilities or to its more precise knowledge of its members' needs, or to both (Tr. 1803, 1843, 2080). In any event, assuming that SCJ does make greater use of local warehouses than other regular warehouse distributors, I cannot see that this in any way diminishes the significance of the warehouse operation which it did conduct. Nor can I see the logic of the majority's conclusion that because of such greater use of local warehouses, SCJ's performance of its warehousing function did not save its manufacturers money (Findings, pp. 1124, 1127-1130). In no sense was its warehousing function any different from that of other warehouse distributors. As we noted before, SCJ's warehouse facilities and size of inventory were in all respects comparable to those of regular warehouse distributors.

Nor can I understand the significance of the majority's observation that in effect SCJ's warehousing operation was no different from that of local warehouses. Local fee warehouses performed neither central billing functions nor sales services for its clients. They simply provide a convenient location for manufacturers to provide local storage points for their deliveries where parts can be picked up pursuant to orders placed with the manufacturer and subsequently billed by the manufacturer to the customer. By contrast, both SCJ and regular warehouse distributors performed central ordering and central billing functions. Moreover, unlike local warehouses, both SCJ and warehouse distributors break bulk and repackage to accommodate small orders (Tr. 1340, 1367). Finally, it should be noted that while regular warehouse distributors still engage in a substantial amount of drop shipment orders, thus performing no warehousing function as such on these orders, SCJ at the time of the hearing on remand had abandoned all drop shipment orders so that as of today, it is more truly a warehouse distributor in this respect than regular warehouse distributors.

The manufacturers and warehouse distributors who testified rated their centralized billing and credit function high among the cost saving functions performed by them for their suppliers (Tr. 1457, 1481, 1719, 1835). According to one warehouse distributor, "99½% of the business is built on credit," and he also noted that credit collections may be as low as 60% (Tr. 1540). There can be little doubt that both warehouse distributors and SCJ relieve the manufacturer of all collection activities and credit risks. It is immaterial in this respect whether SCJ's members are or are not "blue chip" companies. The crux of this issue is that manufacturers, in dealing with warehouse distributors or with SCJ, do not have to concern themselves in any way with investigating the credit status of the ultimate purchaser or with incurring the expense involved in billing and collection and with bearing the credit risk of nonpayment by such ultimate purchasers. If a warehouse distributor or SCJ acquires a new customer or member, the consequent increase in sales volume redounds to the benefit of the manufacturer, while any possible credit risk of that customer is the concern of the warehouse distributor or of SCJ. This is the saving which the manufacturer incurs as a result of the credit and collection services performed by SCJ and, as the witnesses testified, this is an essential part of the business.

All of this evidence was entirely disregarded in the majority opinion. The majority concluded instead that because manufac-

turers testified that their costs of selling to SCJ were the same as those incurred by them in selling to direct purchasing jobbers, the discount to SCJ could not be cost justified and that SCJ members should have known and did in fact know this (Findings, IV, pp. 1132-1133). In supporting this conclusion the majority quotes the testimony of witnesses from Standard Motors Products and Sealed Power Corporation that selling to SCJ did not save them any money over selling to warehouse distributors or direct primary jobber as reflecting any contrary view.

I do not interpret this record testimony as supporting this conclusion and do not believe that it was intended by the witnesses to carry the inferences attributed to it by the majority. I cannot interpret this testimony as meaning any more than what the other manufacturers testified to, namely, that whether or not manufacturers sold through middlemen or directly, they maintain certain regular and essential contacts with the ultimate consumer, the jobber, and tended to expend a substantially identical amount of time and money on these selling activities irrespective of whether that ultimate jobber customer made its purchases directly or indirectly through a warehouse distributor or SCJ (Tr. 1058, 1155, 1214, 1359, 1419-11). This testimony in no way affects, nor do I believe it was intended to deny the other testimony in the record that in addition to these direct sales expenses incurred vis-a-vis all of its jobber customers, both direct and indirect, a significant portion of a manufacturer's total expenses incurred in getting his products to his ultimate consumer, the jobber, are taken up with warehousing, credit and collection and sales and services of the type which are performed by warehouse distributors. To the extent that any portion of these overall functions are performed by SCJ and other warehouse distributors, a manufacturer's sales expenses to his ultimate jobber customers are thereby reduced. Thus the fact that manufacturers spend time and money on selling to SCJ members, customers of warehouse distributors and direct purchasing jobbers in no way detracts from the bona fides of the cost savings to the manufacturer of the warehouse distributor functions performed by SCJ and warehouse distributors which the manufacturer would otherwise have to expend himself in order to market his parts to the ultimate consumer.

In short, this record demonstrates clearly that manufacturers regard the wholesaling-sales-services functions of warehouse distributors as vital and valuable and as saving them significant expenses which they would otherwise have to have incurred themselves in order to market their products.

The only question remaining is whether SCJ members were entitled to believe that the discount which they received on account of their warehouse distributor function was or was not cost justified.

I believe that the record supports the conclusion that the manufacturers' warehouse distributor discount was reasonably related to the services performed by these warehouse distributors, that in all significant respects SCJ performed these same warehouse distributor functions and services in a bona fide manner, and that it was entitled to receive the discount. Moreover, I believe SCJ was entitled to assume that in performing the same functions as other warehouse distributors, it was not violating the law in asking for and accepting the discount which other distributors received in compensation for performing these same functions.

I am of the view that under the teaching of the Supreme Court in *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 79-80 (1953), the respondents knew that the methods by which they were served by the manufacturer were different from those of direct purchasing jobbers and that, further, they were entitled to believe that manufacturers could justify the payment of a discount to their warehouse distributors and hence to SCJ after it assumed the identical warehouse distributor functions. Performing the same functions as warehouse distributors, SCJ was entitled to receive the same discount.

Accordingly, I would affirm the Initial Decision of the Hearing Examiner and dismiss the complaint.

FINDINGS AS TO THE FACTS, CONCLUSIONS OF LAW, AND ORDER

Pursuant to Section 2(f) of the Clayton Act, as amended, the Commission issued its complaint on September 17, 1957, charging respondents with knowingly inducing and receiving discriminatory prices prohibited by Section 2(a) of the Clayton Act, as amended. Following the filing of respondents answer and the conclusion of evidentiary hearings, Hearing Examiner Earl J. Kolb filed his initial decision on June 22, 1960, which found that the allegations of the complaint had been sustained. The Commission adopted the initial decision and respondents appealed in part from the Commission's cease and desist order in the Court of Appeals for the Ninth Circuit. That court, on October 9, 1962, affirmed in part and set aside in part the order and remanded the case to the Commission for further proceedings.

The Commission, on January 17, 1963, re-opened the proceedings [62 F.T.C. 1483]. Hearing Examiner John Lewis was substituted for the original hearing examiner on April 7, 1964, and

hearings were held from May 19 to May 26, 1964. On November 20, 1964, the examiner filed his supplemental initial decision on remand, dismissing the complaint insofar as it challenged the receipt of discriminations in price in the form of warehouse distributor discounts, and the case is now before the Commission on complaint counsel's appeal from the supplemental initial decision.

The Commission, on complaint counsel's appeal, respondents' answer in opposition thereto, the brief in support of the appeal of Automotive Distributors Association, Inc., as *amicus curiae*, and oral argument, has considered the issues on the basis of which the case was remanded, namely, (1) whether the cost justification defense is applicable to certain of the price differentials received by Southern California Jobbers, Inc. (SCJ) in the operation of its warehouse; and (2) whether respondent SCJ or its jobber members are the real purchasers from the manufacturers granting price differentials in the form of a warehouse distributor's discount. The Commission, on the basis of the entire record in this proceeding, has determined that the appeal should be granted and the initial decision vacated and set aside. The following findings as to the facts, the conclusions drawn therefrom, together with the accompanying opinion, shall constitute the decision of the Commission.

FINDINGS AS TO THE FACTS

I

This case involves the sales of automotive parts in the "after market," namely, the distribution of automobile parts for replacement of original factory parts installed by the manufacturer. The chain of distribution begins with the manufacturer who may sell parts to automotive parts jobbers either directly or indirectly through warehouse distributors. Many manufacturers sell simultaneously both to jobbers purchasing directly from them (direct jobbers) and to warehouse distributors. A warehouse distributor is essentially a wholesaler, who in general confines his sales to jobbers. Jobbers are wholesalers of automotive parts on another level of distribution, who in turn principally redistribute automotive parts to garages, service stations, fleet owners and car dealers. The manufacturer selling to direct buying jobbers or warehouse distributors may utilize his own sales personnel or manufacturer's representatives who are independent concerns in many instances representing a number of manufacturers in a particular market.

As a general rule, manufacturers grant warehouse distributors a functional redistribution discount known as a warehouse distributor's discount, which is usually a 20 percent reduction from

the net price to the jobber. The jobbers, whether they purchase directly or indirectly from the manufacturer, generally pay the same price for the automotive parts purchased. Warehouse distributors do not compete with jobbers in sales to the retail trade, such as garages, service stations, etc.

In distributing automotive parts to jobbers, warehouse distributors warehouse the merchandise, sell the goods, and over and above the function of taking orders for purchases from the jobbers, perform various service functions for their customers, as, for example, the giving of technical advice, checking inventory, etc., to ensure orderly distribution of the manufacturer's products. Warehouse distributors in the Los Angeles area expend approximately between 17 to 18½ percent of the functional redistribution discount received by them from the manufacturer in distributing automotive parts to their jobber customers. They earn a net profit of between 1½ to 3 percent before taxes and somewhat less after taxes as a result of their operations. (Tr. 1460, 1631, 1730, 1826, 1842.)

Respondent SCJ, a membership corporation comprised of some sixty automotive parts jobbers, is classified as a warehouse distributor by the manufacturers of the seventy-odd lines of automotive parts which respondents carry. The jobber members belonging to SCJ, unlike warehouse distributors, do compete with jobbers in their trade area in sales to the retail trade. It is the warehouse distributor discount granted SCJ which is the subject of this proceeding on remand. The volume discounts received by SCJ on merchandise which was not brought into the warehouse but rather drop shipped to the members and which have previously been characterized in this proceeding as a "brokerage" operation are no longer in issue here. Respondents conceded that portion of their operation was illegal at the time they sought review of the Commission's decision and order by the Court of Appeals for the Ninth Circuit. That practice has apparently been discontinued by SCJ and the price differentials in issue here at this stage are confined to the warehouse distributor's discount of approximately 20 percent from the jobber price granted the respondents by their suppliers.

II

SCJ is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. The warehouse which SCJ operates is located at 1621 East 27th Street, Los Angeles 11, California. It is a membership corporation, formed by a number of automotive parts jobbers, each of which owns a share of stock in the respondent corporation. At the time of the

hearings on remand in this proceeding, the membership consisted of sixty-six automotive jobbers in the southern California area, as compared to a membership of fifty-nine at the time of the first hearings in these proceedings in 1958 and 1959.

The respondent jobber members of SCJ are independent jobbers engaged in the purchase and resale of automotive parts accessories and supplies in interstate commerce and have been, and now are, engaged in active and substantial competition with other corporations, partnerships, firms and individuals also engaged in the purchase and resale of such automotive parts of like grade and quality in interstate commerce which have been purchased from the same or competitive sellers. (Findings no. 4, 57 F.T.C. 1007, 1014.)

The financial requirements for membership in the organization are substantial and have increased from \$4,450 at the time of the original hearings to \$9,000 at the time of remand. This investment required of the jobber members includes a payment of \$1,250 for a share of stock in SCJ as compared to \$800 at the time of the earlier hearings and the balance is split up between the so-called merchandise guarantee fund and a building fund. (Huffaker, tr. 1918-19.) Further, the stockholders are required to make quarterly payments of \$125 into the merchandise guarantee fund, which is used for operating capital. (Dixon, tr. 2082-83.)

In the four years preceding May of 1964, ten members had joined the group. Under SCJ's bylaws, the acceptance of new members is subject to the approval of the board of directors, based upon the recommendation of the membership committee. (CX 3, pp. 9-10.) In this connection, among other duties it is the function of the membership committee to investigate the applicant's "financial responsibility and business ethics and by contact with present members in his trading area discover if there will be any objection to his acceptance." (*Id.*) The record indicates that as of 1956 and in certain prior years it was SCJ's policy to accept applications only from jobbers located in territories not covered by the present membership. There is some evidence indicating that as of the time of these hearings there were a number of members competing with other SCJ members in their territory. SCJ, however, does no business with any jobber who is not a member of the respondent corporation. (Huffaker, tr. 1958.)

The bylaws provide that the affairs of SCJ be conducted by a board of directors of seven jobber stockholders elected by the stockholders for a term of two years. (CX 3, p. 2.) The board of directors is charged with the duty of appointing, supervising, removing at its

Findings

68 F.T.C.

discretion, and prescribing the duties of the officers, agents, and employees of SCJ. (CX 3, p. 3.) In addition, the directors are empowered to establish quotas which each stockholder must meet during a predetermined period and to make and enforce rules for the enforcement of such quotas and for the payment of indebtedness of each stockholder to the corporation. If the stockholder fails to meet the quota established for him or fails to pay for goods or services in the manner and within the time required, the directors are authorized to deprive him of the privilege of using the corporation's facilities for a time fixed by the directors. (CX 3, p. 3.) As far as the record shows, the members have not been disciplined for failing to meet their quotas, the discounts received by the members apparently being sufficient to, in general, induce purchases at the required levels.

At the time of remand, SCJ carried approximately seventy-five lines of automotive parts in its warehouse. (Tr. 2073; CX 226.) The determination as to which lines were to be handled by SCJ was made by the board of directors after recommendation by the organization's merchandising committee consisting of four to eight jobber members who interviewed representatives of manufacturers desiring to sell their line to the group's members. Before deciding whether to take on a particular line, the board of directors generally surveyed the jobber members of SCJ by questionnaire to determine whether they would support the particular line. After a decision had been made that a particular line would be carried, the membership was notified in writing of that fact.

It is the purpose of SCJ to provide a joint buying and pickup service for the jobber stock shareholders of the corporation in order that such members may buy the articles used in their business for better mutual advantage and to operate a system of distribution to the individual businesses of the stockholders. The articles of incorporation issued in 1935 further provide that the nature of the corporation (SCJ) "shall at all times remain in the nature of a cooperative organization, rather than a strict business corporation." (CX 2, p. 1.) The bylaws in effect, as revised on March 19, 1956, specifically provide that the services of SCJ shall include joint buying, assembling and warehousing of automobile parts and accessories and a delivery system operated and maintained by the corporation for and on behalf of the stockholders. (CX 3, p. 1.)

SCJ's warehousing operation commenced in 1955, when it opened a small warehouse and began to engage in the warehousing of parts for its members. In May of 1957 it moved to another and larger

warehouse, increasing the purchases of automotive parts through the warehouse. (Tr. 363, 596, 874, 878.) On August 1, 1962, it moved to its present location, on which is located a new and larger warehouse with approximately 37,200 square feet of space, employing thirty-seven employees. Ten employees are engaged in the trucking division.

Respondents purchase the merchandise from the manufacturers with whom they deal at the warehouse distributor price. It is this purported functional discount which is at issue on the remand of this proceeding. The average amount of the warehouse distributor's discount or allowance from the jobber net price received by SCJ is 20 percent. (Huffaker, tr. 1964.) This is substantially the same amount as the functional allowances received by warehouse distributors in the Los Angeles area.¹ The discounts and rebates received by SCJ from the manufacturer representing the difference between the warehouse distributor's net price paid by the group and the higher jobber prices paid by the jobber members are "impounded" by SCJ. These impounds periodically are credited to the accounts of the jobber members in proportion to their purchases through SCJ after deduction of each member's proportionate share of the expense incurred by the group in the operation of the warehouse. These impounds are not actually paid to the jobber but are credited each quarter against the amount owed by the jobber member on purchases made through SCJ. Further, the bylaws provided that the extra discounts and rebates impounded by the cooperative "shall be and remain the property of the stockholders of said corporation, and at no time shall become the property of the corporation itself." (CX 3, p. 10.)² SCJ uses the impounded funds in the purchase of merchandise pending the granting of credit for these rebates to the member's account in each quarter. (Tr. 1952.)

In 1962 and 1963 the cost of operating the SCJ warehouse was 6.04 percent and 5.78 percent, respectively. (CX 294.) The cost of operating the SCJ warehouse has never exceeded 7 percent. (Tr. 2096.) The distribution of the difference between the average dis-

¹ This average generally holds true, although there are some variations from the 20 percent figure, which may range from a high of 25 or 26 percent to a low of 10 percent in a few lines. (CX 223.)

² Article XXIII, paragraph 5 (CX 3, p. 10) of the bylaws in effect on March 19, 1956, which provided expressly that the rebates in question should not become the property of the corporation was effective for almost the entire period involved in this proceeding. The amendment of this provision at the stockholder's meeting of March 13, 1964 (CX 295) did not diminish the control of the stockholder jobbers over the discounts received by the buying group in their behalf, for the amended provision, as the one in effect from March of 1956, provided that all net profits were to be credited to each stockholder in proportion to his purchases after deduction for merchandise, service charges, and the group expenses. Clearly, under the revised provision, as under the old, SCJ has no discretion in dispensing its profits to the members.

count of 20 percent received by SCJ and the operational expenses of approximately 6 percent is made by the cooperative to jobber members in accordance with the bylaws.

The 1963 purchasers of the respondent jobbers through the warehouse of the group were approximately three and a half million dollars. (CX 225.) The inventory in respondents' warehouse for the first quarter of 1964 was between \$573,000 and \$574,000. (Dixon, tr. 2044.) Total discounts after the deduction of expenses rebated to the members on these purchases totaled at least \$686,000 in the year 1963. (See Table 1, *infra*.) In fact, the record shows that the majority of the respondent jobbers received net rebates in excess of 15 percent of their purchases in that year. In the case of one of the jobbers whose rebate was 15.8 percent, this rebate exceeded \$44,000. (See Table 1, *infra*.)

Findings

Docket No. 6889—ALHAMBRA MOTOR PARTS ET AL.
TABLE 1.—Summary of Total Purchases, Rebates, Expenses, Delivery Gains and the Resulting Net Rebates Received by Jobber-Members of Alhambra Motor Parts during the Year 1963.

FTC Exhibit Number	Jobber-Member	Total Purchases	Total Rebate	Total Expenses	Delivery Gain	Net Rebate	% of Net Rebate to Purchases
227a,b	A & L Motor Parts.....	\$ 47,949.31	\$ 8,860.29	\$ 2,109.83	\$ 15.02	\$ 6,765.48	14.1%
228a,b	Alhambra Motor Parts.....	108,939.87	22,896.18	5,479.23	55.04	17,471.99	16.0
229a,b	Atkinson Motor Parts.....	13,903.72	2,812.13	699.26	.....	2,112.87	15.2
230a,b	Automotive Parts—San Pedro.....	17,891.08	3,790.55	899.83	10.39	2,901.11	16.2
231a,b	Automotive Parts—Visalia.....	72,733.43	14,931.89	3,658.16	.....	11,273.73	15.5
232a,b	Automotive Supply—Ventura.....	159,495.51	33,751.60	8,021.89	.....	25,729.71	16.1
233a,b	B & W Parts Co.....	90,136.26	18,149.31	4,533.54	.....	13,615.77	15.1
234a,b	Barlow Motor Supply.....	39,146.76	7,827.08	1,968.94	17.51	5,875.65	15.0
235a,b	Beacon Auto Parts.....	77,409.37	15,900.01	3,893.37	41.76	12,048.40	15.6
236a,b	Beedee Auto Parts.....	31,245.04	6,502.58	1,571.52	16.98	4,948.04	15.8
237a,b	Bidinger Auto Parts.....	39,753.42	8,568.15	1,999.47	20.37	6,589.05	16.6
238a,b	Boggs & McBurney.....	123,947.06	24,916.90	6,236.54	57.47	18,737.83	15.1
239a,b	Bussey Auto Parts.....	63,303.90	13,089.35	3,183.94	30.07	9,935.48	15.7
240a,b	Car Parts Co.....	33,852.32	7,298.46	1,702.65	12.86	5,608.67	16.6
241a,b	Art Cole.....	105,885.68	22,045.44	5,352.61	40.55	16,760.38	15.8
242a,b	Curtis & Christensen.....	122,984.43	25,404.29	6,185.59	55.79	19,274.49	15.7
243a,b	Drye Automotive Parts.....	69,753.28	14,328.88	3,508.37	.....	10,820.51	15.5
244a,b	Dunn's Supply.....	45,295.70	9,114.56	2,278.13	.....	6,836.43	15.1
245a,b	Dyer Bros.....	61,141.07	13,072.20	3,075.19	20.30	10,017.31	16.4
246a,b	Eckdahl Auto Parts.....	40,000.74	8,306.18	2,011.80	20.77	6,315.15	15.8
247a,b	Encell's Auto Parts.....	143,160.36	30,546.30	7,200.44	.....	23,345.86	16.3
248a,b	Flammer Auto Parts.....	29,867.64	6,140.32	1,502.21	22.73	4,660.84	15.6
249a,b	Frazier Wright.....	26,346.50	5,416.38	1,325.10	.....	4,091.28	15.5
250a,b	Fullerton Motor Parts.....	280,403.96	58,340.67	14,103.27	125.56	44,362.96	15.8
251a,b	Gibson Motor Parts.....	54,976.88	11,683.44	2,765.09	31.39	8,949.74	16.3
252a,b	Graveline Auto Parts.....	66,230.20	13,726.27	3,331.16	32.80	10,427.91	15.7
253a,b	Graves Auto Supply.....	141,453.68	29,038.12	7,114.58	59.30	21,982.84	15.5
254a,b	Hartman Auto Parts.....	13,118.19	2,727.18	659.83	.....	2,067.35	15.8
255a,b	Hibbard & Rodgers.....	48,684.31	10,389.13	2,448.60	18.92	7,959.45	16.3
256a,b	Hillcrest Auto Supply.....	29,165.06	6,099.66	1,466.89	.....	4,632.77	15.9
257a,b	Huffaker's Auto Parts.....	89,445.79	18,916.23	4,498.78	33.62	14,451.07	16.2
258a,b	McConnell Motor Parts.....	56,292.13	11,528.22	2,831.28	23.39	8,720.33	15.5
259a,b	Chet Martin's Auto Parts.....	60,827.28	12,350.13	3,059.29	33.60	9,324.44	15.3
260a,b	Master Motor Parts.....	24,157.20	5,180.52	1,214.99	7.23	3,972.76	16.4

Docket No. 6889—ALHAMBRA MOTOR PARTS ET AL.—Cont'd
 TABLE 1.—Summary of Total Purchases, Rebates, Expenses, Delivery Gains and the Resulting Net Rebates Received by
 Jobber-Members of Alhambra Motor Parts during the Year 1963.

FTC Exhibit Number	Jobber-Member	Total Purchases	Total Rebate	Total Expenses	Delivery Gain	Net Rebate	% of Net Rebate to Purchases
261a,b	Masters—Oceanside	\$124,725.00	\$ 26,406.66	\$ 6,273.16	....	\$ 20,133.50	16.1%
262a,b	Mission Auto Parts	29,768.99	5,951.97	1,497.23	....	4,454.74	15.0
263a,b	Monte's Auto Supply	192,874.66	39,200.21	9,700.86	49.16	29,548.51	15.3
264a,b	Motor Parts Depot	91,988.43	18,559.05	4,626.69	15.59	13,947.95	15.2
265a,b	Motor Parts & Equipment	64,103.07	13,530.04	3,224.08	26.24	10,332.20	16.1
266a,b	Neufeld's Auto Parts	85,926.14	17,838.39	4,321.77	....	13,516.62	15.7
267a,b	North Long Beach Auto Parts	20,410.47	4,353.49	1,026.52	6.87	3,333.84	16.3
268a,b	Owl Auto Supply	138,917.74	28,330.70	6,986.92	59.68	21,403.46	15.4
269a,b	P & W Parts Store	39,116.47	8,086.80	1,967.43	30.45	6,149.82	15.7
270a,b	Parts Service Co.	81,873.42	16,060.95	4,117.91	21.94	11,964.98	14.6
271a,b	Paso Robles Auto Parts	32,960.28	6,774.02	1,657.78	....	5,116.24	15.5
272a,b	Phoenix Motor Parts	45,157.73	9,616.88	2,271.19	24.52	7,370.21	16.3
273a,b	Pomona Motor Parts	56,874.31	11,498.49	2,860.56	73.35	8,711.28	15.3
274a,b	Sturtevant Auto Parts	39,780.85	8,876.09	2,000.73	83.20	6,958.56	17.5
275a,b	San Bernardino Motor Parts	63,894.15	13,539.93	3,213.66	26.28	10,352.55	16.2
276a,b	Santa Ana Motor Parts	67,397.12	14,409.87	3,389.76	31.06	11,051.17	16.4
277a,b	Santa Barbara Motor Parts	83,475.26	17,574.27	4,198.49	....	13,375.78	16.0
278a,b	Smith Auto Parts	79,436.04	16,315.43	3,995.33	....	12,320.10	15.5
279a,b	Sparks Auto Parts	110,573.49	23,252.90	5,561.42	36.54	17,728.02	16.0
280a,b	Standard Motor Parts	57,024.94	12,057.35	2,868.10	13.73	9,202.98	16.1
281a,b	Tasco Auto Parts	32,854.92	6,567.92	1,652.45	....	4,915.47	15.0
282a,b	Temple City Auto Parts	64,223.25	13,230.11	3,230.11	14.62	10,326.96	16.1
283a,b	Torrance Auto Parts	37,360.16	7,628.66	1,879.10	24.64	5,774.20	15.5
284a,b	Triangle Motor Parts	57,374.91	12,073.61	2,885.71	16.51	9,204.41	16.0
285a,b	Universal Auto Parts	35,946.39	7,345.02	1,807.98	....	5,537.04	15.4
286a,b	Valley Auto Supply	99,913.58	20,869.03	5,025.12	35.79	15,879.70 ¹	15.9
287a,b	Vinson Auto Parts	23,661.62	5,052.24	1,190.04	10.16	3,872.36	16.4
288a,b	Wellington Auto Parts	18,707.92	3,994.46	940.96	10.16	3,063.66	16.4
289a,b	Wilke Machine & Auto Parts	50,577.77	10,629.43	2,543.82	....	8,085.61	16.0
		\$4,355,256.21	\$903,584.91	\$218,779.25	\$1,413.91	\$686,219.57	
	% of Purchases.....		20.75%	5.02%	.03%	15.76%	

¹ Pencil figure on CX 286a is error by \$100.00.

SCJ's jobber members, rather than the corporate entity of the buying group, are the purchasers insofar as the transactions involving receipt of the warehouse distributor discount are concerned. This finding is compelled by the following facts: SCJ is owned by and controlled by its members through the board of directors elected by them and it operates through committees staffed by the members. SCJ's sole purpose is to provide opportunities for mutually advantageous purchasing by, and a delivery service for, the members and it makes no sales to jobbers not belonging to the group. Discounts received by the group and disbursed to the members at all times are the property of the respondent jobbers. From the record as a whole it is clear SCJ, in the course of these transactions, acts as agent of its members and, as a practical matter, has no existence independent of its jobber stockholders.

III

In the distribution of their products auto parts manufacturers incur costs in connection with sales and distributional activities, including among others the following: compensation for sales personnel, freight and delivery costs, the publication and distribution of catalogs and price lists, as well as billing and credit expense. These are the areas to be considered for a determination of whether auto parts suppliers realize significant distribution cost savings in selling through SCJ's warehouse operation as opposed to their sales to direct buying jobbers. Complaint counsel has the burden of coming forward with evidence showing that whatever the differences in quantities and methods by which respondents and direct buying jobbers were served such differential could not give rise to sufficient savings to justify the price differential and that the respondent jobbers should have been aware of that fact.

In connection with the item of sales expense, the record shows manufacturers' salesmen or sales representatives periodically call on their direct buying jobber and WD customers to perform the following functions:

1. Promote the sale of their products.
2. Check on inventory and stock to determine whether the inventory is adequate or whether obsolete parts should be returned for credit.
3. Advise on new lines and changes in the manufacturers' lines.
4. Advise on technical problems which may have arisen.
5. Check price lists and catalogs to make sure they are up to date.

The salesmen of warehouse distributors also perform these functions in their calls on their jobber customers. In many instances, however, manufacturers' salesmen also call on the warehouse distributor's jobber customers in order to perform these services.

Performance of these services is essential to the manufacturer in order to ensure the orderly distribution of his product. (Bolander, sales representative, H. K. Porter Company, Thermoid Division, tr. 1061; Fleer, area manager, American Hammered Division, Sealed Power Corporation, tr. 1147.) Warehouse distributor salesmen should perform the same services for their customers that the manufacturer furnishes direct customers. (Bolander, tr. 1075.) If a warehouse distributor does not have a salesman, the manufacturer has to perform the same service for him that he performs for the direct distributors. (Fleer, tr. 1228.) These functions cannot be performed simply by mail but require work in the field by the warehouse distributor's salesmen or employees. (Wissler, factory representative, Sterling Aluminum Products, tr. 1891-93.) SCJ did not have the sales personnel to perform these functions in 1963 and at the beginning of 1964.³ Further, the "deal book" distributed to the jobber members of SCJ gives the name of the manufacturer's representative so that the jobber members can call on them for help if they so desire. (CX 223; Huffaker, tr. 1929.)

Salesmen or sales representatives of manufacturers supplying respondents with lines of automotive parts on which they are granted the purported warehouse distributor discount of some 20 percent spend approximately as much time with individual SCJ members as with direct buying jobbers, *e.g.*, salesmen of the Thermoid Division of the H. K. Porter Company call on individual SCJ jobber members at least as often as they call on their direct buying jobbers (Bolander, tr. 1099, 1102) and perform the same services performed for the respondent members of SCJ that are performed for direct buying jobbers. (Tr. 1102.) Representatives of the American Hammered Division, Sealed Power Corporation, regularly call on SCJ members, calling on them as frequently and spending as much time with them, and performing the same functions as in the case of direct buying jobber accounts of comparative size. (Fleer, tr. 1213.) In fact, this supplier calls on the franchised accounts of its warehouse distributors to the same extent as direct

³ "The salesman previously authorized has not yet started but will go out to call upon the members on March 2nd." Minutes of the Board of Directors of SCJ, February 27, 1964. (CX 295.)

The record accordingly shows that respondents did not have a salesman to call on the members of SCJ until more than a year after this proceeding was re-opened on January 17, 1963, and some two and a half months prior to the hearings on remand.

1039

Findings

jobbers if such accounts are large enough. (Tr. 1160.) In the case of Standard Motor Products, no distinction is made with respect to salesmen's calls whether the jobber is a direct or indirect account and calls on SCJ jobber members are made with the same frequency as on any other jobber. (Chadwick, district manager, Standard Motor Products, tr. 2031.)⁴

Furthermore, in addition to the calls on the jobber members themselves, the manufacturers have also made calls on the group on occasions, such as open houses, which require expenditure of time and effort by the suppliers' sales personnel over and above that required for contacts with the individual members. (*E.g.*, Bolander, tr. 1099-1100.)

A significant area for determining whether there are differences in the costs of sales and delivery between respondents and direct buying jobbers is freight or delivery costs. Most manufacturers sell to their direct customers f.o.b. from their factory or warehouse, granting prepayment of freight on orders in excess of a certain weight or dollar amount. In those instances where the purchase is made from a supplier's local warehousing facility, as a general rule the major portion of the freight expense will be concentrated in the shipment of the merchandise from the manufacturer's factory to the local warehousing facility, as opposed to that portion of the delivery costs attributable to transporting the goods from the local warehouse to the customer. In those instances where a direct buying jobber and respondents both purchase directly from the factory, there is no difference in the freight expense as far as the manufacturer is concerned, assuming both buy in the same quantities. The record shows that in the case of certain product lines respondents are more apt to buy in the quantities qualifying for freight than direct buying jobbers.⁵ Obviously, where freight is prepaid

⁴ The representatives of certain other manufacturers in this proceeding also testified that they called on SCJ jobber members or indirect jobbers regularly, although these witnesses did state not as much time was spent on SCJ members or calls as frequently made as in the case of direct buying jobbers. (Webster, district manager, Federal Mogul Bower Bearings, tr. 1264, 1275; Costello, regional manager, Republic Gear Company, tr. 1412, 1424.) In general, the testimony of these witnesses on the point, however, gave no concrete information on the cost difference in terms of sales effort expended on respondents and direct buying jobbers. In 1963 SCJ had no salesmen who could perform the service functions in many cases performed either by the warehouse distributor's or manufacturer's salesmen over and above the function of mere order-taking, all of which tasks are essential to the orderly distribution of the product. Accordingly, it is found that there would be no substantial difference on this point in the manner in which these manufacturers dealt with respondents and direct buying jobbers.

⁵ *E.g.*, in the case of Dutch Brand Products, direct jobbers usually do not order in sufficient quantities to qualify for prepaid freight. (Milligan, tr. 1358.) In the case of the American Hammered Division of the Sealed Power Corporation, direct jobbers do not generally qualify for prepaid freight. (Fleer, tr. 1206.) In the case of the Thermoid Division, while most jobbers buy in large enough quantities for prepaid freight, they do not qualify for it as frequently as respondents. (Bolander, tr. 1092, 1093.)

for respondents and not for direct jobbers, the delivery expense is higher in the case of the former.

Where respondents or other customers pick up the merchandise from a supplier's local warehousing facility, they will not be given the benefit of prepaid freight even if the order is otherwise of sufficient size to qualify for this privilege. Even under those circumstances, however, the record discloses no significant delivery cost differentials as far as the manufacturers are concerned between respondents and direct buying jobbers. For example, in the case of Federal Mogul Bower Bearings, Inc., its district manager testified that like SCJ, direct jobbers, if they are in close proximity to the warehouse, generally pick up the merchandise themselves. (Webster, tr. 1259-60.) SCJ's pickup service is not unique. In the case of Dutch Brand Products, a great deal of the merchandise by many of the supplier's customers, is picked up at the warehouse. (Milligan, tr. 1359.) In the case of the Republic Gear Company, the large majority of jobbers in the southern California area pick up their merchandise from the warehouse. (Costello, tr. 1406-07.) In short, although respondents, like other customers, get no freight prepayment privileges on merchandise picked up from the warehouse, this does not indicate any significant differences between respondents and direct buying jobbers, since, in the case of many manufacturers, these customers, if they are in the vicinity of the warehouse, generally pick up their own requirements as respondents do. Therefore, while SCJ's pickups from the supplier's warehouse may have saved the manufacturer money, if the order was of sufficient quantity to qualify for prepaid freight, the record does not support a finding that SCJ saved the supplier significant delivery costs which would have been incurred in sales to direct buying jobbers. Moreover, in the case of the Thermoid Division, the testimony expressly shows that pickups by respondents from that supplier of orders qualifying for prepaid freight were not a substantial part of respondents' purchases from that supplier. (Bolander, tr. 1127-28.)

Finally, SCJ's fleet of trucks which picks up merchandise and distributes automotive parts to its jobbers does not save respondents' suppliers money, for this is not a service which they ordinarily perform for their customers.⁶

An important service furnished by the automobile parts manufacturer to direct buying jobbers and SCJ members alike is the

⁶ E.g., as Robert Bolander of the Thermoid Division testified:

"Q. Would [SCJ's fleet of trucks] save you any money. Would it perform a service that you would normally have to do?

"A. No. Thank you."

(Tr. 1095.)

furnishing of catalogs and price sheets. In the case of both direct buying jobbers and SCJ members, the manufacturers distribute catalogs and price sheets to the individual jobber by direct mail. (Bolander, tr. 1096; Fler, tr. 1207-1208; Webster, tr. 1261, 1262; Costello, tr. 1409.) All the expenses of printing and distributing catalogs and price sheets as far as the respondent jobbers and direct buying jobbers are concerned are the same. Further, the testimony shows that the manufacturers' representatives, in calling upon direct buying jobbers and the members of SCJ alike, among other functions check the catalogs and price sheets to make sure they are up to date. (Bolander, tr. 1100, 1102; Milligan, tr. 1362; Fler, tr. 1213.) As a result, SCJ does not save the manufacturers any money in keeping catalogs and price lists up to date. This is to be expected, since in the period under consideration SCJ simply did not have the personnel with which to perform these functions.

With respect to the items of centralized billing and credit expense, these are relatively unimportant items in terms of cost, having no significant bearing on the question of whether warehouse distributor discounts of the magnitude granted respondents are cost justified vis-a-vis direct buying independent jobbers.

Respondents claim that their warehousing operation saved their suppliers money. To be cognizable under the statutory cost justification defense, however, SCJ's warehousing must relieve the suppliers of functions which the seller normally performs for his non-favored customers. To the extent that respondents' warehouse operation is merely an extra service over and above what the supplier normally does for his customers, the service is one performed by the buyers for themselves and not properly within the scope of the cost justification defense.

Certain of respondents' auto parts suppliers maintain warehousing facilities in the Los Angeles area, which may be either in the form of space in a commercial fee warehouse or in a factory owned warehouse. The fees of commercial warehouses in the Los Angeles area range in the neighborhood of 5 to 6 percent of the sales. (Hufaker, tr. 1940; Krumbholz, tr. 1826; Tatum, tr. 1476-1477.) At best, SCJ's warehousing of auto parts would save the manufacturer in the area 5 to 6 percent, assuming the respondents did not purchase any merchandise from the supplier's local warehouse.⁷

⁷ The record is not clear to the extent to which manufacturers' local warehouses break bulk and repack merchandise. This is immaterial, however, on comparing the costs of direct buying jobbers and respondents. The direct buying jobber purchasing from the supplier's local warehouse, like respondents, will also be buying in case lots if that is the policy of the warehouse. The fact that respondents may subsequently break bulk would not make the transaction with respondents less expensive for the supplier than the manufacturers' sale to the direct buying jobber under these circumstances.

This is clearly insufficient to cost justify the purported functional discounts ranging up to 20 percent or more received by the respondent buying group in behalf of its members.

Moreover, it is the policy of respondents to patronize those manufacturers that maintain local warehouses or manufacture locally since this enables the respondent buying group to replenish its stock weekly if necessary. (Dixon, tr. 2009.) In fact, this policy enables respondents to pick up stock orders by the month, week, and, in certain cases, by the day if it so desires. (*Id.*, tr. 2077.) To the extent that respondents purchase from a manufacturer's local warehouse, their warehousing facilities duplicate those of the manufacturers and cannot be deemed to save the suppliers significant amounts of storage costs. Under these circumstances, the expense of the local warehouse is as attributable to respondents as it is to any other customer purchasing from these facilities. In the case of the Republic Gear Company, for example, respondents are served entirely from the local warehouse of that supplier. (Costello, tr. 1404.) Respondents obtain freight orders from Republic Gear approximately three times every two months and in addition pick up other orders from this supplier's local warehouse "a few times during the week." (*Id.*, tr. 1418.) In this connection, respondents' minutes show that the merchandising committee had under consideration a recommendation to stock a minimum of Republic fasteners on the basis of one-day service from the Republic warehouse in Los Angeles.⁸

The high turnover in many lines handled by the respondent group supports the finding that respondents' warehousing of the manufacturers' products in many cases was of a *pro forma* nature. This indicates the cost savings to the supplier as a result of SCJ's warehousing facilities in many instances were minimal. In this connection, the record discloses that the inventory turnover of warehouse distributors in the Los Angeles area ranged from three to five times a year, with an average turnover of approximately four times. (Tatum, tr. 1459; Humphries, tr. 1570; Livoni, tr. 1732; Krumbholz, tr. 1801; Steritz, tr. 1843.) In the case of SCJ, the overall turnover was in the vicinity of seven times.⁹ In the case of the fifty highest turnovers out of some seventy lines, which involved some 84 percent of the respondents' sales volume in 1963, the turn-

⁸ Minutes, Board of Directors, February 27, 1964, CX 295.

⁹ It is not intended hereby to compare the costs of suppliers doing business with a warehouse distributor and SCJ. A comparison of the turnovers of warehouse distributors and SCJ's warehouse operation, however, is useful to determining to what extent the respondent group is performing a warehousing function.

1039

Findings

over was in excess of eight times and twice the average turnover of warehouse distributors. In many lines—for example, the ten highest lines with a turnover of twenty-one times for that year—the turnover was significantly higher.¹⁰

TABLE 2

Docket No. 6889—ALHAMBRA MOTOR PARTS ET AL.

Analysis of Rates of Turnover Arranged on the Basis of the Highest to the Lowest, during the Year 1963. Source: CX 225a,b.

Products	Sales	Average Inventory	Turn-over	No. of Days in Inventory ¹
Repcos	\$ 98,610	\$ 2,591	38.06	9.46 days
Tyme	22,489	663	33.92	10.61
Associated	15,082	565	26.69	13.49
Irvin	18,016	689	26.15	13.77
McKay	50,947	2,065	24.67	14.59
Marpro	96,862	4,802	20.17	17.85
Oil Dri	2,403	141	17.04	21.13
Sta-Lube	22,426	1,346	16.66	21.61
Dura Built	14,652	884	16.57	21.73
Airtex	176,338	10,905	16.17	22.26
Gojo	13,486	930	14.50	24.83
Rubbermaid	5,884	453	12.99	27.71
Dutch Brand	14,762	1,165	12.67	28.41
Sylvania	8,914	723	12.33	29.20
K & W	19,201	1,596	12.03	29.93
Grizzly	94,926	8,353	11.36	31.69
Bridgeport	25,888	2,287	11.32	31.80
Carburetor	71,293	6,385	11.17	32.23
Proto	142,156	14,506	9.80	36.73
Grigg	12,100	1,244	9.73	37.00
Tung. Flashers	31,874	3,469	9.19	39.17
Thermoid	91,908	10,638	8.64	41.67
Fram	219,169	27,734	7.90	45.57
Murray	33,605	4,315	7.79	46.21
Aviex	6,844	903	7.58	47.49
Las-Stik	1,868	253	7.38	48.78
Trostel	57,853	7,919	7.31	49.25
Standard	264,140	37,868	6.98	51.58
Stant	33,428	4,826	6.93	51.95
Link Belt	33,250	4,847	6.86	52.48
Amflo	21,906	3,276	6.69	53.81
Egan	11,811	1,794	6.58	54.71
Eis	226,773	35,202	6.44	55.90
A.P.	403,810	63,929	6.32	56.96
Gumout	7,568	1,205	6.28	57.32

¹ See footnote on following page.

¹⁰ This point is also evident in the case of the 30 lines with the highest turnover involving 10.31 times a year. The amount of merchandise involved in these lines was in excess of 50 percent of respondents' sales volume for 1963.

Findings

68 F.T.C.

TABLE 2

Docket No. 6889—ALHAMBRA MOTOR PARTS ET AL.—Cont'd
 Analysis of Rates of Turnover Arranged on the Basis of the Highest to the
 Lowest, during the Year 1963. Source: CX 225a,b.

<i>Products</i>	<i>Sales</i>	<i>Average Inventory</i>	<i>Turn- over</i>	<i>No. of Days in Inventory¹</i>
Boston	\$ 1,652	\$ 272	6.07	59.31 days
Whitaker	124,432	20,582	6.05	59.50
Rivets	3,525	598	5.89	61.12
Edelman	95,606	16,237	5.89	61.12
Bussman	4,923	839	5.87	61.33
Verimax	1,755	304	5.77	62.39
Duplex	4,636	805	5.76	62.50
Snugl	12,252	2,133	5.74	62.72
Accurate	20,603	3,701	5.57	64.63
B.C.A.	55,972	10,129	5.53	65.10
Seymour	29,212	5,355	5.46	65.93
Filt O'Ray	4,884	904	5.40	66.67
Lisle	26,347	4,891	5.39	66.79
Tung Lamps	77,594	14,481	5.36	67.16
Arnold	10,384	1,963	5.29	68.05
Copper Tubing	14,385	2,738	5.25	68.57
Hygrade	42,707	8,686	4.92	73.17
San Mateo	1,761	363	4.85	74.23
Republic	181,293	38,752	4.68	76.92
Plews	10,020	2,178	4.60	78.26
Arrow	57,058	12,696	4.49	80.18
Key Bac	1,089	252	4.32	83.33
Vulcan	7,453	1,810	4.12	87.38
Allen	10,019	2,463	4.07	88.45
Acme Air	8,104	2,002	4.05	88.89
Columbus	51,041	13,020	3.92	91.84
American Ball	9,378	2,473	3.79	94.99
Parker	4,385	1,186	3.70	97.30
Bower	14,215	3,849	3.69	97.56
Am. Grease	3,278	937	3.50	102.86
Ace Drill	7,894	2,293	3.44	104.65
Challenger	12,583	4,164	3.02	119.21
Federal Mogul	90,502	35,076	2.58	139.53
Shur Gloss	3,584	2,512	1.43	251.75
Doyle	1,280	922	1.39	258.99
Total.....	\$3,378,048	\$492,037	6.87	52.40
10 Highest Turnovers.....	517,825	24,651	21.01	17.13
20 Highest Turnovers.....	926,435	62,293	14.87	24.21
30 Highest Turnovers.....	1,700,374	165,065	10.31	34.92
40 Highest Turnovers.....	2,602,380	308,999	8.42	42.76
50 Highest Turnovers.....	2,846,019	353,665	8.05	44.72
60 Highest Turnovers.....	3,179,908	425,605	7.47	48.19
Total—All Products	\$3,378,048	\$492,037	6.87	52.40

¹ Based upon a 360 day year.

According to the record, some five of the respondent group's suppliers reduce the purported warehouse distributor's discount if the respondent group utilizes the manufacturer's local warehousing facilities in making the purchase.¹¹ For example, in the case of Standard Motor Products, the discount was 26 percent if purchases were made from the factory and reduced to 21 percent if picked up from Standard's Los Angeles warehouse. In view of the initial size of the discount, clearly any warehousing function SCJ may have performed in the case of Standard would not come close to justifying the price differential under consideration. Further, an analysis of SCJ's purchases from Standard Motor Products shows that for 1963 the rebate received was in the neighborhood of 23.7 percent. It must be inferred, therefore, that part of SCJ's purchases were direct from the factory and partly from the local warehouse.

TABLE 3

Docket No. 6889—ALHAMBRA MOTOR PARTS ET AL.

Analysis of Percent of Rebate Received on Purchases by Jobber-Members of S.C.J. from Standard Motors Products Co. during the Year 1963.

<i>FTC Exh. No.</i>	<i>Jobber-Member</i>	<i>Purchases</i>	<i>Rebate</i>	<i>% of Rebate</i>
227b	A & L Motor Parts.....	\$ 4,584.39	\$ 1,069.68	23.3%
228b	Alhambra Motor Parts.....	10,536.24	2,526.00	24.0
229b	Atkinson Motor Parts.....	1,308.13	318.65	24.4
230b	Automotive Parts—San Pedro.....	559.25	125.86	22.5
231b	Automotive Parts—Visalia	16.69	4.20	25.2
232b	Automotive Supply—Ventura.....	22,933.07	5,453.12	23.8
233b	B & W Parts Co.....	—0—	—0—	—
234b	Barlow Motor Supply	456.18	114.46	25.1
235b	Beacon Auto Parts	972.40	224.60	23.1
236b	Beedee Auto Parts.....	4,411.19	986.62	22.4
237b	Bidinger Auto Parts.....	6,250.20	1,485.66	23.8
238b	Boggs & McBurney.....	1,654.56	386.42	23.4
239b	Bussey Auto Parts.....	6,268.60	1,467.31	23.4
240b	Car Parts Co.....	1,638.82	397.63	24.3
241b	Art Cole	439.30	102.90	23.4
242b	Curtis & Christensen.....	8,339.40	1,964.06	23.6
243b	Drye Automotive Parts.....	6,735.85	1,575.75	23.4
244b	Dann's Supply	—0—	—0—	—
245b	Dyer Bros.	12,326.61	2,923.45	23.7
246b	Eckdahl Auto Parts.....	4,362.53	1,061.31	24.3
247b	Encell's Auto Parts.....	31,409.57	7,537.90	24.0
248b	Flummer Auto Parts.....	2,841.45	662.39	23.3

¹¹ CX 223, pp. 12, 22, 32, 45, 61.

Findings

68 F.T.C.

TABLE 3

Docket No. 6889—ALHAMBRA MOTOR PARTS ET AL.—Cont'd

Analysis of Percent of Rebate Received on Purchases by Jobber-Members of S.C.J. from Standard Motors Products Co. during the Year 1963.

FTC Exh. No.	Jobber-Member	Purchases	Rebate	% of Rebate
249b	Frazier Wright	\$ 2,588.31	\$ 627.22	24.2%
250b	Fullerton Motor Parts.....	27,551.70	6,561.37	23.8
251b	Gibson Motor Parts.....	223.06	52.77	23.7
252b	Graveline Auto Parts.....	453.43	109.38	24.1
253b	Graves Auto Supply.....	1,482.88	354.60	23.9
254b	Hartman Auto Parts.....	2,111.93	505.69	23.9
255b	Hibbard & Rodgers.....	8,322.97	2,000.67	24.0
256b	Hillcrest Auto Supply.....	4,736.90	1,124.00	23.7
257b	Huffaker's Auto Parts.....	1,632.68	390.46	23.9
258b	McConnell Motor Parts.....	5,110.05	1,215.40	23.8
259b	Chet Martin's Auto Parts.....	614.69	143.18	23.3
260b	Master Motor Parts.....	3,048.70	743.73	24.4
261b	Masters—Oceanside	20,035.46	4,793.24	23.9
262b	Mission Auto Parts.....	259.29	58.95	22.7
263b	Monte's Auto Supply.....	3,719.75	880.97	23.7
264b	Motor Parts Depot.....	7,298.10	1,708.09	23.4
265b	Motor Parts and Equipment.....	9,530.71	2,291.53	24.0
266b	Neufeld's Auto Parts	7,867.62	1,847.52	23.5
267b	North Long Beach Auto Parts.....	2,416.64	584.31	24.2
268b	Owl Auto Supply.....	14,142.64	3,359.19	23.8
269b	P & W Parts Store.....	403.11	93.56	23.2
270b	Parts Service Co.....	270.68	63.68	23.5
271b	Paso Robles Auto Parts.....	—0—	—0—	—
272b	Phoenix Motor Parts.....	5,335.58	1,283.81	24.1
273b	Pomona Motor Parts.....	—0—	—0—	—
274b	Sturtevant Auto Parts.....	39.95	—0—	—
275b	San Bernardino Motor Parts.....	13,564.36	3,151.14	23.2
276b	Santa Ana Motor Parts.....	11,067.44	2,651.47	24.0
277b	Santa Barbara Motor Parts.....	10,901.01	2,582.72	23.7
278b	Smith Auto Parts.....	105.40	24.77	23.5
279b	Sparks Auto Parts.....	13,726.10	3,213.07	23.4
280b	Standard Motor Parts.....	3,392.04	826.75	24.4
281b	Tasco Motor Parts.....	200.11	49.18	24.6
282b	Temple City Auto Parts.....	9,544.68	2,219.81	23.3
283b	Torrence Auto Parts.....	1,021.55	245.00	24.0
284b	Triangle Motor Parts.....	3,668.32	884.16	24.1
285b	Universal Auto Parts	2,370.54	577.08	24.3
286b	Valley Auto Supply.....	1,115.76	275.66	24.7
287b	Vinson Auto Parts	1,232.73	305.01	24.7
288b	Wellington Auto Parts.....	2,974.53	703.24	23.6
289b	Wilke Machine & Auto Parts.....	5,411.32	1,277.28	23.6
		<u>\$337,555.15</u>	<u>\$80,167.63</u>	<u>23.7%</u>

In the light of these circumstances, there do not appear to be any substantial differences in the way in which Standard dealt with direct buying jobbers and SCJ insofar as the warehousing of products is concerned. At any rate, assuming this item is properly within the cost defense, the possible cost saving, even if in fact direct jobbers competing with SCJ members did make all their purchases from Standard's local warehouse, would not reach the 5 to 6 percent figure which would be the maximum saving.

On the basis of the record as a whole, it is clear that to a large extent SCJ's warehousing duplicated that locally performed by the manufacturer and that the cost savings, if any, in sales to respondents, as distinguished from costs involved in sales to direct jobbers, would not be significant—certainly not sufficient to justify the price differentials of 20-plus percent, which are under consideration here. This conclusion is particularly evident in the case of purchases from Standard Motor Products.

IV

SCJ's jobber members knew that they were getting a lower price than other jobbers not so favorably situated. This is evident from records of the organization and the fact that respondents organized, maintained and controlled SCJ for the very purpose of inducing lower and more favorable prices from their auto parts suppliers. Respondents' intent in this respect was apparent from the inception of SCJ. For example, SCJ's board of directors, on October 12, 1937, expressed the opinion that where a member used a line merely as a secondary line or an accommodation stock, such member "should be obliged to make such line his leader, or be denied the extra discount over the regular jobber price."¹² Respondents continued to be aware that through SCJ they were getting a break from the jobber's regular price. For example, the Merchandising Committee Report of February 23, 1954, exhorts the members: "We should concentrate more on SCJ lines where the profit over and above the regular jobbers' profits run as high as 20% and in some cases even more."¹³ Subsequently, in a report to the stockholders on February 26, 1957, the members were advised that "With the completion of this warehouse we will be in a better position to deal

¹² Minutes, Board of Directors, October 12, 1937, CX 33-B. No action was taken by motion, but one of SCJ's employees was instructed to "try to induce members to support those lines on which we have the distributor contract." At a meeting of the stockholders on June 27, 1938, the merchandising committee reported that it believed it would be possible, with respect to a certain line, to make purchases "12½ percent below the regular jobbers price." (CX 38-B.)

¹³ CX 61-B.

with the manufacturers than ever before."¹⁴ More recently, and in the period relevant to the hearings on remand, it is equally clear, with respect to the lines on which the warehouse distributor's discount was made, that respondent knew they were in fact receiving price concessions from the jobber's price. In this connection, the "deal book" in the possession of the individual members of SCJ, containing the names of the manufacturers whose lines are carried and the contract terms on which the purchases are made, expressly indicates that as a result of the warehouse distributor discount the respondents are paying prices lower than the regular jobber prices.¹⁵

Before a new line of auto parts is taken on by the respondents, the jobber members on the merchandising and warehousing committee interview the prospective suppliers, a process described as doing the "necessary research"¹⁶ by SCJ's general manager. This is done before the committee makes its recommendations to the board of directors as to whether a line should be accepted. As a result, the jobber members on the committee become acquainted with the operations of the respondents' suppliers and the manner in which the group is to be served. The minutes of the respondents from the inception of SCJ to the period under consideration in the remand hearing are replete with references to recommendations by the merchandising committee as to whether or not a particular supplier should be taken on. In addition, the members as a group are frequently polled as to whether or not they wish to take on a particular line. Furthermore, SCJ's jobber members are acquainted with the respondent buying group's operation. In this connection, committees staffed by the members, such as the merchandising and warehousing committee, participate in the administration of the group. Finally, the jobbers knew from their own experience the amount of sales and distributional effort expended on them by various of their suppliers. In this connection, it is significant that in certain instances SCJ's jobbers have purchased directly from the manufacturer before the suppliers commenced granting SCJ the warehouse distributor discount. (Fleer, tr. 1219; Webster, tr. 1246;

¹⁴ CX 78-C.

¹⁵ For example, the "deal book" sets forth the contract terms with respect to the Republic Gear Co. as follows:

"CONTRACT TERMS Billed at Jobber Net.
 SCJ as Warehouse Distributor, will receive additional discount as follows:

Timing Gears & Automatic Transmission Parts	20%
Flywheel & Transmission Gears & Overdrive Parts	20%
Universal Joints & Power Take-off Joints	20%

Above discounts will be impounded."

(CX 223, p. 54.)

¹⁶ Dixon, tr. 2012.

1039

Order

Costello, tr. 1400.) For the foregoing reasons and their trade experience generally, the respondent jobbers must have been aware of the fact that their suppliers, in terms of sales and other distributional activities, were expending approximately the same effort on them as on jobbers purchasing directly. Accordingly, SCJ and its respondent stockholder jobbers knew, or should have known, that the warehouse distributor discount could not be justified in their case as reflecting cost savings in sales to them distinguished from transactions involving direct buying jobbers who paid prices on the order of 20 percent more than they.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of this proceeding, the respondents, and of the acts and practices of respondents.

2. The respondent buying group, Southern California Jobbers, Inc., was formed for the primary purpose of securing favorable prices for its jobber members and does no business with jobbers other than its members. The constituent jobbers of SCJ must accordingly be considered the purchasers from those auto parts suppliers doing business with, and granting, the respondent group price differentials in the form of warehouse distributor discounts. SCJ is their agent in these transactions.

3. Manufacturers granting a so-called warehouse distributor discount to respondents have essentially the same sales and distribution expenses which they have in dealing with direct buying jobbers.

4. Certain of the respondent jobbers who collectively have been in the auto parts business for many years have purchased directly from some of the suppliers now selling to the buying group. From this experience and their trade experience generally respondents knew, or should have known, that manufacturers granting them the warehouse distributor discount were selling to them by methods entailing essentially the same costs as to competing direct buying jobbers.

5. Respondents' inducing and receipt of the warehouse distributor discount constitutes a violation of Section 2(f) of the Clayton Act, as amended.

ORDER

It is ordered, That the supplemental initial decision of the hearing examiner, filed November 20, 1964, be, and it hereby is, set aside.

Order

68 F.T.C.

It is further ordered, That respondents C. E. Long, Glenn L. Long and J. T. Prochaska, Jr., co-partners doing business as Alhambra Motor Parts, Edward Gaughn, an individual doing business as Allied Motor Parts, Laura Kleopfer, Gloria Kleopfer and Gwenlyn D. Ockey, co-partners doing business as Automotive Parts Co., E. P. Feschrach, F. G. Orm and E. R. Eckert, co-partners doing business as Automotive Supply, B.B. & H. Motor Parts, Inc., a corporation, and its officers, Percy T. Lyon, an individual, doing business as Barlow Motor Supply Co., Beacon Auto Parts, Inc., a corporation, and its officers, Beedee Auto Parts, Inc., a corporation, and its officers, Jack Bidinger, an individual doing business as Jack Bidinger Auto Parts, Frank G. Boggs and Rollin McBurney, co-partners doing business as Boggs & McBurney Auto Parts, Burbank Auto Parts, Inc., a corporation, and its officers, Art Cole, an individual, doing business as Art Cole Auto Parts, E. L. Covey, an individual, doing business as Covey Auto Parts, Curtis & Christensen, Inc., a corporation, and its officers, Wolford Drye, an individual, doing business as Drye Automotive Parts, Donald M. Blackmore, Arrell S. McPartland, Otis Ludwick and Margaret A. Ludwick, co-partners doing business as Dale's Auto Parts, Henry A. Mannington and Ethel C. Mannington, co-partners doing business as Dyer Bros., Eckdahl Auto Parts Co., a corporation, and its officers, El Monte Auto Parts, Inc., a corporation, and its officers, C. E. Encell Auto Parts Service, Inc., a corporation, and its officers, Flammer Auto Parts, Inc., a corporation, and its officers, Frazier Wright Co., a corporation, and its officers, Fullerton Motor Parts, Inc., a corporation, and its officers, Curtis C. Gibson and J. Leonard Gibson, co-partners doing business as Gibson Motor Parts, Graves Automotive Supply, a corporation, and its officers, Carl D. Haase, an individual, doing business as Haase Auto Parts Company, John J. Hartman, an individual, doing business as Hartman Auto Parts, K. A. McFarland, an individual, doing business as Hibbard & Rodgers, Hillcrest Auto Supply Co., a corporation, and its officers, Dora L. Huffaker, an individual, doing business as Huffaker's Auto Parts, Clarence R. Ryan, an individual, doing business as Long Beach Auto Parts Co., John F. Dixon, Inc., a corporation, and its officers, L. C. Haskins, R. B. Sharpe and Willard Wedeking, co-partners doing business as Masters Automotive Supply, Bert C. Bussey and James E. Bussey, co-partners doing business as Bussey Auto Parts, Charles M. Darling, an individual, doing business as Mission Auto Supply, D. T. Johnston and Charles G. Russell, co-partners doing business as Motor Parts

1039

Order

Depot, A. C. Brown and Mable S. Brown, co-partners doing business as Motor Parts & Equipment Co., Henry C. Neufeld, Elmer M. Anderson and Dona Jane Senn, co-partners doing business as Neufeld's Auto Parts, John C. Weatherway and Lester L. Congdon, co-partners doing business as North Long Beach Motor Supply Company, Loren K. Patty, an individual, doing business as Owl Auto Supply, P. & W. Parts Store, Inc., a corporation, and its officers, Loy G. Cabe and Roy L. Cabe, co-partners doing business as Parts Service Company, Pomona Motor Parts, a corporation, and its officers, Stewart J. Bryant, Elizabeth H. Bryant and F. Ray Bryant, co-partners doing business as Paso Robles Auto Parts, Howard L. Phoenix and Ross L. Mossman, co-partners doing business as Phoenix Motor Parts, Santa Ana Motor Parts & Machine Works, Inc., a corporation, and its officers, Edward L. Kenworthy, an individual, doing business as Santa Barbara Motor Parts, San Bernardino Motor Parts, a corporation, and its officers, James W. H. Sparks, Floyd A. Sparks, Carlos A. Sparks and Willie D. Sparks, co-partners doing business as Sparks Auto Parts Service, Sturtevant Auto Parts, Inc., a corporation, and its officers, Robert Dopyera, James R. Barber and Victor Lesovsky, co-partners doing business as Tasco Auto Parts, Mac Johnson, an individual, doing business as Torrance Auto Parts, Triangle Motor Parts, a corporation, and its officers, Valley Auto Supply of San Bernardino, Inc., a corporation, and its officers, Glenn Wellington, an individual, doing business as Glenn Wellington Auto Parts, Wilke Machine & Auto Parts, a corporation, and its officers, Dunn Supply Co., Inc., a corporation, and its officers, Jack A. Monteverde and Ruth B. Monteverde, co-partners doing business as Monte's Auto Parts, Ben McConnell, an individual, doing business as McConnell Motor Parts, and their respective agents, representatives and employees; and the individual respondents Randall W. Brownell, Arthur D. Brownell, Wilma M. Brownell, E. Floyd Hubbard, Elwin A. Hubbard, Juanita Firth, A. C. Peschke, J. Peschke, E. E. McCreary, Jack W. Morse, Earl W. Morse, Jewell T. Morse, F. J. Curtis, Mable B. Curtis, H. C. Kelly, Burdette T. Eckdahl, F. O. Guffin, A. D. Shaw, Ruela B. Sutton, Earl Crawford, James Whitelock, Mary R. Encell, Pearl C. Zittle, Theodore B. Whitmore, Edwin T. Flammer, Edna M. Flammer, William R. Gallagher, Roy Wright, Emma F. Wright, Cecil D. Penn, Joe W. Johnson, Velda L. Johnson, Lemuel A. Graves, William T. Dingle, William H. Sharpe, Lorraine E. Sharpe, Mable M. Brown, John F. Dixon, Brian S. A. Heenan, Helen Dixon, Otha Luster, William H. Woodcock, Lee R. Anthony, John F. Arthur, J. K. Wilkinson,

Order

68 F.T.C.

Helen Bates, C. Ed Thomas, Evelyn J. Thomas, Frank N. Sellers, Peter B. Long, George E. Osborn, John H. Buchenau, Sabin B. Sturtevant, G. E. Lee, S. P. Sturtevant, Robert Heffner, Roy Baugh, Milton A. Souders, John Wilson, Paul Clammer, Arthur Lindholm, H. P. Wilke, N. Alta Wilke, Muriel Merritt, J. Elmo Dunn, Nancy Jane Dunn, and Dewey A. Dunn, and their respective agents, representatives and employees, in connection with the offering to purchase or purchase of any automotive parts, accessories or supplies or other similar products in commerce, as "commerce" is defined in the Clayton Act, shall forthwith in connection with warehouse distributor discounts or similar price differentials cease and desist from:

(1) Knowingly inducing, or knowingly receiving or accepting, any discrimination in the price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price known by respondents to be below the net price at which said products of like grade and quality are being sold by such seller to other customers where the seller is competing with any other seller for respondents' business or where respondents are competing with other customers of the seller.

(2) Maintaining, managing, controlling or operating respondent Southern California Jobbers, Inc., or any other organization of like character, as a means or instrumentality to knowingly induce, or knowingly receive or accept, any discrimination in the price of automotive parts, accessories or supplies, by directly or indirectly inducing, receiving or accepting from any seller a net price known by respondents to be below the net price at which said products and supplies of like grade and quality are being sold by such seller to other customers where the seller is competing with any other seller for respondents' business or where respondents are competing with other customers of the seller.

It is further ordered, That respondent Southern California Jobbers, Inc., a corporation, and its respective members, officers, agents, representatives and employees, in connection with the offering to purchase, or purchase, of any automotive parts, accessories or supplies or other similar products in commerce, as "commerce" is defined in the Clayton Act, do forthwith, in connection with warehouse distributor discounts or similar price differentials, cease and desist from:

(1) Knowingly inducing, or knowingly receiving or accepting, any discrimination in price of such products by directly

1039

Complaint

or indirectly inducing, receiving or accepting from any seller a net price known by respondents to be below the net price at which said products and supplies of like grade and quality are being sold by such seller to other customers where the seller is competing with any other seller for respondents' business or where respondents are competing with other customers of the seller.

For the purpose of determining the "net price" under the terms of this order, there should be taken into account discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are effected.

It is further ordered, That those respondents who severed their connection with Southern California Jobbers, Inc., prior to January 17, 1963, be, and they hereby are, granted permission, within sixty (60) days of the service of this order upon them, to file a motion requesting the Commission to set aside as to them the above order relating to warehouse distributor discounts.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth the manner and form in which they have complied with the order to cease and desist contained herein.

Commissioners Elman and Jones dissented and have filed dissenting opinions.

IN THE MATTER OF
CONSOLIDATED FOODS CORPORATION

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT

Docket C-1024. Complaint, Dec. 21, 1965—Decision, Dec. 21, 1965

Consent order requiring one of the leading food merchandising companies in the Nation with principal office in Chicago, Ill.—having total sales of \$634 million in 1964—to divest itself absolutely within 3 years, to a purchaser approved by the Federal Trade Commission, all stocks and assets of its "supermarket group" which consist of three grocery-store chains, a drug-store chain, a dairy company and a baking concern; and to dispose of its stock interest in four other concerns operating supermarkets.

COMPLAINT

The Federal Trade Commission has reason to believe that Consolidated Foods Corporation has violated the provisions of Section

Complaint

68 F.T.C.

7 of the Clayton Act, as amended, (15 U.S.C., Section 18) by its acquisitions of Piggly-Wiggly Midwest Co., Inc., Quality Food Stores, Inc., and Eagle Food Centers, Inc., and therefore issues this complaint, stating its charges in that respect as follows:

I

DEFINITIONS

1. For the purposes of this complaint, the following definitions shall apply:

a. *Food products* include all products, singly or in groups, commonly identified as "food and kindred products." It includes foods and beverages for human consumption and certain related products, such as vegetable and animal fats and oils. Establishments producing such products are included under Bureau of Census Major Group Classification 20.

b. A *wholesale food products establishment* is an establishment selling at wholesale a general line of grocery products, dairy products, poultry and meat products, confectionery, fish and seafoods, meat and meat products, fresh fruits and vegetables, and such specialty lines as bakery products, breakfast food cereal, canned goods, green and roasted coffee, flour, frozen foods, refined sugar, and soft drinks. This definition corresponds to Bureau of Census Industry Classification No. 504.

c. A *food store* is a retail establishment primarily engaged in selling food for home preparation and consumption. The term "food stores" includes grocery stores, delicatessen stores, dairy stores, certain meat markets, fish (seafood) markets, fruit stores, vegetable markets, candy, nut and confectionery stores, and retail bakeries. This definition corresponds to Bureau of Census Major Group Classification No. 54.

d. A *grocery store* is a retail establishment primarily selling (1) a wide variety of canned or frozen foods, such as vegetables, fruits and soups, (2) dry groceries either packaged or in bulk, such as tea, coffee, cocoa, dry fruits, spices, sugar, flour and crackers, (3) other processed food and non-edible grocery items. In addition, these establishments often sell smoked and prepared meats, fresh fish and poultry, fresh fruits and vegetables and fresh and frozen meats. This definition corresponds to Bureau of Census Industry Classification No. 541.

II

CONSOLIDATED FOODS CORPORATION

2. Respondent, Consolidated Foods Corporation, "Consolidated," is a corporation organized and existing under the laws of the

State of Maryland, with its principal office and place of business located at 135 South LaSalle Street, Chicago, Illinois.

3. Consolidated ranks eleventh among all food merchandising companies in the nation with total sales of \$634 million in 1964. Retail food store divisions accounted for about 37% of its 1964 sales, ranking it among the nation's twenty-five largest food store companies. Another 28% of its 1964 sales was derived from the operation of wholesale food products establishments, ranking Consolidated among the largest such wholesalers in the United States. Consolidated's sales of processed foods products represented 35% of its 1964 sales, and ranked Consolidated among the leading food products processing companies in the United States. Consolidated ranked as the nation's tenth largest fruit and vegetable canner and among the nation's four largest frozen food packers in 1964.

By 1964, Consolidated's net profits rose to \$14 million; its cash flow reached a total of \$26 million, of which depreciation accounted for \$7 million and bank loans for another \$5 million.

4. At all times relevant herein, Consolidated purchased, sold and shipped products in interstate commerce, and was engaged in "commerce" within the meaning of the Clayton Act.

III

PIGGLY-WIGGLY MIDWEST CO., INC.

5. Prior to its acquisition by Consolidated on May 31, 1956, Piggly-Wiggly Midwest Co., Inc., "Piggly-Wiggly," was a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 1009 West Jefferson Street, Rockford, Illinois.

6. Prior to May 31, 1956, Piggly-Wiggly operated thirty-three grocery stores located in and around Rockford, Illinois; Madison, Wisconsin; and Waterloo, Iowa. Piggly-Wiggly had sales of approximately \$31.1 million, net income of \$342 thousand and an adequate cash flow.

7. At all times relevant herein, Piggly-Wiggly purchased, sold and shipped products in interstate commerce, and was engaged in "commerce" within the meaning of the Clayton Act.

IV

QUALITY FOOD STORES, INC.

8. Prior to its acquisition by Consolidated on February 19, 1959, Quality Food Stores, Inc., "Quality," was a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 1350 Foshey Tower, Minneapolis, Minnesota.

Complaint

68 F.T.C.

9. Prior to February 19, 1959, Quality operated twelve grocery stores in and around Minneapolis, Minnesota. Quality had sales of approximately \$13 million in 1958, and enjoyed adequate profits and cash flow.

10. At all times relevant herein, Quality purchased, sold and shipped products in interstate commerce, and was engaged in "commerce" within the meaning of the Clayton Act.

V

EAGLE FOOD CENTERS, INC.

11. Prior to its acquisition by Consolidated on April 24, 1961, Eagle Food Centers, Inc., "Eagle," was a corporation organized and existing under the laws of the State of Illinois, with its principal office and place of business located at Route 67 and Knoxville Road, Milan, Illinois.

12. Prior to April 24, 1961, Eagle operated thirty-eight grocery stores in and around the counties of Davenport, Dubuque, Clinton and Des Moines in the State of Iowa and East Moline, Rock Island, Lee, Blake, McLean, DuPage, Cook and Sangamon in the State of Illinois. Eagle had sales of approximately \$61 million, enjoyed profits of about \$1 million and had a cash flow of nearly \$3 million in 1960.

13. At all times relevant herein, Eagle purchased, sold and shipped products in interstate commerce, and was engaged in "commerce" within the meaning of the Clayton Act.

VI

TRADE AND COMMERCE

14. Food stores account for the largest single segment of retail trade in the United States. In 1963, food store sales were approximately \$57 billion, or 23% of all retail trade in the United States. Grocery stores account for by far the largest portion of food store sales. In 1963, the 245,000 grocery stores in the United States represented 77% of the number of food store establishments, and their \$55 billion in sales represented over 92% of all food store sales.

15. Grocery stores are recognized as a separate class of retail establishments, distinguished by their trade in a wide variety of food and other high-volume, low-markup consumer goods.

16. In 1963, Consolidated ranked as the nation's 21st largest grocery store chain, with sales of approximately \$164 million. It operated 111 supermarkets located in the States of Illinois, Iowa, Minnesota and Wisconsin. Consolidated achieved its position largely by the acquisitions of Piggly-Wiggly, Quality and Eagle. It added

to its overall grocery store operations by acquiring May Drug Stores, Inc., Golden Dairy Company, and Coin Baking Company. Since their acquisition, these companies have been operated as a part of Consolidated's Supermarket Group. In addition, Consolidated acquired a controlling stock interest in four corporations operating supermarkets which are sponsored by its wholesale establishments.

17. Consolidated ranks among the nation's largest general line food wholesale companies with 1964 sales of approximately \$178 million. Through its wholesale establishments, Consolidated sponsored approximately 1,020 retail food or grocery stores in the United States in 1963, and served another 3,368 independent retail food and grocery stores. Consolidated exercised a significant degree of control over the operations of its sponsored grocery stores through administrative, promotional, financial and other services provided to such stores.

18. At the time of the acquisitions of Piggly-Wiggly, Quality and Eagle, Consolidated's wholesale establishments sponsored grocery stores which were in competition with certain of the grocery stores acquired by Consolidated. In 1963, Consolidated's acquired grocery stores and sponsored grocery stores accounted for a substantial share of the grocery store business in a number of local areas.

19. Consolidated sells substantial quantities of processed food products to other chain grocery companies, many of which are actual or potential competitors of Consolidated's acquired chain grocery store companies. In 1959, grocery store chains operating eleven or more establishments accounted for about 28% of respondent's total shipments of canned fruits and vegetables, of which the nation's top ten chains alone accounted for 17%. Since 1959, the percentage of shipments to chain grocery store customers has increased along with the growth of Consolidated's nationally known brands, including its Sara Lee, Ocoma, Thank You and Booth brands.

20. Consolidated also sells substantial quantities of its processed food products to other food processors whose products are sold through chain grocery establishments.

VII

VIOLATION OF THE CLAYTON ACT

21. On May 31, 1956, Consolidated acquired the capital stock of Piggly-Wiggly Midwest Co., Inc., in exchange for 211,603 shares of Consolidated's common stock.

Complaint

68 F.T.C.

22. On February 19, 1959, Consolidated acquired the capital stock of Quality Food Stores, Inc., in exchange for 57,500 shares of Consolidated's common stock.

23. On April 24, 1961, Consolidated acquired the capital stock of Eagle Food Centers, Inc., in exchange for 367,603 shares of Consolidated's common stock.

VIII

EFFECTS OF THE VIOLATIONS CHARGED

24. The effect of the acquisitions of Piggly-Wiggly, Quality and Eagle, as described above, separately and collectively, may be substantially to lessen competition or tend to create a monopoly in the food industry and in the food store or grocery store segments thereof throughout the United States or portions thereof, in violation of Section 7 of the Clayton Act, in the following ways, among others:

a. Substantial competition, both actual and potential, has been eliminated between grocery stores sponsored by Consolidated's general line food wholesale establishments and grocery stores operated by the acquired grocery store companies.

b. Substantial competition, both actual and potential, has been eliminated between Consolidated and other large chain grocery store companies which are actual or potential purchasers of food products processed by Consolidated. Consolidated's acquired grocery store companies have been eliminated as substantial potential competitors outside the area historically served by such companies; and aggressive price rivalry between said companies and substantial customers of Consolidated's processing establishments has also been hindered or eliminated.

c. Consolidated has been eliminated as an aggressive force in sponsoring independent grocery stores in areas in which its acquired companies operate grocery stores.

d. The opportunity for and the probability of substantial reciprocal dealing in the distribution of a wide variety of food products has been increased.

e. Other acquisitions in the food store and grocery store industries may be encouraged or stimulated, thus multiplying the competitive impact of the acquisitions challenged herein.

f. The members of the consuming public in areas in which Consolidated operates the acquired grocery store companies have been, or may be, denied the benefits of free and unrestricted competition in the distribution of food and grocery products.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft or complaint which the Bureau of Restraint of Trade proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 7 of the Clayton Act, as amended; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent 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 respondent 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 respondent has violated Section 7 of the Clayton Act, as amended, 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 Consolidated Foods Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 135 South LaSalle Street, Chicago, Illinois.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

I

It is ordered, That respondent, Consolidated Foods Corporation, a corporation, and its officers, directors, agents, representatives and employees, shall divest, absolutely and in good faith, of all stocks, assets, properties, rights and privileges, tangible and intangible, including but not limited to, all contract rights, plants, stores, machinery, equipment, trade names, trademarks, and good will acquired by Consolidated Foods Corporation as a result of the acquisition of stock, share capital or assets of Piggly-Wiggly Midwest Co., Inc., Quality Food Stores, Inc., May Drug Stores, Inc., Golden Dairy Company, Coin Baking Company, and Eagle Food Centers, Inc., together with all additions and improvements which have been added thereto as may be necessary to reconstitute

each such corporation, or new corporation in the event divestiture is effected through one corporation, as a going concern and viable competitor in the industry in which it is engaged.

II

It is further ordered, That, respondent, Consolidated Foods Corporation, a corporation, and its officers, directors, agents, representatives and employees, shall divest itself absolutely and in good faith, of its stock interest in (1) Food Giant, Inc., Columbus, Ohio; (2) La Porte City Foods Inc., La Porte City, Iowa; (3) Pearson's Food Market, Inc., Anamosa, Iowa; and (4) Stockton Foods, Inc., Stockton, Illinois.

III

It is further ordered, That, pending divestiture, respondent shall not make any changes in any of the aforesaid corporations which would impair their capacity for the sale of food and grocery products, or their market value.

IV

It is further ordered, That, in said divestitures, respondent shall not sell or transfer, directly or indirectly, any of said stock or assets (1) to any person who is, at the time of divestiture, an officer or director of, or under the control or direction of, Consolidated Foods Corporation or any of its subsidiaries or affiliates, or to any person who owns or controls more than one (1) percent of the outstanding shares of common stock of Consolidated Foods Corporation or any of its subsidiaries or affiliates; or (2) to any purchaser who is not approved in advance by the Federal Trade Commission.

V

If Consolidated Foods Corporation transfers the assets, properties, rights and privileges described in Paragraph I of this Order to a corporation, the stock of which is wholly owned by Consolidated Foods Corporation, and if Consolidated Foods Corporation then markets all of the stock in said corporation in a separate public offering, then Paragraph IV of this Order shall be inapplicable, and the following Paragraphs VI and VII shall take force and effect in its stead.

VI

No person who is an officer, director or executive of Consolidated Foods Corporation, or who owns or controls, directly or indirectly, more than one (1) percent of the stock of Consolidated Foods Corporation, shall be an officer, director or executive employee of

1137

Decision and Order

any corporation described in Paragraph V, or shall own or control, directly or indirectly, more than one (1) percent of the stock of any corporation described in Paragraph V.

VII

As used in this Order, the word "person" shall include all members of the immediate family of the individual specified, and shall include corporations, partnerships, associations and other legal entities.

VIII

It is further ordered, That respondent shall not, without the prior approval of the Federal Trade Commission, acquire any part of the stock or assets of any retail establishment which is classified in Standard Industrial Classification Industry Number 5411 (Grocery Stores With or Without Fresh Meats) and Standard Industrial Classification Industry Number 5451 (Dairy Product Stores), as described in the Standard Industrial Classification Manual published by the Bureau of the Budget in 1957; except that nothing in this Section shall require prior approval of an acquisition of stock or assets in a corporation operating not more than three such retail establishments which are sponsored by or affiliated with a wholesale establishment operated by respondent where the contract by which respondent acquires said stock or assets requires respondent to divest its ownership interest within a period not in excess of three years from the date of such acquisition.

IX

It is further ordered, That respondent shall make every reasonable effort to effect a divestiture pursuant to Sections I and II of this Order within a period of three (3) years from the date of service upon it of this Order: *Provided, however,* That, if divestiture has not been effected within said three year period, the Commission shall grant respondent written notice and an opportunity to be heard before issuing any further order or orders which may be deemed appropriate. If at that time respondent shows it has made a good faith effort and that failure to accomplish divestiture within the three year period cannot be attributed to delays by it, the Commission will grant an additional period not to exceed two years in which to complete the divestiture.

X

It is further ordered, That respondent shall, within ninety (90) days after the date of service upon it of this Order, and every

Complaint

68 F.T.C.

ninety (90) days thereafter until respondent has fully complied with the divestitures ordered herein, submit to the Federal Trade Commission a written report setting forth in detail the manner and form in which respondent intends to comply, or is complying or has complied with this Order, together with such other information relating to compliance as may be requested by the Federal Trade Commission.

IN THE MATTER OF
HARRY CAMP MILLINERY CO, ET AL.

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

Docket C-1025. Complaint, Dec. 21, 1965—Decision, Dec. 21, 1965

Consent order requiring a California retailer of wool and fur hats, operating approximately 200 leased departments in department stores in 23 States, to cease misbranding its hats and falsely invoicing and advertising its fur products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Fur Products Labeling Act and 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 Harry Camp Millinery Company, a corporation, and Harry F. Camp, Jr., Meyer M. Camp and David L. Wilson, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act and 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. Harry Camp Millinery Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Their office and principal place of business is located at 140 Geary Street, San Francisco, California.

Individual respondents Harry F. Camp, Jr., Meyer M. Camp, and David L. Wilson are officers of said corporation and formulate,