

Complaint

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Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

5. Fails to set forth all parts of the information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in type of equal size and conspicuousness and in close proximity with each other.

D. Making claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims and representations are based.

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

FURR'S, INC.

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

Docket 8581. Complaint, June 28, 1963—Decision, Oct. 20, 1965

Order dismissing the complaint and closing the proceeding against a large Southwestern grocery chain with headquarters in Lubbock, Texas, which had allegedly solicited payments from three milk suppliers in connection with a promotional advertising scheme in violation of Section 5 of the Federal Trade Commission Act on the grounds that the particular practice complained of had stopped and that an order is not necessary in the public interest to insure against future violations.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (U.S.C., Title 15, Section 45), and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Furr's, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at 1708 Avenue G, Lubbock, Texas.

PAR. 2. Respondent is now, and for many years has been, engaged in the operation of a chain of retail grocery stores, selling a great variety of food, grocery and non-edible household products. There are presently 63 retail grocery stores composing respondent's chain, which stores are located in the States of Texas, New Mexico and Colorado.

Respondent purchases food, grocery and non-edible household products of all types from a large number of manufacturers, suppliers, and handlers of such products. To create consumer demand and acceptance for the products it sells, and to attract business to its stores, respondent engages in extensive advertising. Respondent's sales of its products are substantial, exceeding \$90,000,000 annually.

PAR. 3. In the course and conduct of its business, respondent has engaged and is now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent purchases for resale a great variety of products from a large number of suppliers located throughout the United States. Respondent causes these products, when purchased by it, to be transported from the place of manufacture or purchase to stores or warehouses located in the States of Texas, New Mexico or Colorado for resale to the consuming public. There is now, and for many years has been, a constant current of trade and commerce in these products between and among various States of the United States.

PAR. 4. In the course and conduct of its business, respondent is now and has been in competition with other corporations, persons, firms and partnerships in the purchase, sale and distribution of food, grocery and non-edible household products in interstate commerce.

PAR. 5. In the course and conduct of its business in commerce, and particularly since 1956, respondent has knowingly induced and received from some of its suppliers the payment of something of value to or for respondent's benefit as compensation or in consideration for services or facilities furnished by or through respondent in connection with respondents offering for sale or sale of products sold to respondent by many of its suppliers when respondent knew or should have known that such payments were not made available by such suppliers on proportionally equal terms to all other

customers of such suppliers competing with respondent in the sale and distribution of such suppliers' products.

PAR. 6. For example, in 1962, respondent held a special promotion called "Furr's 1962 Circus." Respondent solicited participation in the promotion by all of its suppliers through personal contacts or telephone calls. In conjunction with, and as a part of, the circus promotion, respondent held a circus in eleven (11) cities located in the States of Texas, New Mexico and Colorado. Respondent also sent a brochure to all of its suppliers describing the advertising and promotional activities which were to take place during the promotion. Respondent, in its brochure, also offered participating suppliers a choice of seven different advertising and promotional deals which are described in summary as follows:

Jumbo Package

Three weeks of in-store displays in 55 of Furr's stores. 3750 cases of merchandise (68 cases per store average).

Three weeks of advertising which included:

- A. Twelve (12) column inches of advertising in 25 newspapers in 23 towns.
- B. Twelve (12) TV 20-second spots (Classes AA, A, B, C and D).
- C. Twenty (20) radio 30-second spots.

Shelf talkers, store bulletins and window signs in all of Furr's 63 stores.

The supplier's cost for participation was \$5,000.

Full End Display

Three weeks of in-store displays in 55 of Furr's stores. 1500 cases of merchandise (27 cases per store average).

Three weeks of advertising which included:

- A. Six column inches of advertising in 25 newspapers in 23 towns.
- B. Nine TV spots (Classes B, C and D)
- C. Ten radio spots.

Shelf talkers, store bulletins and window signs in all of Furr's 63 stores.

The supplier's cost for participation was \$3,000.

Three Quarter End Display

Three weeks of in-store displays in 55 of Furr's stores. 1,000 cases of merchandise (18 cases per store average).

Three weeks of advertising which included:

- A. Five column inches of advertising in 25 newspapers in 23 towns.
- B. Six TV spots (Classes B, C and D)
- C. Eight radio spots.

Shelf talkers, store bulletins and window signs in all of Furr's 63 stores.

The supplier's cost for participation was \$2,000.

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One Half End Display

Three weeks of in-store displays in 55 of Furr's stores. 750 cases of merchandise (13 cases per store average).

Three weeks of advertising which included:

- A. Four column inches of advertising in 25 newspapers in 23 towns.
- B. Five TV spots (Classes B, C and D)
- C. Seven radio spots.

Shelf talkers, store bulletins and window signs in all of Furr's 63 stores.

The supplier's cost for participation was \$1,500.

Quarter End Display

Three weeks of in-store displays in 55 of Furr's stores. 500 cases of merchandise (9 cases per store average).

Three weeks of advertising which included:

- A. Three column inches of advertising in 25 newspapers in 23 towns.
- B. Five TV spots (Classes B, C and D)
- C. Three radio spots.

Shelf talkers, store bulletins and window signs in all of Furr's 63 stores.

The supplier's cost for participation was \$1,000.

Cardboard Dump Display

Two weeks of in-store displays in 55 of Furr's stores. (Displays were in "cardboard dump" and not on shelf).

Two weeks of advertising which included:

- A. Two column inches of advertising in 25 newspapers in 23 towns.
- B. Thirteen radio spots.

Shelf talkers, store bulletins and window signs in all of Furr's 63 stores.

The supplier's cost for participation was \$750.

Shelf Talkers

Three weeks of in-store displays in all of Furr's 63 stores by means of "shelf talkers."

Three weeks of advertising which included:

- A. Two column inches of advertising in 25 newspapers in 23 towns.
- B. Thirteen (13) radio spots.

Store bulletins and window signs in all of Furr's 63 stores.

The supplier's cost for participation was \$500.

At the end of respondent's brochures was a form which interested suppliers filled out and signed if they wished to participate in respondent's circus promotion. A substantial number of respondent's suppliers participated in respondent's circus promotion and agreed to pay, and did pay, respondent a total of \$113,120.59.

PAR. 7. Typical of the suppliers who participated in respondent's 1962 circus promotion, the products which were promoted and the amounts which they paid respondent are the following:

<i>Name of Supplier</i>	<i>Complaint</i>	<i>68 F.T.C.</i>
	<i>Products</i>	<i>Amount</i>
Rayette, Inc., St. Paul, Minn.	Hair spray	\$5,000.00
American Beauty Macaroni Co. Kansas City, Kansas	Macaroni and spaghetti	1,000.00
La Mur, Inc., Minneapolis, Minn.	Hair spray	3,000.00
Zestee Foods, Inc. Oklahoma City, Okla.	Jellies	3,000.00
New England Confectionery Company, Cambridge, Mass.	Candy	2,000.00
Eversharp, Inc., Milford, Conn.	Schick razor blades	2,000.00
Stilwell Canning Company, Inc. Stilwell, Okla.	Canned fruits and vegetables	1,000.00

PAR. 8. Many of respondent's suppliers who participated in respondent's circus promotion, including specifically those listed herein, did not offer or otherwise make available to all their customers competing with respondent in the sale and distribution of their respective products of like grade and quality similar payments or allowances, or other things of value, for advertising, display, or other promotional services or facilities on terms proportionately equal to those granted respondent. When respondent solicited and received said payments or allowances from its suppliers, respondent knew or should have known that it was inducing or receiving a payment or allowance for advertising, display or other promotional services or facilities from its suppliers which the suppliers were not offering or otherwise making available on proportionately equal terms to all their other customers who were competing with respondent in the sale and distribution of such suppliers' products.

PAR. 9. The acts and practices of respondent, as herein alleged, of inducing and receiving special payments or allowances from its suppliers which were not made available by such suppliers on proportionally equal terms to respondent's competitors are all to the prejudice and injury of competitors of respondent and of the public; have the tendency and effect of obstructing, hindering, lessening and preventing competition in the sale and distribution of food, grocery and non-edible household products; and constitute unfair methods of competition in commerce and unfair acts and practices

in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act.

Mr. Dene L. Lusby for the Commission.

Howrey, Simon, Baker & Murchison, Wash., D.C., by *Mr. Edward F. Howrey*, *Mr. Harold F. Baker* and *Mr. Terrence C. Sheehy*, and *Crenshaw, Dupree & Milam*, Lubbock, Tex., by *Mr. James H. Milam* for the respondent.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

NOVEMBER 27, 1964

On June 28, 1963, the Commission issued a complaint which charged that Furr's, Inc., an operator of a chain of retail grocery stores located in Texas, New Mexico and Colorado, had violated Section 5 of the Federal Trade Commission Act by inducing and receiving, from many of its suppliers, payments as compensation or consideration for services or facilities furnished by Furr's, Inc. to such suppliers in connection with the resale of products sold to it by the suppliers, which payments, to respondent's knowledge, had not been made available on proportionately equal terms by such suppliers to their other customers competing with Furr's, Inc. in the sale and distribution of those products.

Respondent's answer, filed on August 29, 1963, denied that it knowingly induced and received disproportionate promotional allowances, and further denied the presence of the requisite interstate commerce. Respondent also alleged that the complaint fails to state a cause of action upon which an order may be predicated; that the Commission is without legal authority to prosecute respondent under Section 5 of the Federal Trade Commission Act; and that the acts and practices of respondent charged to be illegal were engaged in by respondent in the normal course of business to meet the competition of others engaged in the retail grocery business.

On September 5, 1963, counsel for the parties met with the Hearing Examiner in a reported pre-hearing conference. As a result thereof, an agreed order was issued which was to control the subsequent course of the proceeding, unless modified to prevent manifest injustice. The order, among other things, required each party to file a pretrial brief containing (a) a summary of the issues of fact and law; (b) the name and address of each witness whom it intends to call at the hearings, together with a statement of the

nature of the witness' testimony; and (c) a list of the documentary exhibits which the party planned to be introduced. The order further provided that a party may not introduce any testimony or exhibits which are not referred to in the trial brief. Further pre-hearing conferences were held on October 29, 1963, March 2, 1964, and March 13, 1964, at which times matters relating to the conduct of the proceeding were discussed and resolved.

Complaint counsel filed a trial brief on September 26, 1963, followed by a supplemental trial brief submitted on December 12, 1963, and an amended trial brief filed on March 19, 1964. Respondent's trial brief was filed on April 20, 1964.

Hearings were held at Lubbock, Texas, Denver, Colorado, and Washington, D.C., commencing on April 27, 1964, and completed on May 29, 1964, at which time complaint counsel put in his case and the respondent submitted its defense. Testimony was received from a total of 47 witnesses, 43 being called by complaint counsel, and 4 by respondent. The record includes 1310 pages of transcript and over 1000 exhibits. On July 15, 1964, the parties filed proposed findings, on August 24, 1964, filed replies thereto, and on September 1, 1964, presented oral arguments thereon to the Hearing Examiner. The proposed findings of fact and conclusions not hereinafter specifically found or concluded are herewith rejected. Upon consideration of the entire record herein, the Hearing Examiner makes the following findings of fact and conclusions:

At the outset, it is the contention of respondent that the Commission does not have jurisdiction to proceed against respondent under Section 5 of the Federal Trade Commission Act. There is no merit to the position. It is now well settled as a matter of law that a buyer who knowingly induces and receives discriminatory advertising and promotional payments and allowances from his suppliers engages in an unfair method of competition proscribed by, and within the remedial scope of, Section 5 of the Federal Trade Commission Act. *Giant Food Inc. v. Federal Trade Commission*, 307 F.2d 184 (D.C. Cir. 1962), *cert. denied* 372 U.S. 910 (1963); *The Grand Union Company v. Federal Trade Commission*, 300 F.2d 92 (2d Cir. 1962); *American News Company, et al. v. Federal Trade Commission*, 300 F.2d 104 (2d Cir. 1962), *cert. denied* 371 U.S. 824 (1962). It is found that the Federal Trade Commission has jurisdiction over the acts and practices of respondent, as alleged in the complaint, and the complaint alleges a cause of action under Section 5 of the Federal Trade Commission Act.

Respondent, Furr's, Inc., is a corporation organized, existing

and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at 1708 Avenue G, Lubbock, Texas. It is now, and for many years has been, engaged in the operation of a chain of retail grocery stores, selling to the consuming public a great variety of food, grocery and non-edible household products, which it purchases from a large number of manufacturers, suppliers and handlers of such products. As of December 31, 1962, there were sixty-three retail stores comprising respondent's chain, of which forty-one were located in sixteen cities in the western part of the State of Texas, eleven in five cities in the eastern part of the State of New Mexico, and eleven in Denver and Colorado Springs in the State of Colorado. Seven of the stores were in Lubbock, Texas, six in Albuquerque, New Mexico, and seven in Denver, Colorado. Respondent's sales of its products exceed \$90,000,000 annually, and in the course of its business respondent advertises various of its products in an effort to maintain or increase sales in the various geographic areas in which it operates retail stores. For many years respondent has been purchasing the products which it resells in its stores from suppliers located throughout the United States, and respondent causes these products, when purchased by it, to be transported from the place of manufacture and/or purchase within and without the States of Texas, New Mexico and Colorado, to its stores and/or warehouses located in the States of Texas, New Mexico and Colorado for resale to the consuming public. In conducting its business, respondent competes for retail grocery customers with other corporations, persons, firms and partnerships. (Stipulated - CX 1794.)

In the years 1956, 1957, 1959 and 1962, respondent held special promotions, which were financed in large part by payments which respondent solicited from its suppliers. In the Spring of 1962, respondent held a special promotion, called "Furr's 1962 International 3 Ring Circus," and that participation therein was solicited from certain of its suppliers. In some instances the solicitation was implemented by the use of a brochure (identified as Commission Exhibit 3) describing the advertising and promotional activities which were to take place during the said promotion and offering the suppliers a choice of seven different advertising and promotional "packages" ranging in cost from \$500 to \$5,000. (Stipulated - CX 1794.)

One hundred twenty-nine of respondent's suppliers agreed to participate, and paid respondent a total of \$118,899.05. Among the participating suppliers and the amounts paid by them were the

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following: Sioux Honey Association, \$1,000; Northern Laboratories, \$1,500; Stilwell Canning Co., Inc., \$1,000; New England Confectionery Co., \$2,000; Rayette, Inc., \$4,166.40; The Borden Company, \$5,000; Foremost Dairies, Inc., \$5,000; Meadow Gold Dairies, \$1,000; and Belle Products Co., \$2,000. In addition to in-store displays, the monies solicited and received by respondent from its suppliers were expended for newspaper, radio and television advertising, and Circus expenses. The following suppliers' products were carried during the time in question in all of respondent's stores: Sioux Bee honey (Sioux Honey Association); Capri Foaming Bath Oil (Northern Laboratories); Stilwell Can-D-Pak sweet potatoes (Stilwell Canning Co.); Necco Starline candies, New England Confectionery Co.; Aqua-Net hair spray (Rayette, Inc.); and Towie olives and peppers (Belle Products Co.). Borden's dairy products were carried during the time in question only in respondent's seven Lubbock stores and in six stores located in six Texas towns near Lubbock. Foremost milk was carried during the time in question in all of respondent's Texas stores and in all, except one, in New Mexico. Meadow Gold dairy products were carried during the time in question only in respondent's Denver and Colorado Springs stores. (Stipulated - CX 1794.)

The Circus appeared in eleven cities in the States of Texas, New Mexico and Colorado during the period April 26 through May 12, 1962, and members of the public obtained tickets thereto on the basis of one ticket for each \$25.00 of merchandise purchased from respondent. The advertising and promotional activities purchased by the suppliers in the aforementioned "packages" were performed by respondent during the period March 8 through March 29, 1962, or April 5 through April 26, 1962. (Stipulated - CX 1794.)

For an order to cease and desist to be entered against respondent in the instant case, the evidence must establish that certain of the suppliers who participated in its 1962 Circus did so in violation of Section 2(d) of the amended Clayton Act, and that respondent, in soliciting such suppliers, knew or should have known that their participation would result in such violations.

Under Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, it is unlawful for a person (1) engaged in interstate commerce (2) to pay a customer in the course of such commerce (3) for services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of the grantor's product, (4) if such payment is not made available on proportionally equal terms to all other cus-

tomers competing with the recipient in the resale of the grantor's products. 49 Stat. 1526; 15 U.S.C. § 13.

In the instant case, complaint counsel has limited his proof to the aforementioned nine suppliers who participated in the Circus and to the geographical marketing areas of metropolitan Lubbock, Texas, Albuquerque, New Mexico, and Denver, Colorado.

The respondent and each of the nine suppliers are engaged in interstate commerce. This is not disputed (T. 1310). As heretofore stated, the Circus appeared in the three states where the respondent had its stores. Tickets to the Circus could be obtained only at the respondent's 63 stores in three states during the 6 week period, March 8 through April 26, 1962, on the basis of one ticket for each \$25 of merchandise purchased, determined by presentation of cash register tapes. No tickets were sold or given away (CX 3D). As a part of the contract with its participating suppliers, respondent advertised in 26 newspapers and over 45 radio stations and 17 television stations located in cities in the three States where the respondent had its stores (CX 3E). The purpose of the promotion was to get people into respondent's stores to buy the goods of all of its suppliers. The cost of such advertising and the expense of the Circus were paid from the monies received by the respondent from the suppliers who participated in the promotion. Based upon this situation, alone, it must be concluded that the alleged discriminatory payments made by each supplier to the respondent were "made in the course of such commerce," as required under Section 2(d). Furthermore, it was stipulated by the parties that respondent has been, for many years, purchasing the products, which it resells in its stores, from suppliers located throughout the United States, and that respondent causes those products, when purchased by it, to be transported from the place of manufacture and/or purchase, within and without the States of Texas, New Mexico and Colorado, to its stores and/or warehouses located in the States of Texas, New Mexico and Colorado for resale to the consuming public (CX 1794F). See *Shreveport Macaroni Manufacturing Co. v. Federal Trade Commission*, 321 F.2d 404 (5th Cir., 1963), cert. den. 375 U.S. 971 (1964); and *J. H. Filbert, Inc.*, 54 F.T.C. 359 (1957). The facts recited herein show that the payments received by respondent from the suppliers were made "as compensation or in consideration" for the performing of promotional services.

For clarity, in discussing the question of whether any of the nine named suppliers of respondent has violated Section 2(d), the

facts and legal conclusions relating to each such supplier will be dealt with separately.

1. SIOUX HONEY ASSOCIATION

The Sioux Honey Association, an Iowa corporation with its home office in Sioux City, Iowa, is a cooperative of bee keepers organized for the purpose of processing, packing and selling honey to chain stores, wholesalers, and volunteer groups (T. 794-95, 797). A volunteer group is what is commonly known as a retail owned wholesaler. The record also shows instances of direct sales to independent retailers. Its honey is sold under the brand names of "Sioux Bee" and "North American." In the Lubbock, Albuquerque and Denver areas, it sells the "Sioux Bee" brand (T. 821, 822, 824). It conducts business in all 50 States of the United States with total sales of approximately \$9,000,000 in 1962 (T. 797). Shipments of its products are made from any of its seven plants or from consigned stocks in public warehouses located in a number of areas (CX 12 B). Shipments covering sales to customers in Colorado originate from its Sioux City, Iowa, plant. Shipments to its customers in Texas and New Mexico originate at its plant at Rogers, Texas. The honey, that is processed and packaged at the Rogers plant, comes primarily from Texas bee keepers, but some is obtained from sources outside the State of Texas (T. 795). Sales of Sioux Honey were made through brokers (CX 12 B). During the first five months of 1962, it was represented in the West Texas and Albuquerque, New Mexico, areas by Long-Griffith-Rodecape of Lubbock, Texas. Sometime in the early part of 1962, Mr. Morris E. Long, one of the partners of Long-Griffith-Rodecape, when making one of his regular calls on Furr's, was informed of the Circus promotion by respondent's head buyer, Mr. John A. Milligan. Mr. Long was furnished with a copy of the Circus brochure and asked whether Sioux Honey would be interested. Mr. Long called on the telephone Mr. Roy Smock, the Sales Manager of Sioux Honey, and the request was taken under consideration. (Mr. Smock was not available as a witness for the reason that he died during October 1963 (T. 812).) A few days later, Mr. Long received word from Mr. Smock that Sioux Honey would participate in the promotion in the amount of \$1,000 (T. 472, 489-492). The record does not show the date when Mr. Milligan first talked to Mr. Long about the Circus promotion and when Sioux Honey agreed to participate therein, but the parties are in agreement that all this took place during the month of February, 1962 (T. 1271, 1273). The \$1,000 payment was for the advertising and promotion of

Sioux Bee honey. Respondent takes the position that the one pound extract honey was the specific product promoted, but there is no merit to the contention. Sioux Honey Association, in its report to the Commission, states that it was a "General promotion on all Sioux Bee Honey items stocked by Furr's" (CX 12C). Sioux Bee honey is of three types; extract, comb and creamed. All are U.S. Grade A Fancy. There are differences between the three types insofar as processing, appearance, physical characteristics, price and consumer preference (T. 824-28). The products are sold in about 18 different size packages (T. 515). The record shows that, during the first and second quarters of 1962, the period in which the Circus promotion took place, the respondent purchased 13 items from Sioux Honey, which differed as to size of package or kind of honey (CX 1779A-B). The testimony of Broker Long, who made the arrangements for Sioux Honey's participation, shows the product to be promoted was Sioux Bee Honey (T. 501-2, 511, 512, 517), and that Furr's chose the one pound extract item, which is the most popular size, to feature (T. 501, 502, 511, 512, 517). During 1962, the Sioux Honey Association had in general effect a cooperative advertising agreement, which entitled customers up to 5% of its customers' purchases during the quarter year preceding that in which the advertisements appeared. The respondent had such an agreement, and payments were made to it during each quarter of 1962 under the agreement. The \$1,000 Circus promotion payment was a special promotion, and was not within the confines of the cooperative advertising agreement (T. 493, 798, 800, 801; CX 16). It was customary for Sioux Honey to have special promotions by brokerage areas, and that such promotions may be offered in one area and not in another. When a special promotion is set up, it is separate and apart from the 5% written cooperative advertising agreement, and customers are reimbursed from a separate fund other than that allocated for the written contracts. Sioux Honey also made available for its customers' use, without charge, a display stand valued at approximately \$100.00. It is a wooden shelf unit, approximately 5 feet tall, with fluorescent lights behind the shelving to effectively display Sioux Bee honey (T. 508, 512, 810). It was the policy of Sioux Honey Association to offer to all of its customers promotional allowances, and the association relied upon its brokers to carry out its policy (T. 813). In addition to the \$1,000 Circus promotion payment, which was paid by check on August 22, 1962 (CX 1794 H), the respondent received from Sioux Honey \$964.18 for advertising performed during 1962 pursuant to the 5% written co-

operative advertising agreement (CX 605-15). Respondent did not utilize any of Sioux Honey's display racks (T. 817). Complaint counsel offered a tabulation, which was received in evidence, showing that the respondent's 1962 purchases from Sioux Honey totaled \$19,705.25 (CX 518). This figure is derived from invoices supplied by Sioux Honey (CX 519-71). There was also received in evidence another tabulation offered by complaint counsel, which shows the total of respondent's purchases from Sioux Honey during 1962 to be \$26,763.60: \$10,906.05 during the first quarter; \$4,574.25 during the second quarter; \$6,177.30 during the third quarter; and \$4,911.60 during the fourth quarter (CX 1779 A-B). This tabulation was submitted by the respondent pursuant to a subpoena duces tecum. There is nothing whatsoever in the record to explain the discrepancy. Under the circumstances, it must be inferred that complaint counsel, in offering the second tabulation in evidence, recognized the first tabulation to be incomplete, and the second tabulation as submitted by the respondent to be correct.

Alleged Disfavored Customers of Sioux Honey

The alleged disfavored customers of Sioux Honey Association, eleven in number, are (1) Shop-Rite Foods, Inc.; (2) Ray's Thriftway; (3) Stovall Foods; (4) Buddy's Super Market; (5) South Plains Associated Grocers; (6) Hein Food Stores; (7) Associated Grocers of Colorado, Inc.; (8) Red Owl Stores, Inc.; (9) King Soopers, Inc.; (10) Miller's Super Markets; and (11) Safeway Stores, Inc.

(1) *Shop-Rite Foods, Inc.*

Shop-Rite Foods, Inc. in 1962 owned and operated a chain of 57 retail stores under the name "Piggly-Wiggly" with eight outlets in Albuquerque, New Mexico and seven in Lubbock, Texas (T. 431-34, 446). Its Albuquerque and Lubbock stores were in competition with respondent's stores located in those cities (CX 1798). In 1962, Shop-Rite was a customer of the Sioux Honey Association, and during that year made purchases of Sioux Bee honey totaling \$17,208.25; \$6,527.80, \$3,124.75, \$3,189.25 and \$4,366.45 in the first, second, third and fourth quarters, respectively (CX 17-77). Within a week after Sioux Honey had agreed to participate in respondent's Circus promotion, its broker, Mr. Long, called on the buyer of Shop-Rite to offer a proportional promotional allowance. Shop-Rite considered the matter and informed the broker that they wished to accept \$400.00 for the performance of in-store promotions, and that they would consider this to be

