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), an 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.

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:

Name of Supplier	*Products*	*Amount*
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 of 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 prehearing 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

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 aforenamed 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 indedependent 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

a payment equivalent to that made respondent. Shop-Rite did not choose to perform newspaper, radio and television advertising, and did not do so (T. 504). Shop-Rite picked "the stores they wanted to run the promotion in," and, stating how the $400.00 was detemined upon, Mr. Long said: "It was broke down according to the thousand dollars; the amount of stores that Furr's was running it in and they broke down in that proportion" (T. 515). Mr. Reinhart, President of Shop-Rite, called as a witness by complaint counsel, explained that his company elected to promote Sioux Honey in 26 or 27 of its stores based on "geographical area of our stores with relation to Furr's" (T. 446); that the general method used in arriving at the figure was $15.00 per store. (T. 452); that he was well aware of the Circus promotion, and had seen the brochure (T. 451); that in his "own mind that this was a fair and proportional offer in relation to what Sioux was doing for Furr's" (T 445). By letter dated April 10, 1962, the brokerage firm of Long-Griffith-Rodecape had notified Sioux Honey that all displays had been finished in Shop-Rite stores, and requested that the $400.00 payment be made (CX 586). In 1962, there was in effect between Shop-Rite and Sioux a cooperative agreement, and during that year Shop-Rite received $1,234.95 (T. 435; CX 579-585). Adding to this amount the $400.00 received as a special promotional payment, Shop-Rite's total promotional receipts from Sioux Honey in 1962 amounted to $1,634.95. Considering the related facts, it is concluded that Sioux Honey Association had fulfilled its obligation under Section 2(d) with respect to Shop-Rite Foods, Inc.

(2) *Ray's Thriftway*

Ray's Thriftway, a retail grocery store located at Lubbock, Texas, and operated by Raymond G. Johnson, was and is in competition with the respondent. Mr. Johnson was called as a witness by complaint counsel and testified that, during the year 1962, he handled Sioux Bee honey; that he received his first shipment of Sioux Bee honey in June of 1962; that he gave the order to the Cathey Brokerage somewhere around May 20th; that he was a member of the South Plains Associated Grocers, a buying cooperative, at that time, but South Plains was not involved in the transaction; that he had never been offered any payments or allowances by Sioux Honey Association as compensation for the advertising or promoting of Sioux Bee honey; that he had a store manager, Mr. Godwin (not called as a witness), who handled the transactions with Sioux Honey beginning in July, and for the rest of the year of 1962; that he had a honey display stand, but, when asked, "And who supplied that?",

he answered: "I don't remember for sure, because I got tired of it and threw it out." There was nothing in Mr. Johnson's testimony with reference to the amount of his purchases from Sioux Honey, nor did he deal with any other purchases than those ordered in May of 1962 (T. 680-687). Invoices offered by complaint counsel were received in evidence, which show that Ray's Thriftway purchased Sioux Honey products on five occasions during 1962, totaling $261.50 (CX 108). An invoice, dated May 29, 1962, shows a shipment to Ray's Thriftway of 10 items of Sioux Bee Honey, totaling $55.10, and that the sale was billed to the South Plains Associated Grocers; that it was sold through the brokerage firm of Long-Griffith-Rodecape (not Cathey Brokerage), and that Ray's Thriftway was supplied a Sioux Bee Honey stand (valued at $100.00) at no charge. This apparently is the first purchase made by this customer, as to which Mr. Johnson gave testimony. CX 124, an invoice dated August 31, 1962, shows a shipment to Ray's Thriftway in the amount of $46.40, which was billed to South Plains Associated Grocers. Although in both of the aforementioned invoices South Plains is shown as the buyer, they were direct sales (drop shipments) made to Ray's Thriftway, but by arrangement South Plains was billed for the items (T. 498-99). CX 79, an invoice dated September 17, 1962, shows shipment and billing to Ray's Thriftway of 10 cases 24/1 LB Sioux Bee Honey Extract at $71.00. CX 80, an invoice dated October 25, 1962, shows shipping and billing to Ray's Thriftway of Sioux Bee Honey in the amount of $30.30. CX 81, an invoice dated November 19, 1962, shows shipment and billing to Ray's Thriftway of Sioux Bee Honey in the amount of $58.70. Ray's Thriftway was paid by Sioux Honey, from November 1962, a special advertising allowance of $10.00 in connection with an in-store display of 10 cases 24/1 lb. Sioux Bee Honey (CX 587-588). It is apparent that this payment was made in connection with the purchase made of such products on September 17, 1962 (CX 79). The solicitation by the respondent and the agreement by Sioux Honey Association to participate in the Circus promotion took place during the month of February, 1962. The promotion occurred during the period between March 8 and April 26, 1962. It was during this period that the respondent purchased and resold the products involved in the promotion. To establish that Ray's Thriftway was a competing customer, it must be proved that it purchased and resold such products at approximately the same time. See *Atalanta Trading Corp.* v. *F.T.C.*, 258 F.2d 365 (2d Cir. 1958), and *Tri-Valley Packing Association* v. *F.T.C.*, 329 F.2d 694 (9th Cir. 1964). The first purchase made by

Ray's Thriftway, on May 29, 1962, in the amount of $55.10, was about three months after Sioux Honey agreed to participate in the Circus promotion and one month after the promotion. None of the purchases made by Ray's Thriftway was made during the relevant time period. In *Atalanta Trading Corp.* v. *F.T.C., supra,* a $631.00 purchase by one of the alleged disfavored customers was characterized by the Court as "negligible in amount." It also referred to this and to another purchase of $250.00 as "two trivial sales." Certainly then purchases totaling $261.00 in the entire year of 1962 should be regarded as *de minimis.* It does not seem logical or practicable that a supplier should be required to expend the time, effort and expense of offering or making available promotional allowances to customers who make inconsequential purchases and who would gain little benefit from the amount that could be allowed. In considering the foregoing, it cannot be said that Sioux Honey Association violated Section 2(d) in its treatment of Ray's Thriftway.

(3) *Stovall Foods*

In 1962, Clyde A. Stovall owned and operated two grocery stores in Lubbock, Texas, under the name of Stovall Foods. One store, located at 2211 College Avenue, was opened in September 1961, and the other, located at 29th and Slide Road, was opened on June 19, 1962. Mr. Stovall, called as a witness by complaint counsel, testified that he made a purchase of Sioux Bee Honey on May 31, 1962, which was delivered to him at his College Avenue store, but he transferred this purchase to the Slide Road store when it opened on June 19th; that, during the entire year of 1962, he never stocked a single pound of honey in the College Avenue store; that, until December of 1962, when respondent opened its Rosebud store, his Slide Road store was not in competition with Furr's; that the Rosebud store was about eleven blocks from his Slide Road store; that, prior to the opening of the Rosebud store, his Slide Road store had its "own area of trade territory," and was isolated and separated by a highway and a railroad track from the respondent's stores; and that he had not been offered any payments or allowances by Sioux Honey Association for the promoting of Sioux Bee Honey, but they did give him a display rack (T. 696-713). Through invoices supplied by the Sioux Honey Association, which were offered in evidence by complaint counsel, the record shows that Stovall made three purchases during 1962 from Sioux Honey, totaling $133.00; $48.95 on May 31; $34.35 on August 31; and $49.70 on October 5 (CX 82-85). The Sioux Bee Honey stand

was supplied Stovall Foods at the time of the first purchase on May 31, 1962 (CX 83). In November 1962, Stovall Foods was paid by Sioux Honey $7.00 as a "Special Display Allowance" - 10 cases 24/1 LB Sioux Bee Honey. Apparently this was in connection with the purchase of October 5, when such products were bought by Stovall. It is abvious that a violation of Section (d) by the Sioux Honey Association has not been proved with respect to Stovall Foods.

(4) *Buddy's Super Market*

Buddy's Super Market, located at 4205 34th Street, Lubbock, Texas, is owned and operated by Kenneth R. Davis. Mr. Davis testified that he competes with Furr's for retail grocery customers; that his store is two blocks away from one of the respondent's stores; that, during 1962, he bought and sold Sioux Bee Honey; that such purchases were bought direct from Sioux Honey; that, to his recollection, he has never been offered any payments or allowances by Sioux Honey as compensation for advertising or promoting of Sioux Bee Honey; that Sioux Honey supplied him with a display case approximately five years ago, which was in his store probably two years, and it wore out; that they offered him another one, but he did not accept it. The record shows only one purchase of Sioux Honey products during 1962, totaling $46.15, which is reflected by an invoice dated January 31, 1962. The foregoing does not warrant a finding that the Sioux Honey Association violated Section 2(d) in its dealings with Buddy's Super Market.

(5) *South Plains Associated Grocers*

The South Plains Associated Grocers (SPAG) is a cooperative owned by approximately 185 retail grocers, called member stores, who are located within an area 150 miles in radius of Lubbock, Texas. With the exception of four or five which are in New Mexico, the stores are located within the State of Texas. Thirty-two stores are in Lubbock (T. 583-84, 655, 695; CX 1801). Mr. Alfred W. Allston, General Manager of SPAG, called as a witness by complaint counsel, testified that all their Lubbock stores, as well as Furr's stores, are vying for the same business (T. 613); that his company operates functionally as a wholesaler and that, while member customers are in competition with Furr's, SPAG as an entity is not (T. 640-41); that SPAG operates on a fiscal year basis from July 1st to June 30th; that its approximate sales for the years ending June 30, 1962, 1963 and 1964 were $15,250,000, $19,000,000, and $22,000,000, respectively (T. 635); that it buys

and sells about 6,000 items consisting of health and beauty aids, groceries, hardware, kitchenware, nylon hose and some soft goods; that SPAG takes title to all merchandise and resells only to its member stores; that it sells to members on a mark-up basis (T. 638-640), and at the end of each year any profits that are realized are paid to each member on the basis of his purchases (T. 586); that he could not say whether Sioux Bee Honey, Capri Foaming Bath Oil, Rolo candy, Aqua Net Hair Spray and the Towie products were on the shelves, for retail sale, of one or more of the member stores in Lubbock during the first six months of 1962 (T. 656-58); that he had no personal knowledge as to what items are in the stores (T. 612); that SPAG does newspaper advertising, and these advertisements are run twice weekly; that they would not promote an item not carried in stock in their warehouse; that before the ad is run, it is ascertained that at least 95% of the stores are stocking the item advertised (T. 641-44); that they receive newspaper advertising funds from suppliers on a regular basis pursuant to written contracts with suppliers, but they do receive some newspaper advertising allowances other than by written contract (T. 643-44); that SPAG had no advertising contract with Sioux Honey because it did not have its products in its warehouse (T. 588-89); that in 1962, SPAG was not stocking Sioux Bee Honey in their warehouse, but did handle it for some of their stores on a drop shipment basis; that a drop shipment would be an instance in which an item was shipped direct from the manufacturer to the retail store and did not come through the warehouse; that SPAG would be billed for it and charge it to the retailer (T. 506, 587, 592-93, 626-27); that the two per cent cash discount granted by Sioux Honey was kept by SPAG and not passed on to the member customer (T. 628-29); that Sioux Honey representatives had tried repeatedly to get him to purchase and warehouse Sioux Honey (T. 633); and that Burleson, which they bought, warehoused and sold, was their number one honey line in 1962 (T. 629-30). Broker Long testified that he did not consider SPAG to be a customer of Sioux Honey; that he has constantly and repeatedly solicited SPAG to sell them Sioux Honey and had "made several offers to them trying to get in, but they never would accept"; that the drop shipments were not sales to SPAG, but to the retailer; that one of his men did this sales work, got an order and then got a purchase order from SPAG, and that SPAG did a little bit of paper work and received the 2% cash discount (T. 498-506). Mr. Long explained that one of the reasons that he did this type of transaction was to keep in the good graces of SPAG in the hopes that he

could sell them, and added further that "you can't hope to move any Sioux Bee Honey in the independent grocery market in the Lubbock area without getting in the SPAG warehouse" (T. 506-7). The record shows that in 1962 drop shipments of Sioux Bee Honey were made to only four of SPAG's thirty-two store members in the Lubbock market, to which complaint counsel has limited his case insofar as SPAG is concerned. They are Ray's Thriftway, Jerry's Thriftway, Owen's Super Market and Hill's Food Store. Ray's Thriftway, which made a purchase of $55.10 on May 29 (CX 108) and $46.40 on August 31 (CX 124), has been treated before in the discussion with reference to Ray's Thriftway as a customer of the respondent. Jerry's Thriftway made one purchase of $71.00 on January 18 (CX 89); Owen's Super Market made one purchase of $45.05 on May 17 (CX 106); and Hill's Food Store made one purchase of $38.60 on July 30 (CX 117). These are clearly *de minimis* purchases, so it should not be necessary to discuss whether or not the drop shipment sales were sufficiently contemporaneuos with the purchase or promotion of Sioux Honey products by the respondent in connection with its Circus. The foregoing facts do not support a finding of a Section 2(d) violation by the Sioux Honey Association with respect to South Plains Associated Grocers.

(6) *Hein Food Store*

Hein Food Store, a retail grocery located at 417 Rosemont Avenue, N.W., Albuquerque, New Mexico, and owned and operated by Ed Hein, was and is in competition with the respondent (T. 422-23). Mr. Hein, called as a witness by complaint counsel, testified that in 1962 he bought and sold Sioux Bee Honey, but that the Sioux Honey Association did not make or offer to make him any payments or allowances for the advertising or promoting of Sioux Bee Honey; and that he discontinued all advertising, circulars, newspapers or any type of advertising at least as early as January of 1962 (T. 422-25). Although Mr. Hein said that he has been carrying Sioux Bee Honey continuously for about twenty to twenty-five years (T. 427), his testimony does not reveal the dates or the amount of his purchases. Complaint counsel offered in evidence a tabulation and two invoices submitted by the Sioux Honey Association, which show that it made inconsequential sales to this customer during 1962 in the total amount of $134.70, $74.95 on June 25 and $59.75 on June 30 (CX 149-151). The last purchase was for North American honey, a product that was not involved in the Circus promotion. These facts would not warrant a finding of a violation of Section 2(d).

(7) *Associated Grocers of Colorado*

Associated Grocers of Colorado (AGC) is a corporation which was formed in 1935, and as an organization is similar to the South Plains Associated Grocers, which has been previously discussed (T. 731-32, 751). As of February 17, 1962, it had 647 member stores, of which 123 were located in the metropolitan Denver area (CX 1832A-J). In 1964, the membership was in excess of 700 (T. 732). In 1962, AGC member stores had total estimated retail sales of $218,000,000, ranking the company the sixth largest of United States cooperatives; during the same year, the company had wholesale sales of $109,000,000, ranking the company fourth nationally in that category (RX 91). AGC members account for 11% of the Denver market's grocery sales compared to 2% for respondent (RX 93). It has warehouses in Denver, Colorado, Pueblo, Colorado, and Albuquerque, New Mexico (T. 759). The Denver warehouse serves around 380 to 400 members located in the area as far west as Grand Junction, Colorado, and north to Wyoming and western Nebraska (T. 743). Mr. Harold Hoy, buyer of AGC, called as a witness by complaint counsel, testified that his company during 1962 was "buying warehouse-wise two items of Sioux Bee Honey," the four pound extract honey and honey in "a squeeze doll"; that, in addition to these two items, there were others in the Sioux Bee line that were handled on a drop shipment basis (T. 734); that, in the first six months of 1962, they purchased 760 cases, six jars to the case, of the four pound item—about $3,000 (T. 743); and that they received from Sioux Honey 50¢ a case for the advertising or promoting of the four pound item, which was passed on to the stores (T. 736-37). The situation in this particular is well illustrated by setting forth the following testimony given on cross-examination by Mr. Hoy:

By Mr. Baker:

* * * * * * *

Q. Now, Mr. Lusby asked you about this 50 cents a case that was taken off the invoice on the 4-pound extract, is that correct?

A. Right.

Q. Was that characterized and held out as Sioux Honey promotional allowance?

A. We passed that on to the stores as a price reduction.

Q. My question was: Does Sioux Honey offer that as a promotional allowance?

A. They call it a promotional allowance.

Q. And it is shown as such on your invoices?

A. On their invoice to us, yes.

Q. Now, is it their suggestion that this 50 cents a case be utilized to promote, in the manner that the retailer sees fit, the increased sales Sioux Honey?

A. Well, they ask us to pass it on to the stores so that it will result in a lower price at the retail level, yes.

Q. Do you suggest to the stores that Sioux Honey has made this 50 cents a case available and ask them to especially promote Sioux Honey as a result thereof?

A. In our bulletin we tell the stores there is a 50 cents promotion allowance and that we are passing it on to them for their own promotions, yes.

Q. And in fairness to the manufacturer is it your hope that they will use it in a bona fide way by making extra displays or putting out handbills or something to move this product?

A. Well, the idea of course is promotion, and that is where we pass it on to the stores. (T. 746-47).

Mr. Hoy also testified that Bluehill was their major warehouse honey item, and the movement and turnover of Sioux Honey were small in comparison to Bluehill; that the majority of their members would buy and stock Bluehill Honey and, since Sioux Honey was a minor warehouse item, there were a goodly number of their members who did purchase Sioux Honey from their warehouse stock. Through invoices offered in evidence by complaint counsel, the record shows AGC purchased, during 1962, for its Denver warehouse from the Sioux Honey Association the total of $9,676.75 (CX 170, 177, 191, 204, 215, 232, 236, 242, 243, 247, 248, 267, 277, 280, 283, 292, 342, 347, 359, 361, 370, 375). With the exception of 50 cases of Sioux Bee Cut Comb for $205.00 on February 21 (CX 191), all of the items purchased were the four pounders and the squeeze dolls. During the first six months of 1962, they purchased 860 cases of the four pounder at $4.80, totaling $4,128.00, and 270 cases (12 to the case) of squeeze dolls at $3.75, totaling $1,012.50, bringing their purchases up to $5,345.50 for that period. The invoices show that promotional allowances totaling $430.00 were granted during the first six months of 1962. Mr. Hoy also testified that he has no idea where the merchandise ends up after it is warehoused (T. 764); that he is "merely in charge of the buying department, and I only buy the items that sell. Now what happens from the time that we buy it is of really no concern of mine as a buyer" (T. 750). There is nothing in the record which shows the distribution of the products purchased by AGC for its Denver warehouse stock. As previously stated, the Denver warehouse serves around 380 to 400 member stores located in a three-state area, including the Denver stores. In the opinion accompany-

ing the Commission's remand in *J. Weingarten, Inc.*, Docket No. 7714 (March 25, 1963), it is said:

> Antitrust cases and, in particular, Robinson-Patman cases require a meticulous attention to minute details. When dealing with prices, allowances and goods of like grade and quality, the Commission may not indulge in assumptions or presumptions, for these matters are susceptible of exact proof and this is the type of showing which must be made.

There is no evidence from which a finding can be made that any of the warehoused products was distributed to AGC member stores in metropolitan Denver. Through invoices received in evidence, the record shows that, during 1962, Sioux Honey sold $3,193.40 of its products to nineteen AGC member stores in the Denver area on a drop shipment basis (CX 153, 159, 160, 161, 163, 165, 168, 169, 172, 173, 178, 179, 180, 182, 184, 185, 201, 206, 207, 216, 217, 219, 220, 222, 227, 229, 230, 233, 238, 240, 257, 258, 270, 274, 275, 276, 278, 288, 295, 299, 300, 301, 302, 303, 306, 308, 309, 310, 312, 324, 325, 332, 334, 336, 339, 341, 345, 354, 355, 362, 363, 365, 367, 368, 369, 374, 376). Of this number, nine member stores made only one purchase during the year, ranging from $30.40 to $51.75. The total purchases of the remaining ten for the year ran from $96.05 to $519.30. The largest total purchases of a member store for the first six months of 1962 were $262.80, so none of the drop shipment customers made purchases of any consequence during the period involved in respondent's Circus promotion. Mr. Hoy testified that he is sure that Sioux Honey made offers of promotional allowances or advertising allowances to member customers in 1962, and there may have been numerous offers of Sioux to member customers, of which he would have no knowledge; that his company is not set up to handle a promotional program designed to be used by individual member stores, and that, when such a program is offered by a supplier, the supplier must contact member stores directly (T. 744-45). Complaint counsel offered in evidence documents which indicate that Sioux Honey paid promotional allowances to the individual member stores of AGC regarding which no witness was called and no evidence introduced. The invoices, previously discussed, pertaining to purchases made by AGC for its Denver warehouse and its member stores, show that all of such transactions were handled through The Bancker-Nicholls Brokerage Company of Denver, Colorado. In a letter written on May 21, 1963 by this brokerage to the Sioux Honey Association (CX 576), it is said:

> Attached herewith is the information you requested from us this morning for letters that we have sent out to our customers on our various SIOUX BEE

promotions. First find a copy of the program we started on September 3, 1962, and you will note that the same letter went to all our customers who have controlled stores in our area.

Also attached are the letters that went out on our promotion that started May 6th. Again you will note that these letters went out to our buyers that have controlled stores. Because of the fact that this promotion allowance is for display and/or advertising our retail salesmen worked the independent retailers, as you know, with a cash display allowance which was paid upon completion of a display of SIOUX BEE HONEY in the retail stores. The reason we work the independents this way is the fact that very few of them advertise and about the only way they perform is by display. Due to the fact that no jobber that services independent retailers can guarantee displays or advertising the only way we can give any kind of allowance is by paying cash for actual merchandise displayed.

There was received in evidence a copy of Invoice No. 748 of The Bancker-Nicholls Brokerage Co., dated October 30, 1962, billing Sioux Honey Association for "Charges for Display Deals which were paid by us as per attached receipts * * * $543.50" (CX 592). Commission's Exhibit 591 seems to show that $439.00 of this amount was paid in cash to each member store of AGC qualifying. There is nothing in the record which shows which member stores received the payments. Based upon this vague record, there can be no finding that Sioux Honey treated AGC, or any of its member stores, disproportionally. The record is also wanting in establishing that the member stores of AGC are in competition with the respondent's stores in the Denver area. Mr. Hoy, on direct examination, testified that the member stores of AGC are in retail competition throughout the Denver area with Furr's (T. 734), but on cross-examination he made the following answers to questions put to him:

Q. You testified on direct that your members were in retail competition throughout the Denver area with Furr's. In view of your disqualification of yourself at the retail level, would you want to modify that testimony?

A. I said I presume that they were.

Q. And as to whether any particular member store was in competition with Furr's, you wouldn't know?

A. I would not know. (T. 761-62.)

There is in evidence a document which shows that in 1962 the respondent had seven stores in the Denver area and the street address of each store (CX 1637G-H). The record also lists the street address of each of the 123 AGC member stores in the Denver area, as of February 17, 1962 (CX 1832A-J). There were also received in evidence maps of the City of Denver and surroundings (CX 1838; RX 66). The City of Denver, alone, covers an area of 69 square miles. Metropolitan Denver would embrace a consider-

ably larger area (RX 66). This is the sum total of the evidence which complaint counsel relies upon to establish competition between individual member customers and respondent. Not a single member customer was called to testify. Assumptions or presumptions may not be indulged in for matters susceptible of exact proof *(J. Weingarten, Inc., supra)*.

(8) *Red Owl Stores, Inc.*

Red Owl Stores, Inc. is a chain of supermarkets, headquartered in Hopkins, Minnesota, and doing business in Minnesota, North Dakota, South Dakota, Iowa, Colorado, and Wyoming (T. 854). It operates at the wholesale as well as at the retail level (T. 866). Total sales for the entire corporate operation, including retail and wholesale distribution, for the fiscal year ending March 1, 1962, were between $295,000,000 and $299,000.000 (T. 869). The company owns and operates twelve retail grocery outlets in the metropolitan Denver area, having 5% of the area's grocery market as compared to Furr's 2% (T. 854, 868-870). During 1962, Red Owl purchased $18,751.50 of Sioux Bee Honey, $10,416.05 of which was purchased during the first six months of the year (CX 378-426). Respondent admits there is no question respecting purchases of products of like grade and quality during the relevant time period. Mr. Wassenaar, one of Red Owl's buyers, called as a witness by complaint counsel, was asked the question: "And as a retail grocery chain in Denver, is Red Owl in competition among others with Furr's, Incorporated, for retail grocery customers?", to which he answered, "Yes, sir." There was received in evidence a list of the Red Owl stores in the Denver area, but the addresses of the stores are not given. For example, it gives the location of Store #150 at Denver, Colorado - University Hills; #157 - Commerce City, Colorado - Derby; and #215 - Englewood, Colorado (CX 1836). The record sets forth a list of respondent's seven stores with their addresses in Denver (CX 1637G-H) and two maps of the Denver area (CX 1838; RX 66). Mr. Lou G. Hughes, also called as a witness for the Commission, testified on direct examination that in 1962 he was merchandise manager of Red Owl; that, during that year, he personally bought Sioux Bee Honey, Capri Foaming Bath Oil, Aqua-net Spray and Meadow Gold Dairy products; that these four products were bought to be resold to the public for the Red Owl retail outlets, and they were so sold; that he was not aware of any offer to Red Owl in 1962 of any payments or allowances as compensation for the advertising or promoting of Sioux Bee honey; that his company records reveal that, during

the fall of 1962, an offer was made by Sioux Honey in connection with a free promotion, but the offer was rejected by Red Owl (T. 859-863). Mr. Hughes testified further:

CROSS EXAMINATION

By Mr. Baker:

Q. Mr. Hughes, referring first to Sioux honey, if we may, in 1962 what was you major honey line?

A. Superior.

Q. And that was the line that you put emphasis upon in warehousing and sold through your retail stores?

A. Right.

Q. And you testified that in the fall of 1962 you rejected Sioux Honey's special fall promotion; is that correct, sir?

A. That's right.

Q. Now, in view of the fact that you rejected Sioux Honey in the fall and that Superior was your principal line, would you have promoted Sioux Honey in the spring of 1962 if Sioux had offered you promotion allowances?

A. Very likely not.

Q. Mr. Lusby worded his question to you as to whether you bought these products for resale through the retail operations of Red Owl. You also sold them at wholesale, did you not? in the wholesale operation?

A. That's correct.

Q. And some of them went to your retail operation and some went to the wholesale operation?

A. That's correct.

Q. And you do not know the proportion that went wholesale and the proportion that went to your own retail operations?

A. No, sir.

Q. Nor do you know where they went, to what locations?

A. No, I wouldn't know. (T. 865-66.)

* * * * * * *

REDIRECT EXAMINATION

By Mr. Lusby:

* * * * * * *

Q. I wasn't clear. It's correct, is it not, that at least some of your stores were carrying all of the four products that you have been questioned about?

A. Yes.

Q. It's not—it's just not that they're not carrying all four at the same time.

A. That's correct.

RECROSS EXAMINATION

By Mr. Baker:

Q. You don't know which ones or when?

A. I'm afraid you're right. (T. 871.)

Mr. Hughes' testimony shows that Red Owl's purchases of the products involved were redistributed by it through both its retail outlets and wholesale operations. There is no evidence indicating

specifically which of the Red Owl stores were in actual competition with respondent. Although it might logically be inferred that *some* Red Owl stores were in competition with *some* of respondent's stores, the record fails to establish which stores so competed or that those competing stores were actually stocking and selling Sioux Honey products at approximately the time of respondent's Circus promotion. No finding of the alleged violation can be predicated on the facts relating to the Red Owl Stores, Inc.

(9) *King Soopers, Inc.*

King Soopers, Inc. is the owner and operator of a chain of grocery stores doing business in Denver, Colorado Springs, and Pueblo, Colorado (T. 875). Its general office is located at 1400 West 3rd Avenue, Denver, Colorado (CX 1837). Total sales of King Soopers for the year ending June 30, 1962 were $101,824,000. The company operates twelve grocery stores in metropolitan Denver, and has approximately 19% to 20% of the total metropolitan Denver grocery market (T. 875, 894; RX 92-3). Mr. Lawrence Perkins, head buyer of King Soopers, called as a witness by complaint counsel, testified that his company is in competition with respondent for retail grocery business in the Denver area; that he had the responsibility of buying Sioux Bee honey for his company, which has been carrying such product since it has been in business —about sixteen years; that, during 1962, there was in effect a cooperative advertising agreement between Sioux Honey and King Soopers, and King Soopers received payments thereunder each quarter of the year; that King Soopers was offered a special fall Sioux Bee Honey promotion, which occurred during September 3 to October 5, 1962, and that he did not remember if his company was allowed any money for the promotion of Sioux Honey aside from the payments under the cooperative advertising agreement and the special fall promotion; that his company deals with The Bancker-Nicholls Brokerage Co. in regard to Sioux Bee Honey, and that during 1962 Sioux Bee Honey was sold to the consuming public through their retail stores in Denver (T. 874-882). The record shows that King Soopers purchased during 1962 $18,751.50 of Sioux Bee Honey, of which $6,922.00 was in the first quarter, $3,233.75 in the second quarter, $4,375.25 in the third quarter, and $5,477.75 in the fourth quarter of the year. The invoices show that all of the purchases were made through The Bancker-Nicholls Brokerage Co., and all of the merchandise was shipped to 1400 West 3rd Avenue, Denver, Colorado, the location of King Soopers' general office (CX 427-472). Under the 5% cooperative advertising agreement in effect with Sioux

Honey during 1962, King Soopers received $1,031.07 (CX 596-600). In connection with the special fall Sioux Bee Honey promotion, King Soopers was paid $612.50 in November 1962. The purchase invoices show that King Soopers was allowed promotional allowances by Sioux Honey in the total amount of $662.50 during the period from January 18 to May 18, 1962. There is nothing in the record to explain such allowances. Sioux Honey's Denver brokers, who apparently dealt with its customers in the Denver area in connection with sales and promotional allowances, were not called as witnesses, and the record is not specific or clear as to what offers, if any, in addition to what have been heretofore cited, may have been made to the customers of Sioux Honey in the Denver area (see letter of The Bancker-Nicholls Brokerage Company, which has been previously referred to (CX 576)). There is no question as to purchases of Sioux Bee honey by King Soopers during the relevant time period. In view of the position of the Commission in the opinion in *J. Weingarten, Inc., supra*, the Hearing Examiner is compelled to agree with the position of respondent that "It is not sufficient to show general competition between an alleged disfavored customer and the favored recipent of a promotional allowance or to show, in a general fashion, that the alleged disfavored customer handled identical products at approximately" the relevant time period. The record contains no evidence as to which of the twelve King Soopers stores were actually in competition with respondent. Nor is there evidence indicating which of the twelve King Soopers stores handled Sioux Honey products during the relevant time period during 1962. These are matters susceptible of exact proof, without which a finding of the alleged Section 2(d) violation cannot be made.

(10) *Miller's Super Markets*

Miller's Super Markets, a division of the National Tea Company, owns and operates 44 retail grocery stores located in the State of Colorado and in Cheyenne, Wyoming. It has 29 stores in the Denver area, 27 of which were in existence during the first six months of 1962, and controls approximately 18% to 20% of the Denver grocery market (T. 771-72; RX 92-93). For the year ending December 30, 1961, the National Tea Company had total sales of approximately $900,000,000, ranking the company sixth among United States supermarket chains. At that time, it had 897 stores (RX 89). With reference to competition between Miller's and the respondent, the only evidence in the record was given by Ralph

DeGidio, Assistant Division Manager of Miller's, called as a witness by complaint counsel, who testified as follows:

By Mr. Lusby:

* * * * * * *

Q. Mr. DeGidio, with regard to the Denver metropolitan area and the retail grocery business, is Miller's Super Markets in competition for retail customers with Furr's, Inc., among others?

A. Yes.

MR. LUSBY: Take the witness.

CROSS-EXAMINATION

By Mr. Baker:

Q. Mr. DeLidio, when you say you're in competition with Furr's do you mean that each and every store of Miller's is in competition with each and every Furr's store?

A. Not specifically.

Q. You're speaking generally in answer to counsel's question?

A. Yes, sir.

Q. And to determine whether a particular store of Furr's was in competition with any store or stores of yours would require an analysis of the market with respect to location and other factors, would it not?

A. Yes, sir. (T. 773.)

Mr. Andy Teets, grocery buyer for Miller's, testified that during 1962 he bought from Sioux Honey; that Miller's received $1,245.25 for the special fall honey promotion of Sioux Bee, which occurred during the period September 3 through October 5, 1962; that, other than that, he could not recall any offers of payments or allowances during 1962 by Sioux Honey to Miller's as compensation for the advertising or promoting of Sioux Bee Honey. During 1962, Miller's purchases from Sioux Honey totaled $32,165.00, of which $7,003.25 were purchased in the first quarter of the year, $5,558.25 in the second quarter, $8,619.50 in the third quarter, and $10,984.00 in the fourth quarter (CX 473). The invoices concerning such sales by Sioux Honey show that all of the products were shipped to Miller's at 4120 Brighton Boulevard, Denver, Colorado (CX 474-502). Miller's Warehouse #1 is located at this address. (CX 1833). The invoices show that Miller's was given promotional allowances totaling $452.50 during the period from January 9 through May 25, 1962. There is no evidence in the record which throws any light on such allowances. The record contains no evidence as to which of Miller's stores were actually in competition with respondent. Nor does the record show the products involved ever left the warehouse and were stocked and sold by any of Miller's stores in the Denver area. On the basis of the facts, no finding of the alleged Section 2(d) violation can be made.

(11) *Safeway Stores, Inc.*

Safeway Stores, Inc. operates a chain of retail grocery stores with over-all sales, including domestic and foreign operations, of approximately 2.5 billion annually. The Denver division of Safeway covers Colorado, Wyoming, Western Nebraska, Western Kansas, Northern New Mexico and the Black Hills area of South Dakota (T. 912, 930-31). The company, at the time of the respondent's Circus promotion in 1962, had 53 stores in the Denver metropolitan area (CX 1864A-C), which accounted for 45% of the grocery sales in that area in the year 1962 (RX 92). The record does not reveal the number of stores served by the Denver division of Safeway outside of the Denver metropolitan area. Mr. Ralph E. Finney, Grocery Merchandise Manager of the Denver Division of the Safeway Stores, called as a witness by complaint counsel, testified that, starting in January of 1962 and discontinuing in February of 1962, Safeway purchased cut comb honey from Sioux Honey Association; that comb honey is in short supply and is bought whenever it is available (T. 914); that cut comb honey is dry packaged, and a different product from strained honey in the glass jar; that it is a specialty product, is more expensive, and is in a different price range; that cut comb honey is not normally a promotable item on which he would run a newspaper advertisement or special stacking; that he did not think he would advertise the product even if promotional allowances were offered if proof of performance was required (T. 924-25); that cut comb honey is an optional item, wasn't mandatory that any store stock it, but it was available to the stores; that he had no records which would show which, if any, of the stores in Denver actually stocked the product; that, to the best of his knowledge, Sioux Honey did not offer Safeway any promotional allowances during 1962, and a research of the records did not indicate that an offer had been made (T. 915). However, Mr. Finney explained that many promotional allowances were offered by suppliers of which he had no personal knowledge, and no record is made of offers which are not accepted. Furthermore, his testimony and the record indicate that Sioux Honey's Denver broker dealt with Safeway's Grocery Supply Manager, Mr. Palmquist, with respect to sales and promotion of Sioux Honey (T. 919, 925, 926, 928). Commission Exhibit 577A is a letter of The Bancker-Nicholls Brokerage Company, dated August 28, 1962, offering promotional allowances on eight different items of Sioux Bee Honey in connection with a Special Fall Program, which was sent to A. A. Palmquist and Don Hendrix of

Safeway, as well as others in the Denver area. Mr. Finney was shown the letter and made the following answer to questions with reference thereto:

By Mr. Baker:

* * * * * * *

Q. That indicates, does it not, the accuracy of our earlier discussion that offers can be made of which you would have no personal knowledge or which your investigation would not reveal?

A. This offer was made to Mr. Teets of Miller's Super —

Q. And also to Mr. Palmquist of Safeway as indicated on the exhibit, does it not, sir?

A. It says this letter also went to —

Q. Yes, and accepting that as factual, it would indicate that such an offer was made to Mr. Palmquist. I am not — I am only suggesting that this substantiates our earlier discussions that offers can be made which an investigation would not reveal the existence of, because of the scope and nature of the Safeway structure and operations which I assume is true in any business.

A. I'll answer it yes.

Q. Do you have any personal knowledge whether, assuming the accuracy of the exhibit that I have shown you—whether this offer was accepted by anyone in Safeway as revealed —

A. That's an offer on honey. It has nothing to do with the product we were carrying at the time.

Q. I understand that, sir.

A. Now, what is the question?

Q. I said—my question was: Do you have any personal knowledge of whether this offer as made by Sioux Honey was or was not accepted?

A. Well, I am assuming that it was not accepted because we did not carry glass honey at the time. (T. 928-29.)

The Denver brokers or Mr. Palmquist were not called as witnesses. Mr. Finney, when asked, "* * * does Safeway Stores have any retail grocery competition with Furr's, among others?", answered, "Yes" (T. 912). On cross-examination, he said:

By Mr. Baker:

* * * * * * *

Q. Now, Mr. Lusby asked you whether Safeway Stores compete with Furr's stores, and your answer was in the affirmative.

A. Yes.

Q. Now, you are aware of the fact, I assume, that Furr's has and had in 1962 approximately seven stores in the metropolitan Denver market?

A. I believe that's right.

Q. You would not say, would you, that each of the 43 or 44 Safeway Stores competes with a Furr's store?

A. Well, Furr's, as all chains in the area, appeal to the entire area through their advertising media.

Q. There is no question about that. We are in agreement on that.

A. That's right.

Q. What I am asking you is this: Furr's has seven stores in this metropolitan market. Now, you have forty-three. There are undoubtedly Safeway Stores that are nowhere near to a Furr's store. They are substantially removed from the particular area of any Furr's location; is that not correct?

A. That is correct.

Q. And in those instances you would not say, would you, that your stores which are not anywhere near proximate to a Furr's store—that those particular stores of yours directly compete with the Furr's store?

A. Physically, no; not in that particular area.

Q. But some other Furr's stores would compete with one of your stores?

A. That's true. (T. 927-28.)

On redirect examination, he added:

By Mr. Lusby:

* * * * * * *

Q. I want to apologize for asking such a silly question, but it's necessary as a result of the cross examination. Safeway Denver bought these four products [Sioux Bee Honey is one of the four products] that we're talking about to resell to the public through its retail outlets, did it not?

A. Yes.

Q. And they were so sold, were they not?

A. Yes. (T. 929-930.)

There was received in evidence a list of Safeway Stores, together with their addresses, in the metropolitan Denver area. This is the extent of the evidence relied upon to establish competition between Safeway and the respondent in the Denver area. The invoices in evidence, reflecting the purchases of Sioux Bee by the respondent during 1962, do not show it purchased any cut comb honey in the entire year (CX 19-571). Mr. Larry Schuetz, Sioux Honey's Assistant Sales Manager, testified that the extract honey is liquid honey packaged in a jar, while the cut comb honey is packaged in a small cardboard carton (T. 808, 811); that Sioux Honey pays 80% more to the producer for cut comb than for liquid honey, and the retail price of honey reflects this additional cost; that comb honey is considered a delicacy, is produced in a separate production operation, and is in limited supply (T. 817-18); that in some areas it is considered a produce item, purchased by the produce department rather than the grocery department, and is displayed in the produce section with fruits and vegetables rather than on the shelf with strained honey items (T. 811-812); and that there

is a difference in consumer acceptance. Mr. R. F. Remer, Sioux Honey's General Manager, testified that production costs of cut comb honey are very much higher "because of the high cost of the wax foundation that is put into the cut comb and consumed by the consuming public, the buyer, whereas in extracted honey that comb is re-used—I know of it being reused for 15 or 20 years by a bee keeper" (T. 827). Sioux Honey made nine sales to Safeway during 1962, totaling $1,265.00 (CX 508-517), as follows:

	Cases	*Description*	*Price*	*Amount*
Jan. 12	35	12/10 Oz. Cut Comb Honey	$3.75	$ 131.25
25	25	12/10 Oz. Cut Comb Honey	3.75	93.75
29	40	12/10 Oz. Cut Comb Honey	4.10	164.00
Feb. 15	25	12/10 Oz. Cut Comb Honey	4.10	102.50
21	35	12/10 Oz. Cut Comb Honey	4.10	143.50
21	20	12/10 Oz. Cut Comb Honey	4.10	82.00
28	40	12/10 Oz. Cut Comb Honey	4.10	164.00
Sept. 14	30	6/4 Sioux Bee Extract	4.80	144.00
29	50	6/4 Sioux Bee Extract	4.80	240.00
			Total	$1,265.00

The invoices received in evidence show that the first seven of these sales of these sales of the 10 ounce cut comb honey (12 to the case) were shipped to Safeway at 4600 East 46th Avenue, Denver, Colorado, which would appear to be the location of one of the Denver division warehouses (CX 509-515). The two September sales of the four pound extract honey (6 to the case) were shipped direct to Safeway's store #001, 5450 South Broadway, Denver, Colorado (CX 516, 517, 1864A-C). It must be concluded that the foregoing facts do not warrant a finding of a Section 2(d) violation. Until September 14, 1962, Safeway was a customer of Sioux Honey for a two month period ending February 28, 1962, and only in regard to cut comb honey. The solicitation of Sioux Honey and its agreement to participate in the Circus promotion began on March 8 and concluded on April 26, 1962, so the only purchases made by Safeway, that could be regarded as being within the relevant time period, are the four purchases made in February totaling $491.00, which should be regarded as negligible. The evidence recited show that the cut comb honey purchased by Safeway is a different product from the items of honey purchased by respondent. Furthermore, the record does not show which, if any, of the Denver Safeway stores actually stocked cut comb honey during 1962, or that the stores which did stock the product, if any, competed with respondent.

2. NORTHERN LABORATORIES

Northern Laboratories, of Manitowoc, Wisconsin, a Wisconsin corporation, is engaged in the business of manufacturing and selling toiletries, principally bubble bath under the labels of "Charm" and "Capri." Sales are made through manufacturer representatives in all of the fifty states of the United States and in Canada. Manitowoc, Wisconsin, is the point of origin of the shipments of Capri Foaming Bath Oil. Northern Laboratories' total sales for 1962 were $505,498.14. The manufacturer's representative in the Lubbock, Texas, area during that year was Morris Clinton, and in the Denver area, Jack Kirkpatrick (T. 935-37; CX 617). Respondent's buyer of health and beauty aids, Mrs. Opal Shugart, solicited the participation of Northern Laboratories in the 1962 Circus through its Broker Clinton, who, in turn, presented the matter to Mr. Sorenson, President of Northern Laboratories (T. 477, 480-81, 530-31). Mrs. Shugart testified that she asked for a $750 contribution (T. 480). Mr. Clinton said the amount was $1500 (T. 532), while Mr. Sorenson testified: "As I recall it we were to pay $750 towards such advertising and in return get an order for 750 cases" (T. 938). Mr. Sorenson refused that proposition (T. 938), and made a counter proposal whereby Northern Laboratories would contribute $1500 on an order for 1500 cases, which was accepted by respondent (T. 938-944). Mr. Sorenson also testified that, as far as he could recall, up to the time of the Circus, "This $1500 payment to Furr's was the only payment that had actually been made by Northern Laboratories or to anybody for advertising or promoting of Capri Foaming Bath Oil (T. 943). The 1500 case order of respondent in connection with the Circus promotion was the first order of that size ever received by Northern Laboratories. Respondent paid the normal list price of $6.00 per case for the 1500 cases (1 quart size, 12 bottles per case), or $9000 (T. 939; CX 654). The shipment was made on February 27, 1962. Northern Laboratories was billed for the $500 in promotion on April 24, 1962, which it paid the respondent on May 14, 1962. The total sales to respondent during 1962 were $15,646.80 (CX 618; CX 644-654), of which $13,990.80 were purchased during the first six months of the year. Mr. Sorenson also testified that he instructed Mr. Clinton to make offers identical to the agreement with respondent—$1500 for 1500 cases—to everybody else in the area, but he gave no instructions to Mr. Kirkpatrick in the Denver area; that he never considered Furr's as operating in Denver, and all sales to Furr's were shipped to Lubbock.

Alleged Disfavored Customers of Northern Laboratories

The alleged disfavored customers of Northern Laboratories are (1) South Plains Associated Grocers; (2) Red Owl Stores, Inc.; and (3) King Soopers, Inc.

(1) *South Plains Associated Grocers*

South Plains Associated Grocers of Lubbock, Texas, made 13 purchases of Capri Foaming Bath Oil from Northern Laboratories during 1962 in the total amount of $2,304.00, of which amount $612.00 were purchased prior to April 26, 1962, the last day of repondent's 1962 Circus promotion (CX 629-642). No payments were made to SPAG by Northern Laboratories during 1962 for advertising or promoting of Capri Foaming Bath Oil. It is the position of the respondent that Northern Laboratories was not under any obligation to offer or otherwise make available to SPAG promotional payments granted to the respondent, a retailer for the reason that SPAG functionally operates as a wholesaler (see discussion and argument of this point at page 19 of respondent's proposed findings). Notwithstanding, an offer was made to SPAG. Mr. Clinton, called as a witness by complaint counsel, testified that, at the time he was authorized to commit Northern Laboratories to participate in respondent's Circus, he was told by Mr. Sorenson to be sure to offer it to his other accounts (T. 543-44); that the same week of the commitment, he did offer a comparable deal to Shop-Rite Foods and to the South Plains Associated Grocers, which were the only two accounts carrying the line at that time in Lubbock, but neither accepted the offer (Shop-Rite is not alleged to have been discriminated against by Northern Laboratories); that the offer to SPAG was made to Mr. P. T. Glazner, and to Shop-Rite, to Mr. Bill Turner (T. 535-37). Concerning the offers, Mr. Clinton explained:

> I know that in the past, over the years, I know about the Robinson-Patman Law and I know that when you have a promotion—you offer a promotion or an advertising allowance or anything of that type to one account, you have to offer it to your other accounts. So I immediately offered it to—shall I go ahead and answer Shop Rite? (T. 536.)

Mr. Clinton, when asked, "what exactly was the specific offer that you made to South Plains?", answered: "I made them the same offer of a dollar a case on the same ratio—in other words, $1,500.00 for 1,500 cases, or any amount that they felt that they could use" (T. 537). The payment was to be made to SPAG on proof of performance of the same type to be received from respondent,

including newspaper, radio or television advertising, or in store displays (T. 538). Mr. Sorenson testified that his instructions to Mr. Clinton were clear—that, if he offered $1.00 a case, he had to get an order of 1500 cases, but he supposed that it was possible for him to misunderstand. He also testified that, if an offer of $1.00 a case on a lesser quantity had been made, he could not say what he would have done with respect to honoring such acceptance. However, regardless of what instructions were given, it is the terms of the actual offer which are determinative. Mr. P. T. Glazner, buyer of SPAG, handling specific items including Capri Foaming Bath Oil, called as a witness by complaint counsel, testified:

By Mr. Lusby:

* * * * * * *

Q. And have you, Mr. Glazner, ever been offered by Northern Laboratories or a representative of Northern Laboratories any payments or allowances as compensation for the advertising or promoting of Capri Foaming Bath Oil?

A. You mean back in 1962?

Q. Yes.

A. Well, I have difficulty remembering what was offered. I do remember an offer, but I don't remember the terms.

Q. Was that during a discussion with Mr. Clinton?

A. I think he was calling on me at the time.

Q. Now, tell us what you can remember about that.

A. Well, I don't even remember the day or the time exactly, except he came in my office and made an offer of so much a case off for a quantity purchase. I was trying to remember how much the quantity was; I don't remember that.

Q. You don't remember the exact quantity that was involved, do you?

A. No; no, I don't because it was a considerable quantity.

Q. What do you remember about the quantity, then?

A. The only thing I really remember is that I didn't care for the deal.

Q. And why was that?

A. Well, I say, since I don't remember, I hesitate to say how much the quantity was. It was, oh, maybe a thousand, fifteen hundred dozen of the item, and since it's so vague in my mind, I'd hesitate to say how much it was and I certainly don't remember the quantity. (T. 661-62.)

* * * * * * *

Q. That's what I'm trying to get at, Mr. Glazner. You told me this morning, did you not, that the offer involved buying such a number of cases that you could not possibly take advantage of it?

A. I didn't say I could not possibly take advantage of it. I said I didn't care to take advantage of it.

Q. There was a minimum purchase involved to get the allowance; is that it?

A. The way I understand it, it was; that's my memory. Of course, it's been—

Q. All right—

A. I have difficulty remembering the situation because that's two years ago. (T. 663-664.)

Mr. Glazner, when asked by the Hearing Examiner if he considered Morris Clinton a reliable individual, responded:

I think he's a truthful man. That's why I was trying awfully hard to find out—to jog my memory enough that I could remember because I know he's not the kind that would tell an untruth. (T. 664.)

Considering the foregoing, the Hearing Examiner has come to the conclusion that the offer made by Mr. Clinton to SPAG was not dependent upon any minimum purchase requirement. Even assuming, *arguendo*, that Northern Laboratories did not fully comply with Section 2(d) in making an equivalent offer to SPAG, no finding of violation can be made. SPAG serves approximately 185 member stores in an area 150 miles in radius of Lubbock, with 32 member stores in Lubbock (T. 584, 655; CX 1801). All shipments to SPAG by Northern Laboratories were made to SPAG's warehouse (CX 629-642), and there is nothing in the record which shows which individual member stores handled products purchased from Northern Laboratories during 1962. Mr. Allston, General Manager of SPAG, testified that it is "possible" that the product purchased from Northern Laboratories was not on the shelves of any member store during the first six months of 1962. With respect to the South Plains Associated Grocers, it cannot be found that Northern Laboratories violated Section 2(d).

(2) *Red Owl Stores, Inc.*

Red Owl Stores, Inc. made three purchases of Capri Foaming Bath Oil during 1962, totaling $1,776.00, as follows:

Date of Invoice	*Cases*	*Price*	*Amount*	
Feb. 12, 1962	60	$6.00	$ 360.00	(CX 620)
Apr. 11, 1962	36	6.00	216.00	(CX 621)
June 4, 1962	200	6.00	1,200.00	(CX 622)
			Total $1,776.00	

All of the purchasers were made through Northern Laboratories' Denver broker, Mr. Kirkpatrick, and were shipped to Red Owl's warehouse at Denver, Colorado. The invoice dated June 4, 1962 shows a 10% promotional allowance (60 cents a case) in the amount of $120.00, which was deducted from the gross amount of the purchase. Other than the $120.00 allowance, no payments or

allowances were made or offered to Red Owl by Northern Laboratories as compensation or in consideration for the advertising or promoting of Capri Foaming Bath Oil (T. 863-64, 941-44). However, the record fails to establish the requisite competition between respondent and Red Owl in the handling, sale and distribution of Northern Laboratories products, thus precluding a finding of alleged Section 2(d) violation with respect to Red Owl Stores, Inc. The basis of such a conclusion can be found heretofore in the discussion of Red Owl in connection with its purchase of Sioux Honey.

(3) *King Soopers, Inc.*

King Soopers, Inc., which has its general office at Denver, Colorado, and has a chain of grocery stores in Denver, Colorado Springs and Pueblo, Colorado, made four purchases of Capri Foaming Bath Oil during 1962, totaling $2,328.00 (CX 624-626, 628), as follows:

Invoice Date	*Cases*	*Price*	*Amount*
May 23	108	$6.00	$ 648.00 (CX 624)
July 24	100	5.40	540.00 (CX 625)
Sept. 10	100	5.40	540.00 (CX 626)
Dec. 5	100	6.00	600.00 (CX 628)
		Total	$2,328.00

The May invoice, billed at the regular price of $6.00 per case, shows a promotional allowance of $64.80—60 cents a case. On the July and September invoices, the price of the product is listed at $5.40 a case, which is 60 cents a case below the regular price. Northern Laboratories' President, Mr. Sorenson, explained that the 60 cents represented a promotional allowance, that in some instances the customer is billed at the regular price and the promotional allowance is shown on the face of the invoice, and on others the price of the product is adjusted to reflect the 10% allowance without explanation on the face of the invoice (T. 952). The December invoice shows a deduction of $60.00—"less 10% warehousing discount on 100 cs." Other than hereinbefore shown, King Soopers did not receive, nor were they offered, any advertising promotional allowances by Northern Laboratories. The invoices show that all of the purchases were made through the supplier's Denver broker, Mr. Kirkpatrick, and all of the products were shipped via Consolidated Freight to King Soopers' warehouse at Denver, Colorado. Mr. Sorenson, after being shown CX 624, the invoice dated May 23, 1962, testified that shipment was made on May 23, 1962, and that the transportation company used might take three weeks to make delivery at Denver (T. 957). Mr. Doil

Smith, King Sooper's buyer, testified that the invoice dated May 23, 1962 represented the first purchase of Capri Foaming Bath Oil by King Soopers, and he added, "We don't have the exact date as to when this went on sale as a regular item in all stores. It's normal practice to test an item before you put it in all stores on some items" (T. 884). It is obvious that King Soopers was not a customer of Northern Laboratories during the relevant time period, and did not become a customer until after the Circus promotion ended. For further details with reference to this buyer, see King Soopers in connection with Sioux Honey. In Northern Laboratories' dealing with King Soopers, Inc., there can be no finding of the alleged Section 2(d) violation.

3. BELLE PRODUCTS COMPANY

Belle Products Company, a Texas corporation, with its place of business located at 7720 Grand Boulevard, Houston, Texas, imports, packs, and sells peppers, maraschino cherries, Spanish olives, capers and onions under the name of "Towie" (T. 221-22). In addition to the Towie line, Belle sold respondent olives and cherries under the name "Food Club" (T. 272). The company does business in sixteen states, including New Mexico, Texas and Colorado, and its gross sales in 1962 approximated $3,600,000. Belle employs food brokers to solicit the trade, and makes sales to wholesalers, chain stores, and institutional houses (T. 222-23). Belle has only one plant, which is located at Houston, Texas, and the shipment of all of its products originates from that point (T. 242). A document (CX 1382A-H) prepared by Belle in response to subpoena duces tecum, issued at the request of complaint counsel, states:

> Belle Products Company had no policy nor program of sales promotion expressed in writing. All policy and program with reference to sales promotion was oral. The policy was that Belle Products Company would participate in customer merchandising and sales promotional activities in Belle Products Company's line of merchandise. This offer was made known throughout the trade verbally and consistantly. Particular programs were initiated by the customers. (CX 1382A.)

Mr. Benjamin O. Leff, Secretary and Treasurer of Belle Products Company, called as a witness by complaint counsel, testified as follows:

By Mr. Lusby:

* * * * * * *

Q. Mr. Leff, during 1962 did Belle Products Company have in effect any cooperative advertising program?

A. Yes.

Q. Would you explain that answer?

A. We did not have a written cooperative program, but we had a program in effect that had been in effect since we've been in business to merchandise and promote with all of our customers.

Q. And what is that plan?

A. The plan is to offer our merchandising and promotional services to the customer with the understanding that our program is to fit into their particular pattern and needs and that the customer will originate the type of merchandising they desire.

Q. And how is this plan made known to the customer?

A. Every time any one of our salesmen, brokers, or myself, or anyone from my firm calls on a customer, we ask the person that we're calling on if there is any way that we can promote, can merchandise, can help increase the sale of our products, and that we stand ready, willing and desirous of promoting our products to increase the sales.

Q. Under that system, the details of any advertising program or any advertising activity at all would come from the customer; is that correct?

A. Yes, sir.

Q. So that there is no formula on your part that you can apply to a request for an advertising contribution, is there?

A. Only if it comes within a certain percentage of the total sales, and our formula is five percent—in 1962 was five percent of the total volume.

Q. To make sure that I understand you correctly, your plan, as you refer to it, is that upon request from a customer you will participate in advertising with them to an extent not to exceed five percent of gross annual sales; is that correct?

A. Advertising, merchandising, promotion, depending upon the particular type of merchandising promotional method that they select. (T. 227-28.)

Mr. Leff testified that Furr's, Mr. Milligan visited his office in Houston early in 1962, at which time he told him of the Circus promotion, gave him a brochure of the Circus, and solicited Belle's participation (T. 224). Mr. Leff, asked of the details of their conversation, said:

Well, he went through the brochure page by page showing all the details involved and the various plans that were presented in the brochure that I received and the benefits of each of the particular type participation, and I told him that I could not give him an answer at that time, that I would have to discuss it with my partner and, outside of general social conversation, I think that was the gist of the meeting with Mr. Milligan. (T. 229.)

A few days after Mr. Milligan called on Mr. Leff, which was sometime in February 1962, Belle decided to participate in the Circus in the amount of $2,000, and executed an agreement (CX 1595) to participate in that amount, which was mailed to respondent with a letter, dated February 9, 1962, informing respondent of its decision (T. 238-39, 243-44; CX 1594). Mr. Leff said that Belle's

participation was part of its promotional activity (T. 234), and testified further:

By Mr. Lusby:

Q. Mr. Leff, how was the amount of $2,000 determined upon to be your participation in the Circus?

A. That was the amount that we anticipated Furr would sell during the year and were entitled to.

Q. Who first used the number two thousand?

A. I think the number two thousand was one of several options that were available to our company and my partner and I decided that $2,000 would be in line with the advertising budget for the year.

Q. Did Mr. Milligan suggest that you contribute $2,000?

A. No, sir; Mr. Milligan gave the various participations up to one thousand and he did not specifically state that I can remember that we go two thousand. To my recollection, the $2,000 figure was determined by my partner and myself as to what our advertising allowance for Furr's would be. (T. 234-35.)

Mr. Leff explained that, when he spoke of "my partner," he was referring to B. L. Golup, the President of Belle Products Company (T. 235). Mr. Leff also said that the $2,000 figure of participation was determined by analyzing "the previous year's sales, which was approximately the same as what it actually was in 1962, and based on what they had done previously, we projected it, what the entire 1962 would be" (T. 239). He "felt sure that the amount of $2,000 would be a figure that would fit into the formula we were working on" (T. 240). Belle Products was billed by the respondent for its participation in the Circus in the amount of $2,000 by an invoice dated May 3, 1962, which was paid by a check dated May 28, 1962 (CX 1583-84). Respondent received no promotional payment from Belle during 1962 other than this payment (CX 1382G). Purchases of all products by respondent from Belle during 1962 totaled $76,018.07 (CX 1773A-F), of which amount $48,453.35 was for the Towie line of items (T. 272; CX 1382A). Thus, the Circus payment to respondent amounted to 2.6% of its total purchases and 4.1% of its Towie line purchases. Therefore, the $2,000 payment made to the respondent comes within Belle's formula of 5% of total purchases during 1962, which Mr. Leff testified was offered and available to each of its customers. Mr. Leff testified that only four of its items *promoted by the respondent* at the time of the Circus, namely, (1) a six-ounce jar of thrown stuffed Manzanilla olives; (2) a seven and three-quarter ounce jar of thrown stuffed Manzanilla olives; (3) a hot banana pepper; and (4) a mild banana pepper (T. 244). However, the contract, signed by Belle Products

Company, which was received and recognized by the respondent as Belle's commitment to participate in the Circus, named "Towie Spanish Olives," "Towie Maraschino Cherries" and "Towie Peppers" as the products to be promoted. It is not a question of what products respondent promoted, but what products the respondent was required to promote under the agreement. It seems to the Hearing Examiner that the contract is controlling, and that the products involved in this instance are the products named therein.

Alleged Disfavored Customers of Belle Products Company

The alleged disfavored customers of Belle Products Company, four in number, are (1) South Plains Associated Grocers; (2) King Soopers, Inc.; (3) Safeway Stores, Inc.; and (4) Associated Grocers of Colorado.

(1) *South Plains Associated Grocers*

South Plains Associated Grocers (SPAG) of Lubbock, Texas, made warehouse purchases in 1962 from Belle Products Company totaling $3,241.25 (CX 1382D). In addition thereto, 24 of SPAG's 185 member stores made purchases from Belle in 1962 on a drop shipment basis, totaling $5,561.36 (CX 1382E-G). SPAG's warehouse purchases from Belle Products were Towie Salad Olives, Towie Maraschino Cherries, and Towie Mild Banana Peppers, and were shipped from Houston to SPAG's warehouse at Lubbock, Texas (T. 590-91; CX 1493-1516). Belle Products' Mr. Leff testified that, during 1962, it did not make any promotional payment to SPAG, but Belle offered to SPAG, through Mr. Aston, its Lubbock broker, the company's regular promotional program under which respondent received the Circus payment. Mr. Leff stated that the offer was made to buyer of SPAG (T. 230-33). Mr. Allston, General Manager of SPAG, testified that his company had no record of an offer having been made, and he had no recollection of an offer having been made (T. 591). Mr. Allston also stated that he does not personally deal with the suppliers' brokers except in special and unusual circumstances (T. 650). Neither Belle Products' broker, Mr. Aston, nor SPAG's buyer, who dealt with the public, was called as a witness. It must be concluded from the evidence that promotional payments equivalent to the Circus payment to respondent were offered and available to SPAG. There is no evidence showing which member store of SPAG (except those that received drop shipments) handled products purchased from Belle Products Company. Mr. Allston testified that it is "possible" that the Towie products were not on the shelves of any

member store during the first six months of 1962 (T. 657). Drop shipments were made by Belle Products to eight of SPAG's member stores in Lubbock during 1962, and each purchased Towie Olives, Towie Maraschino Cherries or Towie Peppers (CX 1382E-G; 1530; 1554-1579A-B). The name and address of each member store, and the invoice date and amount purchased, are as follows:

	Holt's Fine Foods	2908 Avenue N
Nov. 4	$66.70 (CX 1525)	
	Roy Thriftway	4132 West 19th Street
Aug. 29	$52.95 (CX 1530)	
	United Super Market	50th & Q Streets
March 28	$ 52.55 (CX 1554)	
April 23	74.35 (CX 1555)	
June 3	64.90 (CX 1556)	
June 17	86.20 (CX 1557)	
July 10	64.30 (CX 1558)	
August 19	57.50 (CX 1559)	
Sept. 19	62.35 (CX 1560)	
Nov. 4	71.40 (CX 1561)	
Nov. 18	74.65 (CX 1562)	
Dec. 16	76.25 (CX 1563)	
	$684.45 (CX 1382F)	
	United Super Market	42nd & Boston Avenue
June 17	$ 63.15 (CX 1564)	
July 10	66.60 (CX 1565)	
August 19	95.45 (CX 1566)	
Sept. 19	74.00 (CX 1567)	
Nov. 4	59.50 (CX 1568)	
Nov. 18	66.70 (CX 1569)	
Dec. 16	73.80 (CX 1570)	
	$499.20 (CX 1382F)	
	United Super Market	McKenzie Village
June 17	$ 96.30 (CX 1571)	
July 15	76.90 (CX 1572)	
Sept. 11	93.20 (CX 1573)	
Nov. 18	66.35 (CX 1574)	
Dec. 16	58.05 (CX 1575)	
	$390.80 (CX 1382G)	
	United Super Market	19th & Quaker Streets
August 7	$ 63.50 (CX 1576)	
Sept. 19	60.90 (CX 1577)	
	$124.40 (CX 1382G)	

	United Super Market	1720 Parkway Drive
Nov. 4	$59.50 (CX 1578)	
	United Super Market	40 College Avenue
Sept. 19	$133.20 (CX 1579A-B)	

It should be noted that the only member store that made any purchases during the relevant time period was the United Super Market located at 50th & Q Streets, which made two purchases in March and April 1962 in the total amount of $126.90. As the Circus ended on April 26, 1962, the other seven member stores did not become customers of Belle Products Company until approximately two to seven months after the promotion. Furthermore, the record does not contain evidence of actual competition between any one of the eight member stores and respondent. For further details, see the discussion of SPAG in connection with Sioux Honey. On the basis of the record, no finding of the alleged Section 2(d) violation can be made with reference to Belle Products' treatment of South Plains Associated Grocers or any of its member stores.

(2) *King Soopers, Inc.*

King Soopers, Inc., which owns and operates twelve grocery stores in metropolitan Denver, made two purchases of Towie Thrown Stuffed Manzanilla Olives (7¾ ounce size jar) during 1962, totaling $1437.50 (CX 3720; 1481-1482). The invoice of its first purchase, dated April 23, 1962, shows the purchase of 250 cases, 12 jars to a case, of the above named product in the total amount of $912.50 (CX 1481). The invoice of the second purchase, dated November 4, 1962, shows the purchase of 150 cases of the same product totaling $525.00 (CX 1482). Both invoices show that the purchases were made through Broker Kurtzman, and that the products were shipped by truck from Houston, Texas, to King Soopers' warehouse at Denver, Colorado. The record does not reveal the dates of delivery of the product to the buyer. Mr. Leff of Belle Products testified that his company did not make any payments to King Soopers in the way of promotional allowances, but Belle offered to King Soopers, through Mr. Kurtzman, its broker, the company's promotional program under which respondent received the Circus payment (T. 230-31). Mr. Leff testified that his company was not the regular supplier of this item to King Soopers, Inc., and they "evidently bought because we had a cheap price on it and it was just a special in and out promotion * * *." (T. 262). He also said that he had made repeated efforts to

become a regular supplier of King Soopers, and his broker also consistently called on them and tried to get his product in on a regular basis, but were unsuccessful (T. 263). Mr. Perkins, King Soopers' head buyer, testified that his main supplier of olives was W. O. Summers (T. 879); that he made the two spot purchases from Belle Products strictly on the basis of price; that he felt that he had a very good low price on the two purchases; that the Towie line during 1962 was sold to the consuming public through the King Soopers stores in Denver; that the first purchase of olives in 1962 was probably delivered and on the shelves of their retail stores "from the first to mid-May, somewhere in that area"; and that it was quite possible, with just the two purchases, that there were extended periods of time in 1962 when no Towie olive items were on their shelves. Mr. Perkins also testified that he did not remember or recall of King Soopers ever receiving any offers from Belle Products Company of allowances for promoting the Towie line of products (T. 878), but he also said he could not recollect whether it was Broker Kurtzman with whom he dealt in 1962 in connection with the purchase of Towie olives (T. 880-81). Broker Kurtzman was not called as a witness. On consideration of the evidence, the Hearing Examiner is of the opinion that Belle Products Company offered to, and there was available to, King Soopers, Belle's regular promotional program under which the Circus payments were made. For further details with reference to King Soopers, Inc., see the discussion heretofore in connection with Sioux Honey. The facts do not warrant a finding of a violation of Section 2(d) by Belle Products Company with respect to King Soopers, Inc.

(3) *Safeway Stores, Inc.*

Safeway Stores, Inc., Denver Division, with stores in six states, including 54 stores in metropolitan Denver, made purchases from Belle Products Company during 1962 totaling $1,402.75 (CX 1382D). The invoices, which reflect such purchases (CX 1483-1492), show that two purchases were made during the month of August, two in November, and six in December, and the purchases were limited to three items, namely, Towie Hot Jalapeno Peppers and Towie Sweet Onions with Pimiento. The invoices showing the purchases of the respondent (CX 1383-1424) reveal that not one of these items was purchased by the respondent during the entire year of 1962. The invoices also show that all the products were shipped to Safeway's grocery warehouse at Denver, Colorado. Mr. Leff of Belle Products testified that his company did not make any advertising promotional payments to Safeway of Denver, but they were

offered payments pursuant to their promotional program which has previously been described. Mr. Leff explained the difference between hot jalapeno peppers and the hot and mild banana peppers, as follows:

> Well, the jalapeno is a very limited pepper, inasmuch as it's extremely hot and is sold only to people who have a real strong stomach. The girls, when they pack them in the plant, have to wear rubber gloves. They're so hot they can't even touch them. Whereas, these other peppers have more of a general and broad use and can be used for other—can be eaten by a normal, ordinary person. A person who eats a jalapeno pepper knows particularly what they want—in other words, it's a very specialized product. (T. 255.)

Mr. Leff also said that they did not sell Safeway any product that was sold to Furr's in 1962. Mr. Finney, Safeway's Grocery Merchandise Manager of the Denver Division, testified that, to the best of his knowledge, no promotional allowances were offered Safeway for the promotion of Towie peppers (T. 919); that promotional allowances would be made to his department which he supervises (T. 915-16); but it is possible that promotional allowances were offered in 1962 by Belle Products of which he had no personal knowledge (T. 962). Mr. Finney also said jalapeno peppers are a specialty product with a relatively small turnover, that it is not a promotional item on which you would run newspaper advertising or make in-store displays; and that he did not think he would do such promoting if he were offered allowances which required proof of performance (T. 923-24). Mr. Finney also testified that jalapeno peppers are an optional item, and it was not mandatory that any store stock it; and that he has no records which show what stores, if any, in Denver actually stocked the item. For further details with reference to Safeway Stores, see the discussion heretofore in connection with Sioux Honey Association. It is concluded from the evidence that Belle Products' promotional program under which respondent received the Circus payment was offered and available to Safeway Stores, Inc. The record fails to establish with sufficient specificity competition between Safeway and respondent, and shows without contradiction that Safeway did not purchase any item from Belle during 1962, competitive with, or of like grade and quality to, the products involved in the Circus promotion. Furthermore, Safeway did not become a customer of Belle Products until August 1962, approximately four months subsequent to the promotion by respondent. A finding of a Section 2(d) violation by Belle Products Company cannot be predicated upon its dealings with Safeway.

(4) *Associated Grocers of Colorado*

Associated Grocers of Colorado made six purchases during 1962 from Belle Products Company for its Denver warehouse, totaling $2,437.75. The purchases were limited to two items—the one and one-eighth ounce of thrown stuffed Manzanilla olives and the seven and three-quarter ounce size of the same product. The dates of the invoices and the amount of each purchase are as follows:

Jan. 9	$ 431.25	(CX 1427)
March 3	512.00	(CX 1428)
May 16	450.50	(CX 1429)
May 27	365.00	(CX 1430)
June 24	234.00	(CX 1431)
Nov. 13	445.00	(CX 1432)
Total	$2,437.75	

Belle Products made drop shipment sales during 1962 to the following Associated Grocers' member stores in the Denver metropolitan area, the invoices dated and in the amounts as noted:

	Ce Buzz, Inc. #3	1280 South Sheridan Boulevard
Nov. 22	$207.00 (CX 1445)	
	Mayfair Market	465 Garfield Street
Oct. 21	$46.25 (CX 1462)	
	Rodeo Super Market	3915 West 73rd Avenue
Oct. 10	$58.50 (CX 1468)	
Nov. 13	58.50 (CX 1469)	
Total	$117.00	
	Super Saver Food Market	343 Holly Street
Oct. 21	$73.50 (CX 1472)	
Nov. 13	122.50 (CX 1473)	
Nov. 19	144.00 (CX 1474)	
Total	$340.00	
	Village Market	1465 South Holly
Oct. 21	$59.50 (CX 1479)	
Nov. 13	112.00 (CX 1480)	
Total	$171.50	

The sale to Ce Buzz included sweet pickle slices and onions, totaling $21.75, and the same items were included in the last invoice of Super Saver Food Market in the amount of $85.00. With these exceptions, all of the drop shipments were Towie products involved

in the Circus promotion. The drop shipments to Associated Grocers' member stores should be disregarded for the reasons that the total purchased by the individual member store was negligible and all of the purchases were well outside the relevant time period. Mr. Leff of Belle Products testified that in 1962 his company did not make any promotional payments to Associated Grocers of Colorado, but offers were made to them by Belle Products' broker, Mr. Kurtzman (T. 229-230). As to the nature of the offer, Mr. Leff explained:

> We told them that we would be willing to merchandise and cooperate with them in the manner that they wanted it best, but, you see, they had their own line of olives at the time and cherries that they were carrying under their private label and we were never able to get any distribution with them other than just an occasional order or two or an occasional number or two. We were a very minor supplier of theirs rather than a major supplier. (T. 230-31.)

Mr. Hoy of Associated Grocers, when asked on direct examination if Associated Grocers of Colorado were offered any promotional allowances by Belle Products Company, answered: "Not other than the price given on the product, no. * * * Price concessions on items, yes" (T. 735-36). On cross examination, he explained:
By Mr. Baker:

* * * * * * *

Q. Now, you mentioned on direct that Mr. Lusby asked you if you received any offers from Belle Products for advertising, promoting, and your answer according to my note was, "None other than price concessions."

A. True.

Q. Have you received what you considered "price concessions" in an effort by Belle to get you to advertise and move their product?

A. Well, at that time they would have a promotion and offer a lower price during a certain period. As a big allowance.

Q. Induce you to handle the products?

A. Yes, on items, yes. (T. 763.)

It is the opinion of the Hearing Examiner that Belle Products' promotional program under which respondent received the Circus payment was offered and available to Associated Grocers of Colorado. Mr. Hoy also testified that his company's main olive line was "Shurfine" (T. 747), and they would handle Towie olives on an in-and-out basis (T. 754); that the sales of the 1⅛ ounce stuffed Manzanilla olives were very small and the item would not be stocked by many member stores; and that the amount of their purchases of the 7¾ ounce thrown stuffed Manzanilla olives was not sufficient that a significant number of the member stores were handling and stocking this item (T. 754). For further details, see Associated Grocers of Colorado discussed previously in connection

with Sioux Honey Association. The evidence fails to establish a violation of Section 2(d) by Belle Products Company with respect to Associated Grocers of Colorado.

4. STILWELL CANNING COMPANY

Stilwell Canning Company of Stilwell, Oklahoma, an Oklahoma corporation, is a canner and marketer of boysenberries, blackberries and vegetables. The company packs and markets under a number of its own labels and under customers' private labels. Sales are made through food brokers to chain stores and wholesalers in 20 states, including Texas and Oklahoma. The firm of Jones-Neitzel Company of Dallas, Texas, was Stilwell's broker during 1962 in its sales to the respondent, Shop-Rite Foods of Lubbock, and Safeway Stores at Denver. The sales of the company are in excess of $2,000,000 annually. Shipment of all merchandise sold by Stilwell originates at the company's plant in Stilwell, Oklahoma (T. 348-49). On February 5, 1962, Mr. John Milligan of Furr's called on Mr. John B. Jones, one of the partners of the brokerage firm of Jones-Neitzel Company, at his office in Dallas, at which time he presented to him a brochure of the respondent's 1962 Circus and solicited the participation of Stilwell Canning Company. Mr. Long, called as a witness by complaint counsel; testified that he told Mr. Milligan that Stilwell might be interested, and he would discuss the matter with Mr. Claude Todd, President of Stilwell; that he called Mr. Todd on the telephone, at which time he discussed the promotion with him and told him he was sending him the brochure; and that, as he recalls it, Mr. Todd said, "Well, let me give it a little thought and we will advise you of it" (T. 323). On February 5, 1962, a letter was written to Mr. Claude Todd by Mr. John B. Jones, in which it is stated:

> We are enclosing a brochure on Furr's circus promotion. This is what John Milligan was doing in our office when you talked to him this morning. Please look this over and we will discuss it with you later in the week. (CX 914.)

Mr. Long said that a week or ten days later Mr. Todd informed him that the company would participate in the Circus in the amount of $1,000, and they wanted to promote one of the items Furr's was handling—a three-squat size Can-D-Pak brand whole sweet potato (T. 322-24). Mr. Todd, also called as a witness by complaint counsel, testified that one of the reasons Stilwell selected this item to be promoted was that Stilwell was very long on the product and wanted to get it moved; and that another motivation

in picking the product was its higher price and higher profit—"It's a profitable item and you can afford to promote it" (T. 366). Stilwell Canning Company paid respondent $1,000 in connection with the 1962 Circus promotion (CX 1794H). The record contains no other evidence of promotional receipts by respondent from Stilwell during 1962. Respondent's purchases from Stilwell during 1962 totaled $93,700.12, of which amount $18,162.20 was for Stilwell's three-squat size Can-D-Pak brand sweet potatoes (CX 1780A-C). While Stilwell has no written advertising program, the company makes available to its customers promotional funds from time to time (T. 325-28, 353-54). Mr. Todd testified that, while the company did not have any definite policy, they tried to treat their customers fairly and equivalently. "This is always in the back of our minds whenever an allowance is made that this same offer or allowance should be available to other customers in the area" (T. 360-61).

Alleged Disfavored Customers of Stilwell Canning Company

There are two alleged disfavored customers of the Stilwell Canning Company: (1) Shop-Rite Foods, Inc., and (2) Safeway Stores, Inc.

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

Shop-Rite Foods, Inc., of Lubbock, Texas, made purchases from Stilwell Canning Company during 1962, totaling $3,833.00 (CX 373-374). The only sweet potato item purchased from Stilwell during that period was a 303 size can of Stilwell Cut and Whole Sweet Potatoes in the total amount of $672.00. Shop-Rite made two purchases of this item, the first in the amount of $336.00, which was shipped on February 12, 1962; and the second in the amount of $336.00, which was shipped on February 23, 1962 (CX 876-877). Shop-Rite made no purchases of the three-squat Can-D-Pak whole sweet potatoes during 1962. The product purchased by Shop-Rite is different from the three-squat Can-D-Pak item promoted by respondent. This was the testimony of every witness who testified on the subject. The item purchased by Shop-Rite is inferior in grade compared to the Can-D-Pak whole sweet potato; is packed in lighter syrup; is sold at a lower price; is not uniform in size or color of potatoes; and consists of the rejects and trimmings resulting from the packing of the three-squat Can-D-Pak whole potato (T. 335-38, 341, 354-55, 364-65). Additionally, under the grading and qualifying of sweet potatoes by the United States Department of Agriculture, the cut sweet potato is treated dif-

ferently than the whole potato (T. 354-55). The two items are considered different in the trade in that, in price structure, manufacturers make no attempt to compete with one item by pricing the other item equally (T. 337). Stilwell's broker, Mr. Jones, testified that, at the time of the Circus promotion by respondent, no promotional allowances were offered to Shop-Rite, and he explained that they checked their records carefully and found Furr's was the only concern in the area handling the Can-D-Pak item (T. 328). Mr. Todd, President of Stilwell, also testified that an offer was not made to Shop-Rite because the customer was not handling the product promoted (T. 366-67). Mr. Reinhart, President of Shop-Rite Foods, Inc., the alleged disfavored customer, called as a witness by complaint counsel, testified that the 303 size cut and whole sweet potato, which his company purchased from Stilwell, is not the same product as the three-squat Can-D-Pak whole sweet potatoes; that his main sweet potato supplier was Trapp & Son of Louisiana, from whom he purchased in 1962 the three-squat item; and that he had not purchased from Stilwell the Can-D-Pak sweet potatoes, if ever, for the past three to five years. The record shows that Shop-Rite discontinued the purchase of any sweet potato products from Stilwell at the end of February, 1962. Mr. Reinhart indicated that Stilwell Canning Company had not dealt with Shop-Rite unfairly when he testified as follows:

By Mr. Lusby:

* * * * * * *

Q. Just one other point : Why did you continue, discontinue Stilwell?

A. Evidently we were able to do as well or better through another supplier.

Q. And what determines whether you do as well or better?

A. There are several factors. I think one of the most important is price and equally important is the total quantity of items purchased to make way for a shipment.

Q. Isn't the availability of cooperative advertising money a very significant factor?

A. No, sir.

Q. It's not?

A. Let me qualify that. If we can buy enough of an item to do ourselves, as well as the supplier, some good, yes, sir. But if we cannot buy enough, we cannot expect the supplier to give us an unknown amount of advertising and/or promotion in support of it. (T. 455-56.)

Certainly, in light of the facts, it could not be said that Stilwell was derelict in not offering equivalent promotional payments to Shop-Rite. There is no basis in the record upon which the alleged Section 2(d) violation by Stilwell Canning Company can be found with regard to its dealings with Shop-Rite Foods, Inc. during 1962.

(2) *Safeway Stores, Inc.*

Safeway Stores, Inc. purchased canned vegetables from Stilwell Canning Company during 1962 in the total amount of $62,044.75, of which $35,362.75 constituted sweet potato purchases—the three-squat size of Town House Fancy Whole Sweet Potatoes. All the purchases were shipped from Stilwell, Oklahoma, to Safeway Stores, Inc., Denver, Colorado (T. 344-45; CX 890-912). The undisputed evidence in the record establishes that the sweet potatoes packed for Safeway under the customer's private label, "Town House," are a different product than the Stilwell's Can-D-Pak sweet potatoes promoted by respondent. On direct examination, the President of Stilwell testified:

By Mr. Lusby:

* * * * * * *

Q. Mr. Todd, now, what differences are there in grade and quality between the Can D Pak sweet potato and the squat pack Town House sweet potato product that you furnish Safeway generally?

A. Town House sweet potato is packed according to a certain specification given to us by—made up by Safeway's quality control department. These specifications involve a definite amount of potatoes; they involved uniformity of color; they involve certain syrup—we call it brick's, brick's count—they involve a definite vacuum requirement. Since the Can D Pak is our own label, we have a certain latitude of using our judgment as to what is good for it and it's not quite as difficult to follow in our canning procedures. That is, we might have a little more variance in count. They are packing a lighter syrup. There are certain things which we call technical differences in grades and we use our judgment to decide whether or not this is going to effect the consumer and we may overlook some technicality and put it under our label and we follow this practice and, I think, nearly every processor does this rather than having to follow rigid specifications as laid down by a private label customer. (T. 355-56.)

On cross-examination, Mr. Todd testified:

By Mr. Baker:

* * * * * * *

Q. I'm referring now to 1962. In 1962, because of this heavier syrup content in Town House, you couldn't take a production run of your Can D Pak that didn't meet the sugar content requirements of Safeway and put their Town House label on it, could you, sir?

A. That would be true and also the other factors that I mentioned which we used to call technical grade variations such as a little variance in count or maybe the color is not quite as uniform to a grading expert, but probably would make no difference to the housewife but it would not meet Safeway's specifications. (T. 365.)

Mr. Todd stated that the Town House sweet potatoes sold to Safeway cost about fifty cents a case more than the Can-D-Pak, and

Stilwell attempted to get Safeway to accept a product identical to Can-D-Pak, but that Safeway refused (T. 357-58). Safeway was not granted any advertising and promotional allowances by Stilwell during 1962, but Safeway, during that period, was granted price concessions by Stilwell to be used as the customer saw fit in its judgment in promoting its own brand (T. 362). For example, Stilwell's invoice, dated March 1, 1962, shows that Furr's was billed for 800 cases (24 to the case) of the three-squat Can-D-Pak Fancy at the case price of $5.60, or $4,480.00 (CX 798), and an invoice, dated March 19, 1962, shows that Safeway was billed for 75 cases (24 to the case) of the three-squat Town House Whole Sweet Potatoes at the case price of $5.40, or $405.00 (CX 894). Not only was Safeway not required to absorb the additional fifty cents per case cost, which it cost Stilwell to produce the Town House product, but it paid twenty cents less per case than Furr's was required to pay for the product promoted. Mr. Finney, Safeway's Denver Division grocery merchandise manager, testified that it is unusual for a supplier to offer advertising or promotional allowances because the understanding and knowledge that there will be no advertising or promotional allowances offered is taken into account in striking a price on the goods and, therefore, private label products are normally sold at a lower price than advertised brands (T. 926-27). The record is insufficient in proof of competition. The only evidence of competition between Safeway and respondent is a general statement that such competition exists in the Denver market. Mr. Finney of Safeway testified that there are Safeway outlets substantially removed from any particular area served by respondent's outlets, and that, in these instances, no competition exists (T. 927-28). The record does not establish which Safeway stores compete with which stores of respondent, and further failed to establish that any particular Safeway store in direct competition with an outlet of respondent handled for resale at any time during 1962 any product purchased from Stilwell. For further details, see the discussion of Safeway Stores, Inc. in connection with Sioux Honey Association. The alleged Section 2(d) violation by Stilwell Canning Company cannot be found with regard to its dealings with Safeway Stores, Inc.

5. NEW ENGLAND CONFECTIONERY COMPANY

The New England Confectionery Company (sometimes hereinafter referred to as Necco) is a Massachusetts corporation with its principal office located in Cambridge, Massachusetts. It is engaged

in the business of manufacturing and selling various confectionery products, among which is a line of candy under the "Necco" brand. It sells to retailers, department stores, wholesalers, syndicates and grocery chains in every state of the United States. Sales of the company in 1962 ranged in the area from $14,000,000 to $16,000,-000. Shipments are made from Cambridge, Massachusetts, which is their only place of manufacture, and from various warehouse points throughout the country (T. 989-992). Its broker during 1962 in the Lubbock, Texas, and the Albuquerque, New Mexico, areas was Bob Westerburg and Company of Lubbock, and in the Denver, Colorado, area, McFerren, Speaks and Gustafson, Inc. of Denver (T. 1001-1002; CX 984; RX 1). Early in 1962, Broker Westerburg, in making one of his regular calls at the respondent's place of business, was informed of the Circus promotion by Mr. Milligan, who asked Mr. Westerburg if he had any manufacturers that would be interested in participating. Mr. Westerburg said he did not know, but he would look into it. No mention was made of the New England Confectionery Company at the time. Mr. Westerburg, on returning to his office, discussed the matter with his partner, Mr. Farley, and they talked about various suppliers who might participate in the promotion (T. 471, 559). Mr. John M. Farley, called as a witness by the respondent, testified that he had some of the brochures of the 1962 Circus (CX 1639), which showed the various packages of $500.00 and up available to suppliers for participation in the Circus (T. 1092-93); that the respondent was not buying the Necco candy and the forthcoming promotion "was an opportunity for us to sell it to them for the first time" (T. 1094); that he contacted Gene Yeadon, Necco's Divisional Sales Manager, concerning the Circus and, after giving consideration to the matter, Bob Westerburg and Company, in a letter (RX 1), dated February 28, 1962, wrote to the respondent as follows:

On behalf of the New England Confectionery Company we offer you the following Circus Promotion offer. If you will buy and display 1000 cases, your choice, of the following NECCO Starline items the New England Confectionery Company will pay you the sum of $2,000:

NECCO STARLINE

* * * * * * *

[Ten different Starline items are listed.]

The $2,000 for NECCO's participation in your Circus Promotion will be paid with free goods. By this we mean that whatever the invoice amount of your purchase for this promotion is, $2,000.00 will be deducted from the face of the invoice.

In the many places which NECCO has placed their NECCO STARLINE packages, they have moved well and we sincerely believe that you will have similar success.

Your favorable consideration of this offer will be deeply appreciated.

The offer was accepted by the respondent and, pursuant thereto, it purchased 1000 cases of the Necco Starline candies (T. 1094-95, 1099). The record does not show the date when the offer was accepted, but an invoice of Necco (CX 926), dated March 9, 1962, of the sale to Furr's of 1000 cases of the Starline candies, totaling $5,376.00, shows the order date to be March 6, 1962. Necco paid to the respondent $2,000.00 in the form of free goods for its participation (CX 1794H). The record contains no evidence that respondent received any other promotional payments from Necco during 1962. A tabulation prepared by Necco shows that its total sales to the respondent in 1962 were $7,659.36 (CX 924). The Necco Starline, which was promoted in connection with the Circus, consists of ten different kinds of candies put up in cardboard boxes with an overwrap of printed cellophane, to be sold at the suggested retail price of 29¢ and 39¢ per package (T. 1000; CX 5A-D). The Starline was first introduced and offered to the trade by Necco during the month of January, 1962. Prior thereto, Necco had marketed 5 cent and 10 cent candy items, but the Starline was designed for supermarket distribution and to capture a different consumer. It was the feeling and consideration of the company that the Starline would be a non-competitive item to the nickel and dime items. The pieces of candy in the five or ten cent items are identical to the pieces of candy in the 29 cent and 39 cent Starline package (T. 1066-67). However, the record is unrebutted that the five and ten cent items are not competitive with the Starline items promoted in the Circus. Every witness interrogated on the subject so testified.

Alleged Disfavored Customers of New England Confectionery Company

The alleged disfavored customers of New England Confectionery Company are (1) South Plains Associated Grocers; (2) Red Owl Stores, Inc.; (3) King Soopers, Inc.; (4) Miller's Super Markets; (5) Safeway Stores, Inc.; and (6) Payless Drug Stores, Inc.

(1) *South Plains Associated Grocers*

During 1962, South Plains Associated Grocers, of Lubbock,

Texas, made five purchases from New England Confectionery Company in the total amount of $696.00, as follows:

Date of Invoice	*Amount*	*Commission's Exhibit No.*
1-30-62	$216.00	1055
4-13-62	120.00	1056
6-8-62	120.00	1057
8-9-62	120.00	1058
11-8-62	120.00	1059
	$696.00	1054

The only item purchased was the MacIntosh Rolo 10¢ bar candy. Mr. Allston, SPAG's General Manager, testified:

Q. I show you RX 5-B and -C, which are the Starline items packaged in twenty-nine and thirty-nine cent retail range. You are aware of the existence of that item, are you not, sir?

A. Yes, sir; I'm somewhat aware of it.

Q. Now, in your judgment and experience, a twenty-nine cent package item like this is a take-home-put-in-dish item, isn't it?

A. That's right.

Q. Whereas this item here [the Rolo item] is a put-in-the-pocket or a pick up item to be eaten usually on the spot?

A. Yes, sir.

Q. Now, would you consider the Starline item as directly competitive with this item, Rolo?

A. No, sir; I would say that it is not. It's a different product. It has a difference use in the home.

Q. And it tries to reach a different market?

A. That's right. (T. 616-17.)

It is obvious that no competition existed during 1962 between SPAG and respondent in the sale of the Necco products promoted in the Circus. While respondent contends that Necco was not obligated to offer to SPAG promotional payments equivalent to the payment to respondent, because SPAG is a wholesaler and did not purchase competitive products in 1962, the record shows that Necco did, in fact, make such an offer (T. 1116-21, 1129). When the Starline was offered by Necco's broker to SPAG, he was told that, "It doesn't fit our operations. This stuff is a perishable item and it wouldn't work very good in a hot warehouse" (T. 1124). For further details, see the discussion of SPAG in connection with Sioux Honey Association. The foregoing facts do not support a finding of a Section 2(d) violation by New England Confectionery Company with respect to South Plains Associated Grocers.

(2) *Red Owl Stores, Inc.*

Red Owl Stores, Inc., of Denver, Colorado, purchased from New England Confectionery Company during 1962 in the total amount of $1,608.00 (CX 1033), and the only item purchased was the 5 cent roll of Necco assorted wafers. Mr. Wassenaar, buyer for Red Owl, testified that in 1962 his company was offered by Necco their Starline candies, but it was turned down because it was not considered a good consumer value and it was handling a similar package in the 29 cent to 39 cent range of another manufacturer (T. 857). He testified further:

Q. Now, at the time that New England Candy Company presented the Starline to you, did you consider that line would be competitive with the 5-cent roll packages which you were already purchasing?

A. Not competitive, no, sir.

Q. The 5-cent roll package is not the type of item which you would ever promote in the newspaper or put on a special promotion for, would you, sir?

A. That's correct.

Q. And you would not do that even if the promotion allowance were offered for that purpose?

A. That's correct. (T. 858.)

Mr. Wassenaar also said the 5 cent roll wafers purchased went into the Red Owl warehouse serving both Red Owl's own retail outlets and customers of Red Owl's wholesale operations. He added that Red Owl's retail stores handled very little of the 5 cent roll wafer items, and it was possible that less than twenty per cent of it went into their retail operations. For further details, see the discussion of Red Owl Stores, Inc. in connection with Sioux Honey Association. No finding of the alleged Section 2(d) violation by New England Confectionery Company can be made upon the facts relating to Red Owl Stores, Inc.

(3) *King Soopers, Inc.*

King Soopers, Inc., during 1962, made purchases from New England Confectionery Company in the total amount of $481.92. The only item purchased was a "multiple pack, six 5-cent rolls in a tray" of wafers in assorted colors which retailed for 25 cents (T. 886; CX 1021-1032). Mr. Beirich, King Soopers' buyer, testified that this item would be considered both "a take-home item" and "carry-around-in-your-pocket type of item" which "are easily broken down, but generally speaking we call them family packs" (T. 886-87); that his company was not offered promotional allowances by Necco (T. 886-87); and that in 1962 King Soopers was

offered the Starline products by Necco, but the offer was rejected for the reason, "Well, as a candy buyer we felt that the quality was not quite as good as what we were presently handling" (T. 888). Mr. Beirich testified further:

Q. Would you consider as Starline competitive to the Necco packages that you were handling?

A. No.

Q. Would you as a matter of policy consider promoting the Necco package that you were purchasing in 1962?

A. No.

Q. It is not the type of item that you would run a newspaper ad on or specially promote?

A. That's right.

Q. And that's so even if you are offered cooperative advertising for that purpose?

A. We wouldn't have advertised it. (T. 888-89.)

For further details, see the discussion of King Soopers, Inc. in connection with Sioux Honey Association. The facts do not warrant the finding of the alleged violation of Section 2(d) by New England Confectionery Company in its dealings with King Soopers, Inc.

(4) *Miller's Super Markets*

Miller's Super Markets, of Denver, Colorado, a division of National Tea Company, purchased, during 1962, the Necco 5 cent roll wafers from the New England Confectionery Company in the total amount of $789.60 (CX 998-1007). Of this amount, only one purchase was made, in the amount of $112.80, during the period from February 28, 1962, when Necco made the offer to participate in the Circus promotion, and April 26, 1962, the date when the promotion closed (CX 1000). In addition to the aforementioned, on an order dated January 8, 1962, Miller's purchased Necco Starline items in the amount of $840.00 (CX 998). Almost immediately after this product was distributed to some of Miller's stores, complaints were received because of the tearing and shredding of the cellophane overwrap on the packages, and the merchandise was recalled from the retail outlets. On or about February 16, 1962, Necco ordered and accepted the return of the unsold portion, totaling $687.28, and later reimbursed Miller's for this amount, plus $45.52 handling charges (T. 785-87; CX 1011, 1016). Mr. Stiger, buyer for Miller's, called as a witness by complaint counsel, testified that his company was carrying and had carried for at

least fifteen years the Necco wafers; that in the first part of 1962, "they came out with the Starline as far as I know—it was a new line of candy and they were presenting in here new packaging"; that on January 8, 1962, his company purchased Starline in the amount of $840.00, and, as a first deal order, they received one free for each ten purchased (T. 782-83). When asked what happened to that purchase of Starline, Mr. Stiger answered:

> Well, this merchandise was put on our order pad, the stores ordered out into the stores, and almost immediately I began to get complaints from the stores because the packages—there was a cellophane overwrap and the cellophane was shredding, in other words, tearing. It was becoming unsaleable in the store. We checked our warehouse stock and it was—packages in each case were in the same condition, and as days went by more packages would show up in this condition. In other words, it became unsaleable. (T. 785.)

After explaining the return of the merchandise, Mr. Stiger stated that it was never replaced, and, if Necco had come to him in March or April and offered him almost anything to stock Starline and promote it, he would not have been interested at all. "He had enough" (T. 787-88). Mr. Stiger testified further:

> Q. Now, the Necco 5-cent line that you carry in the roll of wafers, did you at the time and do you now—would you now consider that as a competitive product with the 29 and 39-cent Starline packages.
>
> A. No, that is more of a child item, where this other was for—being towards adults.
>
> Q. And the 29 and 39-cent was also a take-home package to put in a dish, was it not?
>
> A. Yes, sir. (T. 788-89.)

For further details, see Miller's Super Markets heretofore discussed in connection with Sioux Honey Association. The facts do not warrant a finding of the alleged Section 2(d) violation by New England Confectionery Company in its dealings with Miller's Super Markets.

(5) *Safeway Stores, Inc.*

Safeway Stores, Inc., Denver Division, purchased from New England Confectionery Company during 1962 in the total amount of $32,112.69, of which $26,286.61 was for the Starline candies and $5,826.08 was for 5 cent roll wafers. Substantial purchases of both items were made during the relevant time period (CX 955-965). The Denver Division of Safeway covers Colorado, Wyoming and parts of Nebraska, Kansas, New Mexico and South Dakota (T. 912). The company in 1962 had 53 stores in the Denver metro-

politan area (CX 1865A-C). The record does not reveal the number of stores served by the Denver Division outside of the Denver area. Respondent owns and operates 7 stores in the Denver area. There is no proof that one or more of respondent's outlets competes with one or more of Safeway's outlets, and the record does not show which of the Denver stores actually stocked Necco candies during 1962. Absent such indispensable proof, no finding of the alleged violation can be made. *J. Weingarten, Inc., supra.* For further details, see the discussion of Safeway Stores, Inc. in connection with the Sioux Honey Association.

(6) *Payless Drug Stores, Inc.*

Payless Drug Stores, Inc. in 1962 operated three drugstores in Albuquerque, New Mexico, and one in Santa Fe, New Mexico (T. 399-400, 408). During that year, it made purchases from New England Confectionery Company (Necco 5 cent wafers only) in the total amount of $256.50 (CX 1049-1053). Only one purchase of $85.50 was made during the first six months of 1962—invoice dated 3-26-62 (CX 1050). Payless at no time purchased the Starline promoted by respondent (T. 407). When the shipments of the Necco wafers were received by Payless, the product was distributed to all of its four stores (T. 408). Mr. Walter E. Cohen, President of Payless, called as a witness by complaint counsel, testified that his company never did buy the Necco Starline, but the company carried another line that retails in the twenty-nine to thirty-nine cent bracket. When asked, "Does that type of twenty-nine or thirty-nine cent package compete with the five-cent wafers or bar goods?", he replied, "The only resemblance is that they're both candies and I don't believe they compete with each other" (T. 407). Mr. Cohen said that during 1962 no offers or payments for promotional allowances were made to his company by Necco, but he seemed to recognize that the supplier was not required to offer or pay promotional allowances on inconsequential purchases when he testified:

> Q. Now, on purchases of a hundred dollars of Necco divided between your four stores a promotional allowance from Necco wouldn't have meant anything to you, would it?
>
> A. Not unless they gave me a hundred percent allowance and, of course, they wouldn't do that. (T. 409.)

Mr. Cohen also testified that none of the Payless Drug Stores are, in his opinion, in competition with any of respondent's outlets:

By Mr. Baker:

* * * * * * *

Q. You recall when I was talking to you last evening you volunteered to me without me even asking the question that you didn't consider yourself in competition with any Furr's stores?

A. Competition, no—nor am I in competition with any supermarket. My competitors—our competitors are Walgreen Drugstores and Skagg's Drugstores as far as we're concerned. They are the only ones that we are fighting with continually to maintain our position in the drug business.

Q. And so when you answered the question of Government's Counsel you were speaking in a broad general sense and as far as you, Payless Drug, is concerned, you don't consider the supermarkets competition at all?

A. Not at the present time.

Q. Nor in '62?

A. (Witness shakes head negatively.)

HEARING EXAMINER JOHNSON: What was your answer?

THE WITNESS: No. Again, Skagg's and Walgreen's were our competitors. (T. 412-13.)

* * * * * * *

By Mr. Lusby:

* * * * * * *

Q. Now, I understand that your most immediate and direct competition is other drugstores.

A. That is the competition which actually we recognize and which we live by, is Walgreen's and Skagg's.

Q. But there is this broad-type of competition between you and anybody else who handles the same product, is it not?

A. I don't know that you'd call it competition—the fact that we both carry and sell the same merchandise. Now, to me that's true with a number of business. A movie theatre carries candy bars and popcorn and we do, too. I don't know if they're in competition to us, but we carry and sell the same merchandise. But, speaking for myself, our competition in my own heart is Skagg's and Walgreen's because they are giants and we are a small independent chain and they will do anything to destroy us and, eventually, they will because they're going to outlast us and they're the ones who—when we open up the Friday paper, that's the ads we check. We don't check Piggly Wiggly or Furr's or Safeway. We check Walgreen's and Skagg's—that's our competitors. (T. 415-16.)

* * * * * * *

Q. Now, I don't mean there that they are the type of competition that are going to run you out of business or that sort. I just mean the competition for the customer with regard to that sale.

A. Yes, but that's a very weak competition. I'd like to have that competition all the time.

Q. Now, the only other point that Mr.—

A. (Interposing) See, in fact, we carry certain grocery items. We carry Campbell's Soup and Franco American Spaghetti and a little sugar and a

little coffee. Now, I don't feel that I'm in competition with Furr's or Piggly Wiggly or Safeway or Barber's and that.

Q. You mean by that you are not giving them any trouble, is that what you mean?

A. That's right. (T. 416-17.)

* * * * * * *

Q. Now, to pursue that just a little further would it be accurate to say that if the Furr's chain conducted an extensive advertising campaign, radio, TV, newspapers, in Albuquerque in 1962, and during that campaign Necco candies were promoted that you would lose sales of Necco Wafers to any particular Necco candy that might be advertised and carried by the Furr's chain?

* * * * * * *

A. It would be possible, but I would say it would be decimal, the amount. By Mr. Lusby:

Q. What was the adjective?

HEARING EXAMINER JOHNSON: What do you mean by "decimal?" Insignificant?

THE WITNESS: Insignificant. (T. 419)

The facts fail to establish that New England Confectionery Company violated Section 2(d) in its dealings with Payless Drug Stores, Inc.

6. RAYETTE, INC.

Rayette, Inc., a Minnesota corporation, with its principal office and place of business at 261 East Fifth Street, St. Paul, Minnesota, is engaged in manufacturing, marketing and distributing professional and retail beauty products, among which is a hair spray known as "Aqua Net." Rayette sells throughout the United States to customers with multiple retail operations or wholesale operations, and does not deal directly with individual grocery or drug store customers. The company has three locations from which shipments are made—St. Paul, Minnesota, Los Angeles, California, and Bridgeport, Connecticut. Shipments to customers in Lubbock, Texas, and Denver, Colorado, originate in St. Paul, while shipments to Albuquerque originate either in St. Paul or Los Angeles. During 1962, the company's sales representative in the State of Texas was Broker C. B. Tinsley of Oklahoma City, Oklahoma, and its broker in the Denver area and Albuquerque, New Mexico, was Stone Hall Company of Denver, Colorado. Rayette's sales in 1962 were approximately $23,500,000 (T. 961-65, 981). During 1962, Rayette had no written advertising policy or program, but it periodically conducted short term promotions, making available to its customers payments in consideration for advertising and pro-

moting of Rayette products (T. 392, 966-67, 979-980). On February 23, 1962, Rayette agreed to participate in the Circus, and on March 10, 1962, Rayette paid respondent $4,166.40 in the form of free merchandise (434 dozen of Aqua Net at $9.60 a dozen) for the advertising and promoting of Aqua Net hair spray in connection therewith (T. 383-84; CX 1065, 1068, 1794H). Respondent purchased 3760 dozen of Aqua Net hair spray at $9.60 a dozen for the Circus promotion totaling $36,000 (CX 1068). Although it was stipulated that Rayette's payment to respondent for participation in the Circus was $4,166.40 (CX 1794H), the record establishes that this supplier agreed to participate at the $5,000 level (T. 966; CX 1065). The testimony of witnesses in no way explains the discrepancy. The situation is probably explained by documents received in evidence (CX 1066, 1068), which show that Rayette was to give respondent $5,000 free goods—434 dozen Aqua Net at $11.52 a dozen, which would total $4,999.68, or approximately the agreed figure of participation. Rayette's participation was initiated by Miss Shugart, one of respondent's buyers. Although she testified that she did not recall soliciting participation of Rayette through Broker Tinsley (T. 481-82), the testimony of Mr. Tinsley and Mr. Burr, Rayette's Vice President, establishes that the contact was made through Mr. Tinsley (T. 376-77, 964-65). Mr. C. B. Tinsley, called as a witness by complaint counsel, testified that he became Rayette's sales representative in Texas and Oklahoma in January of 1962 (T. 393), and, while making a routine call to Furr's office, Miss Shugart told him respondent was going to have another Circus promotion and that, when the details were available, she would let him know. About thirty days later (February 23, 1962), he again talked to Miss Shugart, at which time she suggested to him Rayette's participation at the $5,000 level. He phoned Rayette's New York office, spoke to Mr. Burr, and relayed the information to him. In turn, Mr. Burr talked to Miss Shugart, and Rayette agreed to participate in the Circus (T. 376-384). Mr. Donald Burr, vice president of Rayette, in charge of sales and advertising, and located in Rayette's New York office, called as a witness by complaint counsel, testified that Mr. Tinsley contacted him about the Circus; "that various levels were offered," and it was Rayette's decision to participate at the $5,000 level (T. 965-66); that Mr. Tinsley was authorized by him to make offerings to everyone within the same category of trade on an equal basis (T. 984); and that no proportional offers were made to the alleged disfavored customers located in Denver or Albuquerque (T. 974).

Mr. Burr explained that he did not know at the time that he agreed to the Circus promotion that Furr's operated retail establishments in the City of Denver "as a matter of fact I thought they were in the general Lubbock area" (T. 978-79). Respondent's purchases from Rayette in 1962 totaled $54,820.00 (CX 1778). Other than the amount paid in connection with the Circus, the record contains no evidence of any other promotional payments by Rayette to respondent during 1962.

Alleged Disfavored Customers of Rayette, Inc.

The alleged disfavored customers of Rayette, Inc. are (1) Shop-Rite Foods, Inc.; (2) South Plains Associated Grocers; (3) Red Owl Stores, Inc.; (4) Payless Drug Stores, Inc.; and (5) F. W. Woolworth Company.

(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). In 1962, it made purchases from Rayette of Aqua Net hair spray in the total amount of $3,840.00, all of which were purchased in the first quarter of the year (CX 1103). Broker Tinsley, after Rayette's commitment to respondent, presented an offer to Shop-Rite on behalf of Rayette completely proportionate to the commitment to respondent (T. 380-81, 385, 440-41, 450-51, 453-55, 458-61, 973). Mr. Tinsley testified that he considered it necessary, when making a promotional payment to one customer, to offer the same payment to all other customers competing in the same functional category. He explained: "Down through the years I've been informed that that is part of the Robinson-Patman Act. That if you offer one to the same category of trade you have to offer it to the others" (T. 386-87). On February 25 or 26, 1962, a few days after Rayette's commitment to respondent on February 23, 1962, Mr. Tinsley presented an offer to Mr. Turner, Shop-Rite's buyer (T. 384). There can be no question that the offer to Shop-Rite was, in fact, equivalent to Rayette's payment to respondent. In this regard, Mr. Tinsley explained that Shop-Rite's buyer, previously employed as a buyer for respondent,

> * * * had more knowledge of the circus promotion than I did. When we discussed the circus promotion, I had to assume that he knew more of the details than I did and I told him that Rayette would go in with Shop-Rite just like they went in with Furr's as far as he wanted to go—little deal, big deal. * * * He took it under consideration. We discussed it in person and

also on the phone probably three or four times, but nothing ever came of it. (T. 380.)

Shop-Rite was told that Rayette would contribute "the same as we had offered Furr's" (T. 380), any amount Shop-Rite requested up to the amount contributed to respondent, and that the specific details of the advertising and promotion would be at Shop-Rite's discretion (T. 380-81, 385). The format of the offer and the advertising to be performed by Shop-Rite followed the details set forth in respondent's Circus brochure (T. 385). After initially offering the proportional payment to Shop-Rite's buyer, Mr. Tinsley repeated the offer in a letter to Shop-Rite's Vice President, Mr. Reinhart (T. 381). Called as a witness by complaint counsel, Mr. Reinhart fully corroborated the testimony of Rayette's broker, Mr. Tinsley, explaining that the offer was on a graduated scale, that "if you bought X number of cases and/or advertised and/or displayed, there was so much available that it was graduated, based on the number of stores or activity" (T. 453-54). The offer, testified Mr. Reinhart, was not tied into any particular type of promotion, such as a Circus-type promotion; rather, Shop-Rite was free to choose any type of promotion desired (T. 455). After receiving the offer from Rayette, the matter was considered and Shop-Rite elected not to take advantage of it because "it would have been in conflict with other promotions * * * scheduled" (T. 450-51, 454-55). Mr. Reinhart, however, explained that he was aware of respondent's Circus promotion, had seen the Circus brochure, and considered the offer received by Shop-Rite fully porportionate to Rayette's commitment to respondent (T. 450-51, 460-61). For further details, see the discussion of Shop-Rite Foods, Inc. in connection with Sioux Honey Association. Considering the related facts, it is concluded that Rayette, Inc. had fulfilled its obligation under Section 2(d) with respect to Shop-Rite Foods, Inc.

(2) *South Plains Associated Grocers*

South Plains Associated Grocers, of Lubbock, Texas, purchased Aqua Net hair spray from Rayette, Inc. during 1962 in the total amount of $20,195.00; $2,880.00, $10,110.00, $5,055.00 and $2,150.00 in the first, second, third and fourth quarters of the year, respectively (CX 1103). No offer was made to SPAG by Rayette, although made to Shop-Rite, because SPAG is a wholesaler and Rayette did not consider a wholesale account entitled to an offer of payments granted a retail account (T. 385-89, 394-95). Mr. Tinsley, Rayette's Lubbock broker, testified:

Q. At any time during 1962 and particularly at or about the time of the payment of the free goods to Furr's in connection with their circus were any payments or allowances made or offered by Rayette to South Plains Associated Grocers for the advertising or promoting of Aqua Net?

A. No, there wasn't. That's a wholesale account and we treat them differently. We think of them differently.

Q. When you say a "wholesale account," wholesale is a term that you have determined on to classify South Plains under, is that not correct?

A. Well, not only I have determined it, but they themselves have determined it. If you should ask them what they are, they would tell you they were wholesale. (T. 381.)

Mr. Tinsley explained:

I go to Furr's Foods with any kind of a promotion or any other chain and they can say, "Yes, we'll put a hundred cases of this or two hundred cases in all of our stores," and so you've got a deal. Then you've got to go to the South Plains Associated Grocers. * * * He would say, "I would wish that our stores would take a hundred or two hundred cases, but probably we'll have some stores that won't even take a case." They have no forced distribution like you have in a chain. That's the difference. (T. 390-91.)

Because of the nature of SPAG's operation, an offer by Rayette of promotional money equivalent in terms to that given respondent would have been a futile gesture and, therefore, not required to have been made. In *Liggett & Myers Tobacco Co., Inc.*, 56 F.T.C. 221, 253 (1959), the Commission, itself, interpreting the meaning of the term, "available," declared:

We do not believe * * * that it is necessary to make known a promotional plan where such would be a useless or futile gesture. The question of whether the gesture would be futile is one of fact.

In practice, SPAG would not conceivably accept an offer equal to the commitment to respondent and in good faith assume the obligation of performing the promotion and advertising activities performed by respondent. In this regard, Rayette's broker testified:

Q. Do you mean by that that you consider it would have been useless, just a futile gesture to make the offer to South Plains?

A. It certainly would. Let me explain that. If I had made the same offer to South Plains, first of all, I would have had to have gone to all the stores individually and sold each individual on the idea of putting in the big stacks of Aqua Net. They wouldn't have gone, I assure you they wouldn't have gone—not all of them wouldn't go, now, you'll find some of them that would, but you would find more that wouldn't particularly at that time. There's no way that you can think of a grocery chain—I mean a grocery wholesaler and the chain being the same. It don't work. They cooperate to buy, but that's as far as it goes. (T. 391.)

Even if Rayette were required to make a proportional offer to SPAG, the record evidence is totally insufficient to support a find-

ing of the alleged violation. Not one shred of evidence will be found in the record showing which SPAG member-customers in Lubbock, if any, handled Aqua Net hair spray for resale during 1962. Complaint counsel's SPAG witness was unable to testify on this issue and, indeed, stated that it is "possible" that no Lubbock member-customer had Aqua Net hair spray on its shelves during the first six months of 1962 (T. 609-612, 657). All sales by Rayette to SPAG were for warehouse stock (T. 619), and the merchandise was redistributed by SPAG to any of 185 members in an area 150 miles in radius of Lubbock (T. 655). This, compounded by the evidence that many SPAG members carry only about half of the items warehoused by SPAG (T. 638), and that members, free to buy from whomever they choose, buy products from other wholesalers (T. 600-601), precludes a finding that any particular member in competition with respondent in the Lubbock market handled Aqua Net during 1962. Absent specific and precise proof of competition among SPAG member-customers and respondent, there can be no finding made of the alleged Section 2(d) violation by Rayette with respect to SPAG. *J. Weingarten, Inc., supra.*

(3) *Red Owl Stores, Inc.*

Red Owl Stores, Inc., headquartered in Hopkins, Minnesota, and doing business in six states, owns and operates twelve retail grocery outlets in the Denver metropolitan area. Red Owl purchased Aqua Net hair spray from Rayette during 1962 in the total amount of $1,800.00, all purchased in the third quarter of the year. Rayette did not offer or otherwise make available to Red Owl any payment or allowance on terms proportionally equal to the Circus payment made to respondent (T. 864, 974). The record affirmatively and conclusively shows that Red Owl, during the relevant time period, was not a customer of Rayette within the meaning and terms of Section 2(d). As noted previously, Rayette's commitment to participate in the Circus was on February 23, 1962, and respondent's promotion occurred during the period from March 8 through April 26, 1962. Mr. Hughes, Denver branch manager of Red Owl, testified that his first purchase from Rayette was in September of 1962, and that his company had never purchased or handled any Rayette products prior to that time (T. 867). Under the circumstances, Rayette was not obligated to offer equivalent promotional allowances to Red Owl. Even had the one 1962 purchase by Red Owl been "contemporaneous," no finding of the alleged violation could be made. The record is totally barren of evidence of which particular store or stores of Red Owl compete with respondent or that such stores handled Aqua Net during 1962. For further details, see the

discussion of Red Owl Stores, Inc. in connection with Sioux Honey Association.

(4) *Payless Drug Stores, Inc.*

Payless Drug Stores, Inc., which operates three stores in Albuquerque, New Mexico, and one in Santa Fe, New Mexico, purchased Aqua Net hair spray from Rayette during 1962 in the total amount of $2,414.00 (CX 1103). The only evidence as to purchases by Payless is a tabulation which shows it made no purchases during the first quarter, $662.00 in the second quarter, $1,298.00 in the third quarter, and $456.00 in the fourth quarter of the year. The evidence does not show exactly when these purchases were made. Respondent's Circus promotion ended on April 26, the first month of the second quarter of the year 1962. It is, therefore, apparent that the record fails to establish with requisite precision the fact that Payless purchased Aqua Net hair spray from Rayette during the relevant time period. Rayette did not offer or otherwise make available to Payless any payments or allowances on terms proportionally equal to the Circus payment made to respondent (T. 974). However, Payless' Vice President, Mr. Cohen, testified that in the middle of the year Payless was offered advertising allowances of 10% of all purchases during the period from June 1 through August 31, 1962 for the promotion of Aqua Net hair spray pursuant to the "Twin-Pac Plan" (T. 404, 405; CX 1797), but the offer was rejected (T. 411). Mr. Cohen explained:

Q. And you weren't particularly interested in promoting Rayette in the first six months—

A. (Interposing) No. I'm still not interested in promoting it.

Q. And you wouldn't have promoted it in the first six months if anything had been offered to promote it?

A. Probably not, because of the discrimination as far as their—

Q. (Interposing) You didn't like their prices?

A. That's right.

Q. So you wouldn't promote it anyway?

A. If we feel that we can't buy an item as cheap as anyone else, we don't want to promote it, which is true of a number of companies. (T. 412.)

* * * * * * *

THE WITNESS: (Interposing) I want to explain about Rayette, if I may. Maybe it will clarify it.

MR. LUSBY: All right.

THE WITNESS: I don't criticize Rayette for their policies, but it's not a healthy situation as far as our stores are concerned and there are other manufacturers who have the same policies—unless you are a large-volume buyer you will be unable to compete and, fortunately, there aren't too many

manufacturers who keep their best price away from the average store. The reason we do not promote it is because we do not want to encourage this. (T. 420-21.)

It is apparent that an offer by Rayette, Inc. to Payless Drug Stores, Inc. of promotional allowances equivalent in terms to that given respondent would have been a futile gesture. Furthermore, as detailed in the discussion of Payless Drug Stores, Inc. in connection with New England Confectionery Company, Mr. Cohen testified that his company is not in competition with respondent. The facts do not support a finding of a Section 2(d) violation by Rayette, Inc. with respect to Payless Drug Stores, Inc.

(5) *F. W. Woolworth Company*

F. W. Woolworth Company is a variety merchandiser operating through retail outlets and does business throughout the United States, Canada, Great Britain, Puerto Rico, Mexico and other parts of the world. The company operates 18 stores in the Denver metropolitan area, one store in Albuquerque, New Mexico, and two stores in Lubbock, Texas (T. 832, 833; CX 1834A-B). Sales of the company exceed $1,000,000,000 annually (T. 845). Woolworth purchased Aqua Net hair spray from Rayette, Inc. for delivery at Denver during 1962 in the total amount of $5,699.00, no amount in the first quarter, $380.00 in the second quarter, $1,061.00 in the third quarter, and $4,258.00 in the fourth quarter of the year; and for delivery at Lubbock, in the total amount of $191.00, of which $48.00 was in the third quarter, and $143.00 was in the fourth quarter of the year. Mr. A. J. Davis, regional buyer of Woolworth, with headquarters at Denver, Colorado, called as a witness by complaint counsel, testified that the first order for the purchase of Aqua Net hair spray by Woolworth was placed on April 16, 1962 by its New York executive office buyer to be delivered to eleven stores throughout the country as a test or trial order (T. 838-39; RX 88). Pursuant to this order, twelve cases (12 to the case) were delivered in May 1962 to Woolworth Store No. 1130 located in the heart of downtown Denver (T. 836-38). On this purchase, Woolworth received "two free with ten" plus a 10% "promotional allowance" (T. 839; RX 88). Mr. Davis explained that Rayette was anxious to get into Woolworth's distribution system, and that the free goods and 10% promotional allowance were offered as an inducement to get Woolworth to stock and display the product on a test marketing basis (T. 842). Records of Woolworth show that, at the very earliest, Aqua Net hair spray was not on the shelves in Woolworth's outlets in Lubbock, Texas, or Albuquerque, New Mexico,

until July 1962; that Denver stores, other than the downtown store, did not receive for resale any Aqua Net hair spray until July 1962 (T. 843-45). Thus, the only purchase by Woolworth in any of the geographical marketing areas was the trial order placed by Woolworth in April for resale through its downtown outlet. Rayette's Circus payment to respondent amounted to approximately 11.6% of the Circus purchaser. This is only slightly more than Woolworth received in promotional allowances during the relevant time period, and, considering that Woolworth also received free goods (two free with ten) during the same period, it is obvious that Woolworth was not disproportionately treated, but, in fact, received far more than did respondent. Mr. Davis also testified that the respondent's closest store is approximately five miles from Woolworth's downtown store (T. 842), and that he "never considered Furr as what you might term a direct competitor" (T. 835). With respect to F. W. Woolworth company, it cannot be found that Rayette, Inc. violated Section 2(d).

7. THE BORDEN COMPANY

The Borden Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 350 Madison Avenue, New York 17, New York. It is engaged in the business of processing packaging and selling dairy and related products in thirty states of the United States to consumers, institutions, wholesalers, chain stores and other retailers, under the brand name "Borden." Shipments are made from 245 distribution depots in twenty-five states. Gross sales annually exceed $900,000,000. Pursuant to a resolution of its Board of Directors in 1935, Borden's president created supervisory units (districts), of which there are now nine, with the offices thereof located throughout the country in the following cities: San Francisco, California; Chicago, Illinois; New York City; Tampa, Florida; Columbus, Ohio; Newark, New Jersey; Troy, New York; High Point, North Carolina; and Houston, Texas. The chairman of each district reports to a vice president of the company who is located in the principal office in New York City. This vice president acts as liaison between the district chairman and the president of the company. He counsels with the chairman concerning policy problems and advises the president concerning the developments and progress of the various districts. Each district pays its own operating expenses and is expected to make a profit and cover its expenses by its sales. Capital budgets are prepared by the district offices and must be approved by the

home office. Each district then handles its own funds, but as funds in excess of those needed to operate the district accrue, they are transferred to the home office. The Borden Company branch at Lubbock, Texas, is a direct operation of The Borden Company of 350 Madison Avenue, New York. The participation of The Borden Company in Furr's 1962 Circus was solicited of William I. Pittman, Sales Manager of Borden's Lubbock branch, by Clem Boverie, respondent's Senior Vice President; that Borden agreed thereto; and that $5,000.00 was thereupon paid to respondent by the Southern Division (Houston, Texas) of The Borden Company as a Circus contribution, with the understanding that respondent was under no obligation to render any advertising or other services in respect to Borden's products. No inquiry was made by respondent to ascertain whether The Borden Company was making payments available on proportionally equal terms to respondent's competitors. Throughout 1962 The Borden Company sold its products to respondent, in the total amount of over $1,250,000.00. Throughout 1962 The Borden Company sold the same products in substantial amounts to many customers competing with respondent in the distribution of such products, but did not offer or otherwise make available to them any payment or payments on terms proportionally equal to the aforementioned Circus payment made to respondent. (The foregoing facts were stipulated by the parties (CX 1795A-C).) Although Borden participated in the Circus with the understanding that respondent was under no obligation to render any advertising or other services in respect to Borden's products, respondent nonetheless advertised and promoted Borden's products in connection with the Circus (CX 1842, 1845, 1849, 1854, 1862). In conjunction with the Circus, Borden built mass displays of some of its products in the Furr's stores (CX 1104H). The $5,000.00 paid by Borden went into the respondent's promotion fund, which was used, among other things, to pay for advertising the Circus in newspapers (T. 1189). Typical of such advertising is a full page advertisement run by the respondent in the Mar. 8, 1962 issue of The Albuquerque Tribune (CX 1840). About 25% of the page is devoted to the Circus, reading:

NOW! FREE TICKETS TO FURR'S *BIG* 3-RING CIRCUS

HERE'S HOW TO GET TICKETS

One FREE ticket to the big Circus will be given for purchases of $25 at any Furr's Super Market. Save your Salmon colored cash register tapes and redeem them for FREE tickets. A booth has been set up in each Furr's Super Market for the redemption of tickets. Just bring your salmon colored

cash register tapes to the booth, select the performance you wish and receive your FREE ticket. NO TICKETS WILL BE SOLD. THERE ARE NO RESERVED SEATS. TICKETS ARE AVAILABLE AT FURR'S ONLY! Should your tapes exceed $25 on redemption for a ticket, a credit will be issued for redemption on your next ticket.

COMING MAY 5 Tingley Coliseum

The purpose of the Circus was to get people into respondent's stores to buy the goods of all of its suppliers, including Borden. Respondent contends that the Circus payment to respondent by Borden does not violate Section 2(d), because respondent was under no obligation to render any advertising or other services in respect to Borden's products. There is no merit to this contention. An analogous factual situation occurred in *R. H. Macy & Co., Inc.* v. *Federal Trade Commission*, 326 F.2d 445, 448, 449, 450 (2d Cir. 1964). Macy had solicited and received contributions of $1,000.00 apiece from 540 of its suppliers to help defray the advertising and promotional costs of its 100th Anniversary Celebration, and was charged with violating Section 5 of the Federal Trade Commission Act. Macy contended that it had not violated Section 5, because its suppliers had not violated Section 2(d) of the amended Clayton Act, since Macy did not agree to render, and did not render, services or facilities in connection with the sale of the product of any particular supplier. Rejecting this contention, the Court remarked:

> We think this too narrow a reading of Section 2(d). In enacting the Robinson-Patman Act in 1936 "to curb and prohibit all devices by which large buyers 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, 80 S.Ct. 1158, 1160, 4 L.Ed.2d 1124 (1960), Congress could perhaps have worded the legislation more clearly. But one of the evils that Congress made clear that it was condemning under Section 2(d) was an advertising or promotional allowance exacted by a large buyer to achieve indirect price discriminations, either through shifting the buyer's advertising costs to his vendors, or through simply pocketing the difference between an inflated allowance and that amount actually spent to advertise or promote the vendor's product. * * *
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> * * * * * * *
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> The question is whether Congress, in applying Section 2(d) to certain promotional allowances for services that were actually rendered, exempted part of what it had originaly intended to cover—payments as promotional allowances where the buyers rendered no direct promotional services for the vendor's products. We think the drafting of Section 2(d) not quite so inept, and that payments by vendors solely for the institutional publicity of the buyer come within its ban. Admittedly, it might be difficult to read the language of Section 2(d) to encompass a payment by a vendor to a buyer

who did nothing but put the money in his pocket; that would seem to be a Section 2(a) price discrimination. But here Macy's used the payments for institutional advertising and promotions to get more people into its store to buy the goods of all its vendors. The payments by the contributing vendors were thus in consideration for services or facilities furnished by Macy's in connection with the offering for sale of the vendor's goods. To hold otherwise would produce the incongruous result that it would be unlawful for a powerful buyer to secure payments for advertising from his suppliers if he used those payments to confer direct promotional benefits on his suppliers, but that it would be lawful for the buyer to secure such payments if he used them to confer indirect promotional benefits on his suppliers by directly benefiting himself through institutional advertising.

Respondent also contends that there can be no finding of disproportionate treatment on the theory that during 1962 Borden provided in-store promotional services to its Lubbock customers, other than respondent, which more than balanced against the Circus payment to respondent. There is no evidence in the record that would sustain such a conclusion. There was received in evidence a part of a Special Report filed by The Borden Company, pursuant to an order of the Commission dated May 6, 1963, which shows, among other things, that in 1962 Borden made available to all its customers, including respondent, a substantial amount of in-store promotional services (CX 1104A-J). The report recites:

> We spent more than $10,000 for these point of sale materials in 1962. In addition, we had a crew of men, each with an automobile furnished by us, who spent at least half of their time, throughout the year, on In-Store Promotional Work, at a cost to us of at least $30,000. (CX 1104F.)

The report also states:

> In the Furr's stores, we participated in such promotions of our products on only two occasions during the entire year 1962. (CX 1104F.)

It is stated further that the records of Borden do not show the proportion of the aggregate value of all such work rendered in all retail stores, which is attributable to the work done in the Furr's stores in connection with the two. There is nothing in the report or in the record which shows that any of the competitors of the respondent participated in such in-store promotions that were made available by Borden. The stipulation of fact between the parties to this proceeding states that Borden "did not offer or otherwise make available" to customers competing with respondent "any payment or payments on terms proportionally equal" to the Circus payment (CX 1795C). In *R. H. Macy & Co., Inc.* v. *Federal Trade Commission, supra*, it is stated (at p. 450):

> Macy's argues that the Commission must show that the contributing vendors were unwilling or unable to make similar payments to Macy's competitors if

and when they had a 100th Anniversary Sale. But once the Commission proved that special payments had been made only to Macy's, the burden of coming forward with evidence that similar payments were available to Macy's competitors when and if they had special institutional celebrations was on Macy's. See Vanity Fair Paper Mills, Inc. v. F.T.C., 311 F.2d 480, 486 (2 Cir. 1962).

This burden was not borne by respondent. It is found that the acts and practices of The Borden Company, as proved, are in violation of subsection (d) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

8. FOREMOST DAIRIES, INC.

Foremost Dairies, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its executive offices located at 2903 College Street in Jacksonville, Florida, and its administrative operating offices located at 425 Battery Street in San Francisco, California. It is engaged in the business of processing, packaging and selling milk and related dairy products, under the brand name "Foremost." Sales are made to consumers, wholesalers, chain stores and other retailers in the states of Alabama, Florida, Georgia, Virginia, West Virginia, North Carolina, South Carolina, Tennessee, California, Pennsylvania, Michigan, New York, New Jersey, Minnesota, North Dakota, South Dakota, Washington, Kansas, Missouri, Arkansas, New Mexico, Texas, Louisiana and Hawaii. Gross sales for 1962 were $430,682,386.00. It owns and operates fifty-nine processing plants located in the aforementioned states. In addition, it owns and operates 182 sales, receiving and distribution facilities located in those states and in the States of Kentucky, Delaware, Maryland, Iowa and Oklahoma. Foremost Dairies of Lubbock, Texas is a branch of the Southwest Division (Dallas, Texas), and a direct operation, of Foremost Dairies, Inc. of San Francisco, California. The participation of Foremost Dairies, Inc. in Furr's 1962 Circus was solicited of Lindsley Waters, Jr., General Manager of Foremost's Southwest Division, by Clem Boverie, respondent's Senior Vice President; that Foremost agreed thereto; and that $5,000.00 was thereupon paid to respondent by Foremost as a contribution to help defray the costs of the Circus, with respondent under no obligation to furnish any services or facilities with regard to Foremost's products. No inquiry was made by respondent to ascertain whether Foremost Dairies, Inc. was making payments available on proportionally equal terms to respondent's competitors. Throughout 1962 Foremost Dairies, Inc. sold its milk to respondent in the

total amount of $1,310,529.72. Throughout 1962 Foremost Dairies, Inc. sold its milk in substantial amounts to many customers competing with respondent in the distribution of the said product, but did not offer or otherwise make available to them any payment or payments of terms proportionally equal to the aforementioned Circus payment made to respondent. During 1962 Foremost Dairies, Inc. paid respondent an additional $520.00 for the cooperative advertising of its products. (The foregoing facts were stipulated by the parties (CX 1796A-C). Although Foremost participated in the Circus with the understanding that respondent was under no obligation to render any advertising or other services with regard to Foremost's products, respondent nonetheless advertised and promoted Foremost's products in connection with the Circus (CX 1841, 1843, 1858). Respondent's contentions with regard to this supplier are identical to those in respect to The Borden Company. For further details, see The Borden Company heretofore discussed. It is found that the acts and practices of Foremost Dairies, Inc., as proved, are in violation of subsection (d) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

9. MEADOW GOLD DAIRIES

Meadow Gold Dairies, of Denver, Colorado, is an operating division of Beatrice Foods Co., a Delaware corporation. Beatrice's does business in most of the states of the United States, and has its principal office at 120 South LaSalle Street, Chicago, Illinois. Meadow Gold Dairies manufacturers and processes dairy products, including a full line of fluid milk and ice cream, and distributes frozen foods and other food products; such products are sold at wholesale principally to retail stores and institutional accounts; sales are also made at retail by home delivery routes; and a relatively small amount of dairy products is sold to independent distributors or jobbers. Substantially all such sales are made within the Denver metropolitan area. The annual sales of Meadow Gold Dairies for the fiscal year ended February 28, 1963 were approximately $8,000,000. Meadow Gold Dairies has a continuing advertising and sales promotion program available to all of its customers, which includes demonstrations, sampling, indoor and outdoor signs, point-of-purchase materials, cooperative advertising, and seasonal and individual product promotions. During 1962, the respondent utilized a number of such promotions (T. 895-903); CX 1127A-B). The participation in Furr's 1962 Circus was solicited of Louis J. Anjier, Manager of the Meadow Gold ice cream and milk processing plant in Denver by John Milligan, respondent's head buyer;

Meadow agreed to participate in the amount of $1,000.00, with the understanding that respondent was under no obligation to render any advertising or other services in respect to Meadow Gold's products (T. 473-74, 898-99). By a check, dated May 11, 1962, Beatrice Foods Co. (Colorado District Accounting Division) paid respondent $1,000.00 for participating in the Circus (CX 1129). Beatrice Foods Co. allocated $600.00 of this payment as sales promotion by the Meadow Gold Dairy Division, Denver, Colorado, and $400.00 to sales promotion of its separate operating division in Colorado Springs, Colorado, which serves Furr's stores in the latter city (T. 899; CX 1127B). During the period of the Circus promotion, Meadow Gold had in-store demonstrations and set up displays in respondent's stores, which Meadow had done previously and has done since (T. 899). Respondent's purchases of Meadow Gold products during 1962 totaled $123,988.59 (CX 1772C), of which $95,020.47 represented purchases by respondent's stores in the Denver metropolitan area (CX 1127C, 1130, 1210).

Alleged Disfavored Customers of Meadow Gold Dairies

The alleged disfavored customers of Meadow Gold Dairies are (1) Red Owl Stores, Inc.; and (2) King Soopers, Inc.

(1) *Red Owl Stores, Inc.*

Red Owl Stores, Inc., which operates at the wholesale as well as the retail level, owns and operates twelve retail grocery outlets in the Denver metropolitan area. Three of its stores in this area made purchases during 1962 from Meadow Gold Dairies of Denver. Store No. 215, located at Englewood, Colorado, made one purchase during 1962, and that was on March 1, in the amount of $26.25. Prior to this date, the last purchase made by this store was on October 1, 1960 for $17.40 (CX 1211). Store No. 161, located at 9100 West 6th Avenue, Denver, Colorado, made three purchases in 1962, totaling $94.84; $21.84 on May 12; $56.01 on August 18; and $17.01 on October 26 (CX 1212). Store No. 164, located at W. 64th Avenue & Wadsworth Blvd., Arvada, Colorado, made one purchase in 1962, on August 28, in the amount of $19.24 (CX 1213). Only one of the five purchases, $26.25 by Store No. 215 on March 1, 1962, was made during the relevant time period. Considering the infinitestimal amount of purchases, and the dates thereof, it cannot be said that Meadow Gold Dairies violated Section 2(d) in its dealings with Red Owl Stores, Inc.

(2) *King Soopers, Inc.*

King Soopers, Inc. is the owner and operator of a chain of grocery stores doing business in Denver, Colorado Springs and Pueblo, Colorado. The company operates twelve retail grocery stores in the Denver metropolitan area, which are in competition with respondent for the retail grocery business in the Denver area (T. 875-76; CX 1837). Throughout 1962, Meadow Gold Dairies sold substantial amounts of its products to each of the twelve King Soopers stores located in the Denver metropolitan area (CX 1222-1379). Ledger sheets submitted by Meadow Gold Dairies show its sales during 1962 to such twelve stores at the localities in the Denver area as follows: Store No. 2, Derby, 6040 East 64th Avenue (CX 1368-1379); Store No. 3, Westminster, 72nd & Federal (CX 1222-1227, 1354-1367); Store No. 4, Centennial, 5050 S. Federal (CX 1342-1353); Store No. 5, Mayfair, 1370 Kearney (CX 1326-1341); Store No. 6, Dahlia, 3304 Dahlia (CX 1314-1325); Store No. 7, Lakewood, 8400 W. Colfax (CX 1300-1313); Store No. 8, Brentwood, 2085 S. Federal (CX 1288-1299); Store No. 9, University Hills, 2790 S. Colorado Blvd. (CX 1278-1287); Store No. 10, Lakeside, 5801 W. 44th Ave. (CX 1264-1277); Store No. 11, Alameda, 2340 W. Alameda (CX 1250-1263); Store No. 13, Aurora, 9395 Mountview (CX 1236-1249); and Store No. 14, Fanfare, 333 Havana (CX 1228-1235). Respondent contends that the Circus payments to respondent by Meadow Gold Dairies do not violate Section 2(d) because respondent was under no obligation to render any advertising or other services in respect to Meadow Gold products. The answer to such contention is given in the discussion heretofore in connection with The Borden Company. Respondent also takes the position that any offer of promotional funds to King Soopers for the promotion or advertising of Meadow Gold products during 1962 would have been a futile gesture. There is no evidence in the record that would justify such a conclusion. Mr. Charles McCotter, Merchandise Manager of King Soopers, called as a witness by complaint counsel, testified on cross-examination that Meadow Gold was not his company's main dairy product line, but their main line consisted of their own private label, "King Soopers," and "Sealtest," and that he would not classify Meadow Gold as a minor supplier, but he would characterize it as a secondary supplier (T. 892-93). Mr. McCotter testified further:

Q. In view of the fact that you have your own brand as well as the Sealtest brand, would you seriously consider promoting the Meadow Gold label?

A. Milk is a perishable product and its promotability is questionable outside of space allocation, and we have our own product to sell and that naturally would be the one we would be trying to sell.

Q. In other words, even if a promotion allowance were offered you for Meadow Gold you wouldn't then consider giving them more shelf space to promote their product to the detriment of your own label and your major supplier Sealtest?

A. Wouldn't do it very likely. There would be considerable discussion. It would necessitate changing our entire mode of operation. (T. 893.)

Mr. Roy Furr, President of the respondent company, testified that his people, who solicited the Circus promotion, were "instructed to let everyone know and anyone know that if anybody felt that they couldn't go along for any reason, there would be no discrimination or *space allocation reduction* or anything of that nature" (emphasis added) (T. 1155). With respect to the milk companies, Mr. Furr stated:

I believe as you have heard testified earlier by some of our people, milk is a different commodity from your average round of dry groceries and nonfoods. It does not lend itself to promotions within store. You can't stock milk out of the store, you can't make stacks of it. You don't have the refrigeration to do it. And if you spread out on your display in your cases, you discriminate against some other supplier. There's just so much milk room in one of those cases and we try to divide it up there based on the movement of the milk. If you give one operator more space, then you are discriminating against the other operator—the other supplier. So it really doesn't lend itself to that type of promotion and we so told the dairy people that we just couldn't offer them any kind of displays or anything of that nature. So that's the reasons that we don't think it lends itself to it. (T. 1173-74.)

It is apparent from the testimony of Mr. Furr, and other evidence in the record, that the respondent did not give Meadow Gold Dairies or the other participating milk companies any more in-store space during the Circus promotion to the detriment of any nonparticipating supplier. Mr. McCotter's testimony to the effect that King Soopers would not be inclined to promote the Meadow Gold brand if advertising allowances were offered for that purpose was conditioned on giving Meadow Gold "more shelf space * * * to the detriment of your own label and your major supplier Sealtest" (T. 893). It is found that the acts and practices of Meadow Gold Dairies with respect to King Soopers, Inc. are in violation of subsection (d) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

Did Respondent Induce the Discriminations Knowingly?

The question now presented is whether respondent knew, or should have known, that it was receiving unlawful payments from

some of its suppliers. It is the position of the respondent that its methods, instructions and procedures in conducting the 1962 Circus promotion preclude a finding that respondent induced payments known to be illegal. Respondent's 1962 Circus promotion was conducted during the months of March and April, 1962 (CX 1794I). In late 1961, the feasibility and practicability of conducting this promotion was first considered (T. 1153-54). However, because of an investigation by the Federal Trade Commission of an identical promotion by the respondent in 1959, and knowledge of pending litigation by the Federal Trade Commission against other grocery chains, including a Texas grocery chain (J. Weingarten, Inc.), involving promotional activities, respondent exercised ultra-precaution in deciding finally whether to go forward with the 1962 Circus (T. 1153-54). Respondent's attorney, Mr. James H. Milam, was consulted (T. 1136, 1153-54). Mr. Roy Furr, President of respondent, testified that similar promotional programs were not conducted in 1960 or in 1961, but that

> * * * in '61 we talked about it again for '62 and we knew of the investigation by the Federal Trade Commission; we knew of the Weingarten Case and several others * * * because we had read that in the trade magazine, so we knew about it. And we discussed that with Mr. Milam thoroughly. * * * So it was during the real late part of '61 that I remember talking to Mr. Milam, our attorney, on two or three occasions. (T. 1153-54.)

Mr. Milam, an attorney who has been practicing law since 1935 and has represented respondent since 1945, explained that he had been consulted by Mr. Furr respecting the possibility of conducting the 1962 Circus promotion and that he advised respondent, after legal research, that the promotion could be conducted in full compliance with legal requirements under certain conditions (T. 1136-37, 1143-44, 1211-12). In this regard, Mr. Milam testified:

> Mr. Furr talked to me sometime in—I believe it was late '61 first about it, and after making a study of the matter I advised him that I thought that they could have this 1962 Circus if certain rules and regulations were followed. I told him that, in my opinion, there was no violations or illegality about a solicitation for promotional allowances for these kind of promotions and that if certain what I considered rules were followed about it that I felt like it would be all right. * * * (T. 1136-37.)

At that time, Mr. Milam discussed with Mr. Furr very precisely the rules which, in his opinion, the company should follow (T. 1137). The substance of the advice and opinion received from counsel is fully corroborated by the testimony of Mr. Furr, who explained that Mr. Milam had advised:

* * * that he felt it would be perfectly legal; that actually, in his opinion, it was legal if, of course, we would follow certain instructions (T. 1154).

After receiving Mr. Milam's advice, Mr. Furr met with the company's executive group, consisting of the officers, and in this meeting a decision was made to conduct the 1962 Circus promotion (T. 1154-55). A few days later, Mr. Furr requested Mr. Milam to meet with the executive group (T. 1137-38, 1155), and explain his opinion and the rules to be followed to the entire group. In Mr. Milam's words, the instructions presented to the executive group were:

[F]irst, of course, there was to be no coercion of any kind or threats of retaliation if a supplier didn't participate and, second, that, in my opinion, it was not necessary to make—in presenting the program to a supplier make—ask an affirmative question about whether this was available to the other—their other customers, but that if anything came up or suggestion or anything at all came up about whether a supplier was offering it to the other customers of that supplier that Furr was to immediately tell them—or the person making the solicitation—that if they couldn't make it proportionately equal to the others, their other customers, that we didn't want for them to participate at all. We wanted it perfectly—if any intimation would come up about that. And, further, to tell them that they were the only ones that could actually know that this was done and that if there was any question in their mind, to consult their own attorneys about it because we didn't want the participation from that supplier unless they could make it proportionately equal. (T. 1137.)

After these instructions were given by Mr. Milam, Mr. Furr directed the officers "to carry those instructions out and to check on it to see that it was done" (T. 1138). Again, this testimony is fully substantiated by the testimony of Mr. Furr. He explained that after Mr. Milam presented to the executive group the directives and instructions that the matter was discussed "for quite some time" and that:

I finally told Mr. Boverie who is Senior Vice-President, to take the instructions and these instructions I repeated them myself, and as best I recall this is what I told him: For him to get his group of merchandising and advertising people together and work out the plans and details of the promotion, together with these specific instructions: that his people who solicited the promotion—the invitation of participation of the manufacturer or supplier—that these people, his people be instructed to let everyone know and anyone know that is anybody felt that they couldn't go along for any reason, there would be no discrimination or space allocation reduction or anything of that nature. There should be no pressure put on any manufacturer or supplier to participate. Sure try to sell it, but not put on any pressure * * *

So we instructed our people, I asked Mr. Boverie, too, it was not necessary to ask each supplier if he was going to pass this equally to all competitors,

but if, by any indication or the supplier brought it up, then to tell them that if they felt it was illegal we sure didn't want them to come in with us on it * * * if they felt that way * * * unless they could make it equal to all. But if they felt that way, we suggested that they talk to their own attorney and they were the only ones who could make up their minds. We could not force them, but if they couldn't do that, we'd rather that they not come in.

Those were the instructions that I gave Mr. Boverie and ask him to carry them out and I know he did. (T. 1155-56.)

The evidence further demonstrates that Mr. Boverie did carry out the directive of Mr. Furr and did instruct respondent's buyers and supervisors as to the methods and rules to be complied with in soliciting supplier participation. Mr. Boverie personally gave the instructions to buyers and supervisors of respondent in a meeting called for that purpose in late 1961 or very early 1962. He testified that he

* * * explained to them the circus and the reasons we thought the circus would be good for both of us and that it will increase sales and to assure them that we hoped they could go along with us. If they could not go along, there would no one be penalized in any way and we also told them the legality of it and all that was brought up and someone in the meeting asked me, "What if they ask me if it's legal," because there have been a lot of—we were, incidentally, investigated, I believe, for our 1959 Jerry Louis Show and it was on our mind all right and I know my answer to them and I really stressed it is, "If anyone asks you whether it's legal or not, for you to definitely tell them that 'you are the only one that knows whether it's legal or not and if there is any question in your mind consult your attorney and then if there is any question, well, then we'd advise you not to go with the promotion.' " But we were very insistent on that. (T. 313-14.)

Among respondent's buyers attending the meeting in which Mr. Boverie explained the details and instructions were Mr. John Milligan and Miss Opal Shugart, both called as witnesses by complaint counsel. The testimony of these two witnesses demonstrates thoroughly that the instructions were understood and that the solicitors were fully aware of the necessity of adhering strictly to the conditions set by counsel in conducting the 1962 Circus promotion. All of the nine suppliers for which complaint counsel has introduced evidence in this proceeding were solicited by Mr. Milligan, Miss Shugart or by Mr. Boverie, himself.
Mr. Milligan testified:

Q. And were you given any instructions by your superiors in connection with the solicitations that you were to make?

A. The manner in which we were to make them?

Q. Any instructions at all.

A. Yes, sir, we were.

Q. What were they?

A. To go out and see if we could sell this package and if anyone did not want to participate, forget it; if anyone thought that it was illegal, to ask them to check with their attorney to see what they thought about it.

Q. And were there any other instructions?

A. Well, we weren't to put any pressure on anyone or anything. (T. 463.)

The testimony of Miss Shugart is equally demonstrative. She testified that Mr. Boverie, in the meeting mentioned above,

* * * told us we were having a circus promotion and that he would like for us to solicit these funds or approach these people and that we were not to use any pressure and that if anyone wanted to go along with us that they could; that we'd be glad to have them. If not, they were not to lose any shelf space and we were not to use any coercion. (T. 477.)

Regarding the availability of the solicited payment to competitors of respondent, Miss Shugart testified, "* * * I did tell them to present it to other people if they asked me" (T. 478-79). Additional evidence of respondent's good faith is threaded throughout the record. Both Mr. Milam and Mr. Furr testified that, at least to some degree, the fact that the Federal Trade Commission had investigated a promotion conducted by respondent in 1959, without any indication that such promotion was deemed even questionable, entered into the company's decision to go forward with the 1962 promotion (T. 1143-44, 1154). In 1959, explained Mr. Milam, a representative of the Commission requested information concerning the 1959 "Show of Stars" which was supplied (T. 1138). Concerned by this investigation, Mr. Milam inquired of the investigator whether anything about the 1959 promotion was deemed illegal and requested that respondent be advised (T. 1139). The investigator explained that he could not speak for the Commission but that "if they found any violations" respondent "would hear about it from Washington" (T. 1139-40, 1143). Mr. Furr also was aware that the investigator had advised that respondent would hear from Washington if anything was deemed illegal with regard to the 1959 promotion (T. 1157-58). The investigator, Mr. Flowers, corroborated fully the understanding of Mr. Furr and Mr. Milam and explained that he did in fact advise them that word would be received from the Commission in the event a determination was made to issue a complaint charging a violation of the law by respondent (T. 1219-20). The investigator did not advise respondent that advice would be forthcoming if the actions were deemed proper (T. 1220). However, no word at all was received by respondent from the Commission regarding the 1959 investigation

(T. 1140). As noted previously, Mr. Milam's advice to respondent that it was possible to proceed with the plans for the 1962 Circus promotion in full compliance with the law was based upon his research and understanding of the law at the time (T. 1144). He allowed also, however, that the lack of any notification by the Commission regarding the 1959 investigation by late 1961, a lapse of time he considered reasonable to assume no action would be taken, was considered (T. 1143-44).

Mr. Milam explained:

Q. What meaning did you attach to Mr. Flower's statement that you would hear about it from Washington?

A. Well, I just attached the meaning—just the words that he said. He said that if there was any violation, we would hear from Washington.

Q. You would hear if there were violations?

A. Yes, sir.

Q. What if the determination had been made that there was no violation?

A. My understanding was that we would receive no communication from them at all—was my understanding of it at the time. I don't know that anything was expressly stated, but he just said that if they find any violations, you will [be] hearing from Washington on it.

Q. Was there any time period involved in that?

A. No, sir. I felt like a reasonable time, because—I was in charge of getting this information and I'd furnished all that he wanted and told him, if there was anything else that they wanted to let us have it and I felt certain the time had long passed that we would have heard if they felt like there were any violations in connection with this '59 Show.

Q. Mr. Furr sought your advice concerning the proposed 1962 Circus. In formulating your advice, did you give any consideration at all to Mr. Flower's statement that you would hear about any illegality from Washington?

A. That's a hard—I mean—I'll tell you primarily it was my research is what my advice was based upon, it was primarily my research and my opinion on what I thought the law was in reference to that, is what I based my opinion on. Some individuals did discuss it and it was my opinion that if they had found any violation in the '59 Show that we would have heard about it by then. But that wasn't the basis of my opinion, I tried to read the Decisions and formulate an opinion from what I thought the decisions had held at that time.

Q. In other words, you did a workmanlike job of researching the law rather than relying on this assumption?

A. I tried to. (T. 1143-44.)

In connection with the prior investigation by the Commission of respondent's 1959 promotion, it is worth noting, as Mr. Furr testified, that Furr's, like every other business of any consequence, has been investigated many times over the years by various agencies of the government, including Food and Drug, Internal Revenue, Wage

and Hour Division of the Department of Labor, etc., and that with the exception of a small Food and Drug case around 1932, Furr's has never been sued or prosecuted by the United States or any agency thereof (T. 1178-79). It cannot be questioned that respondent exercised complete good faith in an attempt to assure compliance with all legal requirements in conducting and soliciting payments for the Circus promotion.

In *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61 (1953), a suit under Section 2(f) of the Robinson-Patman Act, the evidence, as disclosed by the Supreme Court opinion, was that Canteen occupied "a dominant position in the sale of confectionery products through vending machines" *(Id.*, at 62); that it "received, and in some instances solicited, prices it knew were as much as 33% lower than prices quoted other purchasers"; "that petitioner knew the prices it induced were below list prices and it induced them without inquiry of the seller or assurance from the seller" as to their legality *(Id.*, at 62-63); and that Canteen "never inquired of its suppliers whether the price differential was in excess of cost savings, never asked for a written statement or affidavit that the price differentials did not exceed such savings, and never inquired whether the seller had made up 'any exact cost figures' showing cost savings in serving petitioner" *(Id.*, at 67). On these facts the Commission, as stated by the Court, argued "that Congress was attempting to reach buyers who, through their own activities, obtain a special price and that 'knowingly to induce or receive' can be read as charging such buyers with responsibility for whatever unlawful prices result" *(Id.*, at 71-72), i.e., that Canteen had an affirmative duty to investigate and inquire as to legality. The Court rejected this argument. Notwithstanding *Automatic Canteen*, some courts and the Commission have held in their *latest* pronouncement on this subject that a buyer who initiates a special promotion, and affirmatively induces a seller to make payments in connection with the advertising and promotion of his products in such special promotion, automatically possesses himself of information which requires him to affirmatively inquire of his sellers whether such payments were being made available on proportionally equal terms to competitors. See *Grand Union Co.* v. *F.T.C.*, 300 F.2d 92 (2d Cir. 1962); *American News Co.* v. *F.T.C.*, 300 F.2d 104 (2d Cir. 1962), cert. denied, 371 U.S. 824 (1962); *Giant Foods, Inc.* v. *F.T.C.*, 307 F.2d 184 (D.C. Cir. 1962), cert. denied, 372 U.S. 910 (1963); *R. H. Macy & Co.* v. *F.T.C.*, 326 F.2d 445 (2d Cir. 1964); *Fred Meyer, Inc.*, F.T.C. Docket No. 7492 (March 29,

1963). It was stipulated that no inquiry was made by respondent to ascertain whether The Borden Company or Foremost Dairies, Inc. were making payments available on proportionally equal terms to respondent's competitors (CX 1795A-C, 1796A-C). It is found that the respondent knew, or should have known, that the payments it was inducing and receiving from its suppliers in connection with its 1962 Circus promotion were not being made available on proportionally equal terms to its competitors. Although it is so held, it does not necessarily follow that an order should enter in this case.

In *Vanity Fair Paper Mills, Inc.*, Docket No. 7720, the Commission in its opinion, 62 F.T.C. 568, 577, stated:

> It must be remembered that a cease and desist order of the Federal Trade Commission does not punish or impose compensatory damages for past acts. Its purpose is to prevent illegal practices in the future.

The Commission's recent emphasis and insistence upon a clear showing of the *necessity* of an order before entry thereof are illustrated in the *Sperry Rand* case, Docket No. 7559, Opinion of the Commission, 64 F.T.C. 842, 844. In that case, respondent was charged with a violation of Section 2(a) of the Robinson-Patman Act. The complaint issued in August 1959, and after protracted hearings the Examiner filed a lengthy Initial Decision on March 18, 1963, in which he rejected all defenses of Sperry Rand and entered an order to cease and desist. Sperry was charged specifically with substantial discriminations in price in the sale of portable typewriters to Sears Roebuck. On appeal, the full Commission held that

> [t]he purpose of Commission cease and desist orders is not to punish law violators, but to prevent the recurrence of unlawful conduct. If the probability of such recurrence is remote and insubstantial, the Commission may conclude that the public interest does not require entry of a formal order.

Based on this unquestioned proposition, the Commission went on to find that because of the "unique circumstances of this case" the matter should be terminated without entry of a cease and desist order. Recognizing that there existed an evidentiary basis for an order as found by the Hearing Examiner, the Commission nonetheless held that the discriminations found were with respect to a "special sale" and that repetition was "unlikely." Certainly, the circumstances in *Sperry Rand* were no more "unique" than the circumstances in the instant case and the probability of recurrence is far more "remote" and insubstantial in the instant case than in the *Sperry Rand* case. The instant case is not a typical buyer in-

ducement case, but is a thoroughly unique case. In no other buyer inducement case does the record disclose that the respondent actively sought and abided by advice of counsel. In no other case does the evidence show that a respondent made such an affirmative good faith effort not to violate the law.

The advice of respondent's counsel, given prior to the 1962 Circus promotion, was that respondent did not have an affirmative duty to make inquiry as to the legality of the promotional allowances received from suppliers but that, "if anything came up or suggestion or anything at all came up about whether a supplier was offering it to the other customers of that supplier," respondent was to immediately tell such sellers "that if they couldn't make it proportionately equal to others, their other customers, that we didn't want for them to participate at all" and "to tell them that they were the only ones that could actually know that this was done and that if there was any question in their mind, to consult their own attorneys about it because we didn't want the participation from that supplier unless they could make it proportionately equal" (T. 1137). Although this advice may be considered unsound judged by the latest precedents of the Commission, it certainly cannot be said that it was unsound as of the date that it was given or that it was other than completely consistent and in accordance with *Automatic Canteen.* In this connection, it should be noted that *Giant Food, Inc.* v. *Federal Trade Commission, supra,* which probably goes farthest in the direction of adoption of the Commission's holdings in these types of cases, was not decided until June 14, 1962, more than two months after respondent's promotion in issue and long after the advice of counsel was given to respondent in late 1961 and early 1962. It is equally incontrovertible on this record, taken as a whole, that, if the *Giant* case had been decided by the Court as of the date the advice was given to respondent, and that, if respondent's counsel had advised that there existed a legal duty to make affirmative inquiry, respondent would have meticulously and in good faith complied with such advice. The testimony of respondent's officials, employees and counsel was completely candid and straightforward, and can only be accorded the utmost credence. Their demeanor and conduct bespoke integrity.

It may be urged that one who initiates a course of action is legally responsible for the effects thereof, even though he does not know beforehand what the actual legal effects will subsequently be determined to be, and from this one can deduct as a matter of

law and inference that respondent "knew" or "should have known" of the resulting illegality. Whether or not this proposition is sound as a matter of law, it cannot be said that respondent "knew" or "should have known" of any resulting illegality in the sense of having actual knowledge beforehand or having knowledge of circumstances and events from which it may be legally concluded that respondent "should have known" of any resulting illegality which might be found. As pointed out above, if respondent was in fact in violation, such violation was inadvertent without culpability and absent *scienter*. Under these circumstances, the entry of an order against respondent is clearly uncalled for. There is no warrant or basis in this record for assuming that respondent, were it advised that under the current precedents of the Commission it should have assumed the duty of making affirmative inquiry of its suppliers, will not follow that course in the future, if in fact it even conducts any special promotions in the future for which it solicits seller participation. Indeed, from the record made in this case, the only reasonable conclusion is that respondent will in the future be guided by the current pronouncements of the Commission. Under such circumstances, the complaint should be dismissed as the rationale of the so-called abandonment cases and other cases demonstrate.

United States v. *W. T. Grant Co.*, 345 U.S. 629 (1953), involved interlocking corporate directorates under Section 8 of the Clayton Act. There was no question but what the Act had been violated and the only question open was as to whether an injunctive order should be entered against defendants. The Court held that the moving party, the government, must satisfy the Court that relief is needed. The test, as enunciated by the Court, was: "The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." Applying this test, the Court refused to disturb the holding of the trial court that an injunctive order was unnecessary. As held by the Seventh Circuit in *National Lead Co.* v. *Federal Trade Commission*, 227 F.2d 825, 839-40 (7th Cir. 1955), the same consideration applies to Commission orders:

> While the Commission is vested with a broad discretion to determine whether an order is needed to prevent the resumption of unlawful acts which have been discontinued, this "discretion must be confined * * * within the bounds of reasonableness." (Quoting from *Marlene's, Inc.* v. *Federal Trade Commission*, 216 F.2d at p. 559.)
>
> This rule of reasonableness requires something more than a mere guess or suspicion contrary to the evidence and to the finding of the trial examiner

that a resumption of discontinued practices may not reasonably be anticipated. * * *

While the instant case is not, of course, in the strict sense, an abandonment case, the principles established in the abandonment cases, as well as other cases, are applicable. In both abandonment and non-abandonment cases, Examiners and the Commission have applied the test established by the Supreme Court in *Grant*, viz., that an order is not warranted unless there is "cognizable danger of recurrent violation" as distinguished from a "mere possibility." Thus, in *Firestone Tire & Rubber Co.*, 55 F.T.C. 1909 (1959), the Commission applied the test of the *Grant* case. The Commission noted that the "hearing examiner has found that respondent acted in good faith in attempting to comply with the guides as they relate to designations," although discontinuance of the alleged illegal practices did not occur until *after* the issuance of the complaint.

The fact that respondent vigorously contested the allegations of the Commission in this case cannot be used against it or serve as a basis for a claim that its "attitude" or "desire to respect the law in the future" are suspect. In *Stokely-Van Camp, Inc.* v. *Federal Trade Commission*, 246 F.2d 458, 465 (7th Cir. 1957), the Court held:

> Fact (2) is irrelevant. Its irrelevancy is emphasized by the Commission's apologetic statement that no criticism is to be made against respondents (petitioners here) for vigorously defending the position they had taken, which, of course, they had a right to do. It does not follow, however, that one who defends charges before the Commission is, on that account, to be subjected in the future to a cease and desist order because his defense there proves unsuccessful. That would be a policy abhorrent to our sense of justice.

This is particularly so in a case such as the instant one where the question of law is close, was in an unsettled state as of the time of the acts and practices challenged, and where respondent has in good faith relied upon the advice of counsel.

Another factor to be considered in determining the necessity of an order is "the character of past violations" of the law, if any. *United States* v. *W. T. Grant Co.*, *supra* (at p. 633). Respondent here has never before been prosecuted for an antitrust violation and, indeed, although respondent, like every other business of any consequence, has been investigated many times during the past 35 years by various agencies of government, it has never been sued or prosecuted by the United States or any agency thereof with the exception of a small Food & Drug case around 1932 (T. 1178-

79). Respondent here has not, of course, given any sworn assurance that it will not violate the law in the future. Its scrupulous attempt to assure legality in conducting the promotion here in issue, however, leaves no question that violations will be consciously avoided. Moreover, the lack of sworn assurance does not in any wise constitute a basis for a finding that there is "cognizable danger of recurrent violation," nor, for that matter, even a "mere possibility." Respondent had no occasion to affirmatively proffer such assurances since it clearly believed, in good faith, that it was in complete compliance with the law and, on this record, that belief cannot be questioned. In *Stokely-Van Camp, Inc.* v. *Federal Trade Commission, supra*, the Commission had denied an abandonment dismissal of the complaint on the ground, among others, that there were no affidavits indicating future intentions. The Court of Appeals reversed the Commission on the ground that all of the surrounding circumstances, as in the instant case, demonstrate an absence of likelihood of future violations.

Even though it be held that the advice given respondent in January 1962 was partially incorrect, based on then existing Commission precedent, it is certainly true that the advice given had the effect in actual practice of minimizing to a great degree the possibility that respondent would induce and receive illegal payments. This is attested to by the evidence in this record. While complaint counsel began with a substantial number of possible Section 2(d) violations, the record in this case can sustain a finding of Section 2(d) violations with respect to only three suppliers. Under these circumstances, it must be found that the legal advice, and the act of respondent in following such legal advice, were efficacious in preventing violations of law in the vast majority of transactions. And, even if there were a few Section 2(d) violations, the question as to whether respondent "knew" or "should have known" this must still be met.

But more than this, the three transactions in which there is a basis for a finding of Section 2(d) violations and, from this, a violation of Section 5 by respondent, could at most be with respect to the so-called milk companies. Again, however, as in the case of the advice of counsel, respondent's transactions and dealing with the milk companies in early 1962 were, under precedents of the Commission, completely outside the scope of Section 2(d). Section 2(d) prohibits the payment or contracting for payment of anything of value to or for the benefit of a customer,

as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities (emphasis added).

Respondent clearly did not solicit from the three dairy suppliers payments proscribed by Section 2(d). Commission law on this issue is unequivocal. In *Yakima Fruit and Cold Storage Co.*, Docket No. 7718, Opinion of the Commission (September 28, 1961), the complaint charged discriminatory promotional payments in violation of Section 2(d). The Commission, however, dismissed the complaint on the ground that the payment by Yakima was merely a "donation" (Com. Op., p. 3) made "* * * in response to a solicitation to 'participate' in a customer's anniversary sale * * *" (Com. Op., p. 5), and not a payment in consideration for services and facilities furnished by the buyer *in connection with the sale of Yakima products,* as required by Section 2(d). The Commission's holding was categorical:

As we read the Act, there must be a showing that the payment was made as consideration for "services or facilities" furnished by the customer in connection with the seller's product. Thus, payments made for other types of consideration or for which no tangible consideration *was expected* would not violate Section 2(d) (Com. Op., p. 2, emphasis added).

Recently, the Commission reaffirmed this view. In *Fred Meyer, Inc.*, Docket No. 7492, March 29, 1963, the Commission stated:

Where money or something of value is given by a seller to a buyer *without even the contemplation* of promotional services by the purchaser, there has been no payment "as compensation or in consideration" for such services, and Section 2(d) is therefore not applicable (Com. Op., p. 10, emphasis added).

It was not until the January 16, 1964 decision of the Second Circuit in *R. H. Macy* v. *Federal Trade Commission, supra,* that any antitrust lawyer would question the foregoing legal conclusion. To now enter an order against respondent on this basis would not only be unfair for the reasons urged above, but would be doubly unfair when based on a change of law after the fact. Thus, the simple question is whether in equity and fairness the change of law, effected by the decision of the Second Circuit in *R. H. Macy,* shall have retroactive effect and thereby constitute a basis for a finding of violation against respondent. Even if the milk companies should *now* be found to have violated Section 2(d), respondent did not know, could not know, and could not have had reason to know of

such violations in advance. To now retroactively apply a change of law would be contrary to requirements of equity, fairness and recent decisions. Thus, the Supreme Court recently had occasion, in *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964), to reevaluate the validity of its 1926 decision in *United States* v. *General Electric Co.*, 272 U.S. 476 (1926), wherein the Court had held it lawful to use *bona fide* agents in the distribution of products and that through the use of agency the principal could set the prices of the agent. In *Simpson* v. *Union Oil*, the Supreme Court reevaluated its 1926 decision and, in effect, overruled it. However, and directly in point here, the Supreme Court in clear recognition of the fact that Union Oil's contracts were legal, *when adopted* because of the *General Electric* doctrine, stated in the last sentence of its opinion: "We reserve the question whether, when all the fact are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today" (377 U.S. at 24-25). This suggestion of the Court is, of course, based in equity and fairness. Subsequent to the Supreme Court's decision in the *Union Oil* case, the District Court for the Southern District of New York, in *Lyons* v. *Westinghouse Electric Corp.* (1964 CCH Trade Cases, ¶ 71,266 (S.D.N.Y. 1964)), had occasion to consider the fairness of retroactive application of the Supreme Court's *Union Oil* case and expressly declined to do so on the ground that to do so would be "manifestly unjust." In so doing, the court pointed out that "the Supreme Court may eventually decide that it will not apply the new doctrine to the Union Oil Company in that particular case, but will limit itself to announcing that the new rule will henceforth govern future cases." This, of course, is the implicit suggestion in the Supreme Court's comment in the *Union Oil* case. The Court in *Lyons* further pointed out: "State courts have followed this approach, and when they do, their action does not violate the Constitution" (citing *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). This approach has likewise been recently applied in the Second Circuit in *United States* v. *Fay*, 333 F.2d 12 (2d Cir. 1964).

The unfairness of retroactive application in administrative proceedings is also well recognized. Thus, in *Wood Wire and Metal Lathers International Union, et al.*, 119 N.L.R.B. 166 (1958), 7 Pike & Fischer Ad. Law Cases (2d Series) 781, it was held that, where the N.L.R.B. changed certain of its substantive rules having the force and effect of law, it would be unfair to enter an order

against respondent for conduct which, *when performed*, was not illegal. Thus, the N.L.R.B. overruled as erroneous its then existing interpretation and rules, but further held that such new interpretation and rules would "not control the disposition of this case" and the case at bar was disposed of on the basis of the "interpretation of the law which * * * existed when the respondents' acts were committed and when the complaint against them issued and not upon a contrary interpretation announced thereafter." Likewise, in *N.L.R.B.* v. *International Brotherhood of Teamsters*, 225 F.2d 343 (8th Cir. 1955), it was held that the N.L.R.B. may make any general pronouncement which it sees fit as to the validity of a contract provision in the case before it and may overrule or abandon a contrary view taken in an earlier case but that it may not enter an unfair labor practice order on the basis of a retroactive application of such new interpretation. The Court stated that the Board may not "brand a party as being guilty of an unfair labor practice" on the basis of a reversal of an earlier case. The Board may not, said the Court, "blanket an employer or a union with a cease and desist order predicated on the fact of the contract provision having been made, when the Board has up to that time held that such a provision is not violative of the Act." In *Lesavoy Foundation* v. *Commissioner of Internal Revenue*, 238 F.2d 589 (3rd Cir. 1956), the Third Circuit considered a case in which the Commissioner of Internal Revenue had revoked a certificate of exemption for a charitable, educational and philanthropic organization which it had granted six years previously and attempted to retroactively assess a tax deficiency against the organization. The Court, holding that obviously the Commissioner of Internal Revenue may change his mind when he has made a mistake of law or fact, stated it is quite another matter for the Commissioner, once having changed his mind, to make such new interpretation retroactive. The United States Department of Interior, in *Franco Western Oil Co., et al.*, 65 I.D. 427, 8 Pike & Fischer Ad. Law Cases (2d Series) 749, has held that where the Department of Interior places a different interpretation on an Act of Congress from that previously applied, its decision announcing the new interpretation will be given prospective application only. Finally, it should be noted that in none of these cases were there such compelling equities as in the present case. Respondent consulted counsel and obtained advice which, under any interpretation, cannot be labeled as clearly erroneous and which by any fair appraisal was thoroughly consistent with the then existing law. Indeed the Commission,

itself, has recognized such equities. In *Arnold Constable Corp.*, 55 F.T.C. 577 (1958), the Commission dismissed a complaint even though a violation was proved since respondent had relied on the advice of certain Federal Trade Commission personnel. The Commission stated:

> The Commission being of the opinion that while the foregoing does not constitute a defense to any unlawful activity in which the respondent may have been engaged, principles of equity and ordinary fair dealing do militate against the future prosecution of the complaint insofar as it charges the respondent with the use of fictitious pricing claims.

Thus the Commission entered the following order:

> *Accordingly, it is ordered,* That paragraphs 7, 8 and 9 of the complaint be, and they hereby are, dismissed, it being understood, however, that this action shall be without prejudice to the right of the Commission to institute a new proceeding against the respondent or to take such other action as may be warranted in the event the practices alleged to be unlawful are continued or resumed (55 F.T.C. at 578).

In arriving at the conclusion that no order shall be entered in this proceeding, the Hearing Examiner, in addition to the foregoing, has given consideration to the following facts. There is no evidence in this record as to any pressure or coercion placed upon any supplier. In *American News, supra,* the prevailing factual element upon which the Court based its findings of knowledge of illegality was the use of pressure and coercion of the customers on their suppliers. American News and other buyers, stated the Court, "approached various publishers demanding what were generally called 'display promotional allowances' or 'promotional allowance rebates' and threatened to discontinue handling a publication if its publisher refused to comply" *(Id.,* at 107). In the instant case, not a single supplier or broker witness even hinted that there was the slightest pressure or coercion of any type. Mr. Leff, Secretary-Treasurer of Belle Products Company, when asked, "And, from the standpoint of Furr's, was there any pressure, subtle or overt, put on you in connection with joining in the participation in the 1962 Circus?", answered: "There was no subtle or overt pressure. Naturally, they were interested in having people join their Circus and they tried to sell this particular Circus, but, then, this is a normal sales—it was not any threats or coercion, even implied or otherwise" (T. 266-67). In *Fred Meyer, supra,* the Commission postulated that respondent was placed on notice of the illegality of the promotional payments received because

* * * the natural reaction of a supplier who has yielded to the demands of one of his larger customers is not to further lighten his purse by making the same payments to hundreds of others but to minimize his outlay by concealing the fact that he has made any such payment at all. A powerful buyer does not go to a seller with hat in hand asking to be given something that is "proportionately equal" to what the smaller buyers are getting; he wants something *in addition* to what the others are receiving (Com. Op. at 46; emphasis in original).

This theory is certainly inapplicable here; it presumes and is premised upon the existence of "hundreds" of other customers and the existence of "smaller buyers" compared to respondent. Mr. Furr testified:

Q. Did you have any reason to believe that your suppliers who actually agreed to and did participate in the 1962 Circus would make proportional payments for services available to other customers?

A. Did you ask if I felt they would?

Q. Yes.

A. I felt and I knew it then and I feel it today just as much as I did then. Definitely.

Q. Why did you say that?

A. In our market—maybe I can do better on an illustration. If you have, say four buyers pretty well about the same size who control the biggest part of the market and I just know, after having bought groceries for as many years as I have and having been in the business as long as I have and I have had dealings with a lot of sellers and I've had dealings with a lot of buyers—and I know that no seller can afford to go into any market and give me something that he doesn't give somebody else, because what he does there he runs the risk there of losing that other business and it's just not economically sound for him to do it. (T. 1158-59.)

The Commission postulation in *Fred Meyer*, that where a supplier is dealing with many customers, including many small customers, a large buyer requesting and receiving promotional payments is put on notice constructively that the supplier will not voluntarily approach all customers "to further lighten his purse," in a situation in which that same supplier deals with only a handful of large buyers the inference, if any, is to the contrary. Certainly, it cannot be assumed that a supplier will knowingly jeopardize its position with three or four large buyers by granting special considerations to a single large buyer. This is precisely the situation in this case. The record shows that in the three geographical markets here involved (Lubbock, Texas; Albuquerque, New Mexico; and Denver, Colorado) each supplier (with the exception of the dairy companies) serves only a very limited number of customers other than respondent, most of which are large buyers. Because of the nature

of the market in which respondent operates, the express belief of respondent was that no supplier would jeopardize its position with any of the other large buyers in granting it disproportionate treatment. Mr. Furr explained succinctly this belief:

* * * knowing the market structure and knowing that these suppliers cannot afford—it would be just like in our business. * * * If we charged one customer one thing and another customer another thing, we are going to lose a customer and we just can't afford to lose them if we can help it and that would be deliberately running the customer away and I know the manufacturer cannot and will not do that. He just is not going to do it.

Now, * * * we know he is going ahead and make this available to our competition. It confirms my belief and our belief that everybody is getting the same treatment in some form or another. (T. 1172-73.)

Mr. Allston, General Manager of South Plains Associated Grocers of Lubbock, testified that he knew that the common suppliers of Furr's and SPAG would not mistreat him; that he knew about the Furr's Circus in advance, knew that Furr's was soliciting supplier participation, and knew that he dealt with the same brokers as dealt with Furr's; that he had conversations with brokers about the Furr's Circus; that he discussed the Circus promotion with common suppliers and assumed that such suppliers would give him fair and equivalent treatment as a large buyer, the same as they were giving Furr's in the "net-out," and he was "not too worried" about getting equalization of treatment (T. 650-54). The market structure facts do not apply to the dairy suppliers. In this connection, Mr. Furr testified:

By Mr. Baker:

Q. Now, you mentioned the market structure and you have these very substantial other buyers like SPAG and wholesalers Shop Rite and Safeway—

A. That's true generally across the board, but that's not true with respect to the milk companies.

* * * * * * *

Q. Since, however, the milk companies sell to every Tom, Dick, and Harry —they don't just sell to substantial customers?

A. That's right.

Q. Didn't you have reason to believe that in—or a milk company going into a ma and pa store—if I may use that expression—wouldn't offer them offsetting services or facilities to the payment to Furr's in connection with the Circus?

A. Well, actually, Mr. Baker, he does that constantly. The milk people have a program, and it's common knowledge within the trade, that they have a promotional monies that they spend constantly all during each year. They come to us with these different types of in-store promotions or demonstrations, banners, signs, and even equipment—dairy boxes or ice cream boxes and

things of that nature—signs outside. We stay away from all that that we possibly can. We think we can operate our stores better without that type of promotion. In fact, we discourage all in-store demonstrations that we can and those demonstrations that they try to get us all to take, well, the independent stores most of them take them. I think all of them do one way or the other. They use that and the milk people will put their own people in there to hold these demonstrations and we don't do any of that.

Q. Those offerings of the milk companies, while they are available to you, you don't consider them particularly suited to your operation?

A. That's right, so we feel—we know in our own minds they are really getting more in a sense than we are getting.

HEARING EXAMINER JOHNSON: What do you mean? They are getting more * * * the small operator?

THE WITNESS: That's right. Different cases like your promotions, and your cases, and your banners, some kind of promotion signs and so forth which amounts to more in the proportional part.

By Mr. Baker:

Q. Have you had discussions to that effect with milk suppliers?

A. Well, I'll tell you what. I'll bet you can ask any milk supplier and he'll tell you that they do more for a small independent store than they do for the large chain.

Q. And you've had them to tell you that?

A. Yes, sir, I have, but they have tried to get us to take them, but we don't take them. We don't think it fits in our picture.

Q. Of course * * * the common economics of it is that it costs the milk company substantially more to service directly the small accounts than supermarkets like you have?

A. That's right.

Q. * * * [A]nd you have or had that same knowledge, I assume, in 1962 as you do today?

A. Sure, I did.

Q. In view of that knowledge and understanding that you had, did you have any reason to believe when the milk companies were solicited that, if they joined in the Furr's circus, that you would get disproportionate treatment as compared to the other customers of the milk company?

A. I did not. I felt very definitely as I felt about the other suppliers—that everybody would be treated equally. There's no question in our mind about it, or in my mind. (T. 1173-76.)

CONCLUSION

In their appearances at the hearings, Mr. Roy Furr, President, and the other officers of the respondent corporation gave the definite impression of being honest and frank, and it is the opinion of the Hearing Examiner that they have the desire to respect the law and they would not have knowingly violated the law. It is also the opinion of the Hearing Examiner that respondent is not likely

to resume any of the illegal practices involved in this proceeding, and a dismissal of the complaint without prejudice would accomplish everything that could be accomplished by a cease and desist order.

ORDER

It is ordered, That the complaint in this proceeding be, and it hereby is, dismissed without prejudice, however, to the right of the Commission to issue a new complaint or to take such further or other action against the respondent at any time in the future as may be warranted by the then existing circumstances.

OPINION OF THE COMMISSION

BY DIXON, *Commissioner:*

This matter is before the Commission on complaint counsel's appeal from the hearing examiner's initial decision dismissing the complaint without prejudice. The complaint charged respondent[1] with violating Section 5 of the Federal Trade Commission Act[2] by inducing and receiving from some of its suppliers promotional payments or allowances which the suppliers were not offering or otherwise making available on proportionally equal terms to other customers competing with respondent in the distribution of such suppliers' products, when respondent knew or should have known that the payments were not being so offered or otherwise made available.[3] The language of the complaint parallels Section 2(d) of the Clayton Act, as amended,[4] and is, in essence, a charge that respondent has induced and received payments from its suppliers which the suppliers could not make without violating Section 2(d), under circumstances indicating that respondent knew or should have known the facts which made the payments a violation of that provision. Since payments by a supplier to a retailer for use by the retailer in its own institutional advertising have been held to violate Section 2(d) where such payments are not made available on proportionally equal terms to other customers of the supplier competing with the retailer,[5] the instant complaint is broad enough to encompass the knowing inducement and receipt of such payments. The case was tried upon this theory.

[1] Respondent is engaged in the operation of a chain of retail grocery stores in the States of Texas, New Mexico, and Colorado.

[2] 66 Stat. 631 (1952); 15 U.S.C. 45(a)(1).

[3] Complaint, pars. 4, 8.

[4] 49 Stat. 1526 (1936); 15 U.S.C. 13(d).

[5] *R. H. Macy & Co.* v. *Federal Trade Commission*, 326 F.2d 445 (2d Cir. 1964).

The occasion of the suppliers' payments was a promotional extravaganza denominated as "Furr's 1962 International Three Ring Circus." Respondent requested that a large number of its suppliers "participate" in the circus by subscribing to one of a number of promotional "packages" which varied in cost from $500 to $5,000. In return, respondent agreed to advertise one or several of the products of the contributing suppliers in the newspapers and on radio and television and to display these products in certain manners in its stores. Although some 129 of respondent's suppliers agreed to participate in the circus and paid respondent a total of $118,899.05, the evidence offered by complaint counsel dealt with only nine of these suppliers. The examiner held that the evidence failed to establish that six of these suppliers had violated Section 2(d) of the amended Clayton Act by contributing to the circus.[6] However, the examiner held that three of the suppliers—The Borden Company, Foremost Dairies, Inc., and Meadow Gold Dairies—violated Section 2(d) by participating in the circus,[7] and that respondent knew or should have known that the payments induced and received were not being offered or otherwise made available to competitors on proportionally equal terms.

Although the examiner found that the evidence established the violation of law charged in the complaint, he concluded that the issuance of an order to cease and desist was unnecessary and instead dismissed the complaint without prejudice. In so doing, the examiner observed that the respondent had consulted an attorney prior to initiating the solicitations for payments to determine the lawfulness of its plan, and had been advised that if certain steps were followed during the solicitations, no violation of the antitrust laws would occur. The evidence showed that respondent carefully followed the attorney's advice, including advice to refrain from exercising any coercion in obtaining payments. In addition, the examiner was impressed by the demeanor and cooperation exhibited by respondent's representatives throughout the hearings and by

[6] In finding that the suppliers' payments to respondent did not violate Section 2(d), the examiner held that some of respondent's competitors had received affirmative offers of payments on proportionately equal terms from some of the suppliers; that some of the competitors were not customers of the participating suppliers during the interval when respondent was soliciting contributions for the circus and while the circus was being conducted; that the proof failed to establish that some of respondent's competitors were purchasing products of like grade and quality as those respondent agreed to promote; that the purchases of the suppliers' products by some of these competitors were so small as to be *de minimis*, thus relieving the supplier of the obligation to offer or otherwise make available to them proportional advertising payments; and that the evidence failed to establish that some of the alleged nonfavored competitors of respondent in fact competed with respondent.

[7] The evidence shows that respondent was under no obligation to promote the products of these three suppliers in return for the payments.

respondent's past record, which showed no antitrust prosecutions. For these reasons, the examiner concluded that the possibility of a repetition of this type of violation was remote and insubstantial. Moreover, the violations found by the examiner involved instances where suppliers had granted allowances to respondent without extracting from respondent an agreement to promote their particular products. Since these contributions were solicited and paid during the first six months of 1962, they occurred prior to the decision of the court of appeals in *R. H. Macy & Co.* v. *Federal Trade Commission,* 326 F.2d 445 (2d Cir. 1964), which held that institutional payments of this type violate Section 2(d). The examiner noted that the Commission's position respecting such payments at that time was expressed in the first decision in *Yakima Fruit & Cold Storage Co.*, 59 F.T.C. 693, 696 (Oct. 10, 1960), which stated that where a supplier granted payments to a buyer for the buyer's promotional efforts without any expectation that the buyer would advertise or promote the supplier's products, such payments did not violate Section 2(d) of the amended Clayton Act.[8] Thus, in addition to concluding that an order was unnecessary, the examiner felt that the issuance of an order would result in the retroactive application of a change in the law and, as a matter of policy, would be unfair.

In a charge such as that in the present case, the evidence must show that the respondent induced and received promotional or advertising allowances from some of its suppliers; that the suppliers' payments were made in violation of Section 2(d) of the amended Clayton Act in that they were not offered or otherwise made available on proportionally equal terms to buyers competing with the respondent in the distribution of the contributing suppliers' products of like grade and quality; and that the respondent knew or should have known that the allowances were not being so offered or otherwise made available to its competitors. *Grand Union Co.* v. *Federal Trade Commission,* 300 F.2d 92 (2d Cir. 1962); *American News Co.* v. *Federal Trade Commission,* 300 F.2d 104 (2d Cir.), *cert. denied,* 371 U.S. 824 (1962); *Giant Food, Inc.* v. *Federal Trade Commission,* 307 F.2d 184 (D.C. Cir. 1962), *cert. denied,*

[8] That case was subsequently reopened and remanded to the hearing examiner. On remand, the examiner held that the payments were in fact made as compensation for the advertising of Yakima products and that the evidence thus established a violation of Section 2(d) of the Clayton Act, as amended. The Commission in a second opinion dated September 28, 1961, adopted this decision and issued an order to cease and desist. See 59 F.T.C. at 700-706. Thus, the statements of the Commission in its first opinion with respect to institutional advertising are, at most, dicta. In any event, the current policy of the Commission in connection with institutional advertising is reflected in the analysis of the court in *R. H. Macy & Co.* v. *Federal Trade Commission, supra.*

372 U.S. 910 (1963); *R. H. Macy & Co.* v. *Federal Trade Commission, supra; J. Weingarten, Inc.*, Docket No. 7714, 62 F.T.C. 1521 (March 25, 1963); *Fred Meyer, Inc.*, Docket No. 7492, 63 F.T.C. 1 (March 29, 1963); *Billy & Ruth Promotion, Inc.*, Docket No. 8240, 65 F.T.C. 143 (April 3, 1964); *ATD Catalogs, Inc.*, Docket No. 8100, 65 F.T.C. 71 (April 3, 1964); *Individualized Catalogs, Inc.*, Docket No. 7971, 65 F.T.C. 48 (April 3, 1964); *Santa's Playthings, Inc.*, Docket No. 8259, 65 F.T.C. 225 (April 3, 1964).

In this case, the evidence shows that two important executives in respondent's organization solicited the contributions from the three milk suppliers. Respondent's senior vice-president obtained the Borden and Foremost payments, while its head buyer solicited the Meadow Gold contribution. Borden and Foremost each contributed $5,000 and Meadow Gold contributed $1,000. Respondent did not agree to provide any advertising in return for these payments. Borden and Meadow Gold already had in existence advertising and promotional programs which consisted of in-store demonstrations, signs, displays, and other point-of-sale materials. Foremost had a cooperative advertising program and there is some indication that Meadow Gold also made cooperative advertisement payments. The contributions to the circus were apparently additional payments outside the normal programs of the three dairy suppliers. Although respondent did not agree to promote any of the dairy suppliers' products during the circus, there is evidence that Meadow Gold desired such advertising and that it, in fact, expected respondent to promote its products in connection with the circus.[9] Moreover, respondent advertised Borden and Foremost products in various newspapers during the circus promotion.[10] It was stipulated that Borden and Foremost did not offer or otherwise make available to customers competing with respondent any payments on terms proportionally equal to the circus payments. The examiner found on the basis of the evidence that Meadow Gold did not offer or otherwise make available to a chain of stores competing with respondent a payment on terms proportionally equal to the circus payment. We think the above evidence establishes that the three dairy suppliers violated Section 2(d) of the amended Clayton Act and we so hold. *R. H. Macy & Co.* v. *Federal Trade Commission, supra.*[11]

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[9] Tr. 473-76; CX 1127(B).

[10] CX 1841, 1842, 1843, 1845, 1849, 1854, 1858, 1862.

[11] Respondent contends that the Meadow Gold and Borden payments were not made in the course of commerce, as is required by Section 2(d). The evidence shows that respondent's Lubbock, Texas, office billed Meadow Gold's Denver, Colorado, office for its payment and that the

Respondent's position that there can be no finding that it knew or should have known that the allowances received were not being offered or otherwise made available to competitors is predicated upon the fact that, pursuant to its attorney's advice, its representatives who solicited payments refrained from asking whether the supplier was making available similar allowances to competitors unless the supplier himself raised the question. If the question of legality of the allowances or the necessity for proportionalization was raised by the supplier, respondent's representative informed the supplier that only he (the supplier) could know whether the payment to respondent was legal and that there was no obligation to contribute if the payments could not be offered to respondent's competitors on proportionally equal terms. The evidence specifically shows that respondent's representatives did not inquire whether the three dairy suppliers were offering or making available proportional allowances to competitors. The examiner observed that the above advice was valid when given, but that the Commission's latest pronouncements on the subject indicated that a buyer who instigates a special promotional campaign automatically possesses sufficient information to put him on notice that the allowances are probably not being offered on proportionally equal terms to competitors, and, therefore, that affirmative inquiry must be made.

Respondent vigorously contests this ruling, and relying on *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U. S. 61 (1953), a case brought under Section 2(f) of the amended Clayton Act, contends that the Commission's latest rulings on this subject are in error. In the alternative, respondent argues that even if these rulings are a correct interpolation of the principles enunciated by the court in *Automatic Canteen*, their application in the present case would result in the retroactive application of a change in the law. The core of respondent's argument is its position that *Automatic Canteen* does not impose upon it the duty of inquiring whether a supplier is offering its competitors proportionally equal

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check which constituted payment was prepared by Meadow Gold's Colorado accounting office and was made payable to Furr's Supermarkets in Lubbock, Texas (CX 1128, 1129). The Borden payment, which was solicited by respondent at Borden's Lubbock branch and paid by Borden's Houston, Texas branch, was not restricted for use in Texas and could be used by respondent to defer the general circus expenses wherever the circus appeared. The circus appeared in Colorado, New Mexico, and Texas, and was accompanied by extensive newspaper, radio, and television advertising in all three states. During the appearance of the circus, Borden products were advertised in all three states. We think that these facts are sufficient grounds for a finding that the donation was granted for use in commerce and was, in fact, used in commerce. Thus, the statutory requirement has been satisfied with respect to both suppliers. *Cf. Shreveport Macaroni Mfg. Co.* v. *Federal Trade Commission*, 321 F.2d 404 (5th Cir. 1963), *cert. denied*, 375 U.S. 971 (1964).

payments, since, in respondent's words, such an inquiry would be "illogical and meaningless."[12]

At the outset, we note that the issue before us is not whether a buyer has a duty to inquire whether a supplier contributing to the buyer's special promotional campaign is offering proportionally equal payments to the buyer's competitors, or, assuming that such an inquiry has been made and an affirmative answer has been given, whether the Commission may nevertheless find that the buyer knew or should have known that the payments were not, in fact, being so offered. Instead, the issue in this case is whether the absence of such an inquiry can prevent the Commission from finding that the buyer knew or should have known that it was inducing and receiving allowances which were not offered or otherwise made available to competitors on proportionally equal terms. This question was not precisely decided by the court in *Automatic Canteen Co.* v. *Federal Trade Commission, supra.* There, the court stated that it was deciding what the Commission's burden of introducing evidence should be in cases arising under Section 2(f) of the Clayton Act, where the respondent took the position that the price differentials were cost justified.[13] The court held that the Commission must show the existence of facts which would indicate that a buyer requesting a lower price knew or should have known that the lower price solicited could not be cost justified. The court noted that a buyer "* * * who knows that he buys in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer can fairly be charged with notice that a substantial price differential cannot be cost justified."[14] A prima facie case could thus include proof that the buyer knew that the methods by which he was served and the quantities in which he purchased were the same or substantially the same as in the case of his competitor. Once this was shown, a finding that the buyer knew or should have known that the prices could not be cost justified and thus were not legal would be permissible.[15] The court stated that it was not illustrating what other circumstances could be shown to indicate knowledge and that it was not considering what weight could be attached to affirmative statements by the seller that the prices

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[12] Respondent's Appeal Brief, p. 73.

[13] 346 U.S. at 82.

[14] 346 U.S. at 80.

[15] *Ibid.*

were or were not cost justified, since no such statements had been made.[16]

The Commission had applied the standards set forth in *Automatic Canteen Co.* v. *Federal Trade Commission, supra,* to cases brought under Section 5 of the Federal Trade Commission Act charging that a buyer had induced and received from its suppliers allowances forbidden by Section 2(d) of the amended Clayton Act before the respondent in this case had begun its solicitations in February and March of 1962. In *Grand Union Co.*, 57 F.T.C. 382 (1960), the Commission listed the facts which were the basis for its conclusion in that case that the respondent had knowingly induced and received avertising allowances which were not permitted under Section 2(d). There, the evidence showed that the discriminatory payments resulted from a plan originated and implemented by the respondent, and that the payments were actively solicited by the respondent, who sometimes used pressure to encourage participation. The amounts of the payments were unilaterally determined by the respondent and were not designed for easy proportionalization. Moreover, the payments were not negotiated as part of current cooperative advertising plans and were generally outside such plans. In some instances, the respondent continued to receive from the supplier an allowance under the announced advertising program in addition to the special payments. The Commission, citing *Automatic Canteen Co.* v. *Federal Trade Commission, supra,* stated that these circumstances should have at least "provoked inquiry in the mind of a prudent businessman" and held that there had been a knowing inducement of the illegal allowances.[17] In *American News Co.*, 58 F.T.C. 10 (1961), the Commission stated that "A buyer who induces a seller to depart from his customary pattern of allowances and grant a promotional payment two or three times greater than previously paid does so at his peril unless possessed of particular knowledge that the seller has granted like concessions to others similarly situated."[18] The Commission held in *Giant Food, Inc.*, 58 F.T.C. 977 (1961), a case which closely resembles the present case, that the requisite knowl-

[16] 346 U.S. at 80, n. 24.

[17] 57 F.T.C. at 424.

[18] 58 F.T.C. at 27. In affirming the Commission's decisions in both of the above cases on February 7, 1962, the United States Court of Appeals for the Second Circuit held that the Commission was, on the basis of the evidence, justified in finding that the respondents knew or should have known that they were inducing payments which were not being granted to competitors on proportionately equal terms. See *Grand Union Co.* v. *Federal Trade Commission,* 300 F.2d 92, 100 (2d Cir. 1962); *American News Co.* v. *Federal Trade Commission,* 300 F.2d 104, 110 (2d Cir.), *cert. denied,* 371 U.S. 824 (1962).

edge had been shown where the evidence established that payments for a 19th Anniversary Sale had been solicited of all suppliers, many of which had cooperative advertising plans; that the agreement to participate in the Anniversary sale, which had been prepared by the respondent, contained a clause which stated that participation would not alter or modify existing advertising agreements between that respondent and contributing suppliers; and that respondent had been specifically informed by some suppliers that the requested payments could not be proportionalized.[19] Thus, prior to the instant respondent's solicitations, the Commission had indicated that a buyer requesting from its suppliers special payments in addition to normal promotional allowances must proceed with extreme caution and that the requisite knowledge in a charge of this type could be found if there were facts which served to put the buyer on notice that the allowances induced and received were not being offered or otherwise made available on proportionally equal terms to competing buyers.

The evidence in this case is strikingly similar to the evidence in the above-mentioned cases. First, respondent devised the various combinations of services and facilities available and established the amounts which would be charged for various package deals. Respondent's advertising packages included particular types of in-store displays coupled with specified amounts of television, radio, and newspaper advertising. The packages could be purchased for $5,000, $3,000, $2,000, $1,500, $1,000, $750, and $500. The brochure describing the plans did not give the suppliers the option of varying the types of advertising available, *i.e.*, more newspaper and less television advertising, nor did it affirmatively give them the option of subscribing to a plan with a cost in between the cost of the announced plans. Secondly, respondent determined in advance of the solicitations the amounts it wished some suppliers to contribute and asked for these amounts. In some instances, the pages in the brochure describing less expensive plans were deleted, so that the supplier was not aware that less expensive plans were available. These two factors show that a contributing supplier was not given much freedom in selecting an amount which would fit into its present plan. Moreover, it is apparent that difficulty would be encountered in formulating a new plan to make similar pay-

[19] 58 F.T.C. at 998, 1008. In affirming the Commission's decision, the United States Court of Appeals for the District of Columbia Circuit, citing *Automatic Canteen Co.* v. *Federal Trade Commission, supra,* held that a buyer cannot plead want of knowledge as a successful defense to a charge of knowingly inducing illegal advertising and promotional allowances where it appears that the want of such knowledge on the buyer's part is culpable. See *Giant Food, Inc.* v. *Federal Trade Commission,* 307 F.2d 184 (D.C. Cir. 1962), *cert. denied,* 371 U.S. 910 (1963).

ments available on proportionally equal terms to respondent's competitors. Thirdly, respondent actively solicited the contributions of many suppliers by sending some of its most important executives to the suppliers' offices to make the requests. Even though no overt coercion was exerted, the leverage exercised by such personal visits cannot be discounted. Fourthly, the contract for participation attached to the brochure describing the advertising plan stated that participation in the campaign would not affect any existing advertising plans. Significantly, respondent continued to receive other promotional benefits under existing plans from many suppliers, including the three dairy suppliers. Thus, it is quite apparent that the requests for participation contemplated an additional contribution over and above existing promotional plans. Finally, some suppliers declined to participate and questioned the legality of the plan. All of these factors served to inform respondent of the possible illegality of the payments and of the difficulty of proportionalization, and justify a finding that respondent knew or should have known that it was soliciting and receiving allowances from its suppliers which these suppliers were not offering or otherwise making available to respondent's competitors. We do not think that the absence of an affirmative inquiry with respect to the question of proportionalization can shield the respondent from a finding that it possessed the requisite knowledge where, as here, the record is replete with facts sufficient to put respondent on notice that it was requesting a special allowance which its suppliers would have difficulty making available to competitors on proportionally equal terms.

Although the Commission had stated its position with respect to the "knowledge" element in cases such as the present case prior to the date of respondent's solicitations in early 1962, it had not taken the position prior to that time that a payment by a supplier to a buyer for use by the buyer in its own institutional advertising was a violation of Section 2(d) of the Clayton Act.[20] As a result, respondent argues that it could not have knowingly induced a supplier to violate Section 2(d) when the payment of the allowance did not constitute a violation of Section 2(d) when the inducement and receipt occurred.

In making this argument, respondent overlooks the fact that the proof need not show that the buyer knew that the suppliers were violating Section 2(d) under applicable law when they made the payments, but need only show that the buyer knew or should have

[20] See n. 8, *supra*.

known the facts upon which the subsequent findings of illegality are predicated—*i.e.*, that the payments were not being offered or otherwise made available to competitors on proportionally equal terms. In several cases where the charge has been the knowing inducement and receipt of illegal price discriminations or promotional allowances, novel interpretations of the law have been applied in determining that the lower prices or the promotional allowances violated Sections 2(a) and 2(d) of the amended Clayton Act. For example, in *National Parts Warehouse,* Docket No. 8039, 63 F.T.C. 1692 (December 16, 1963), *aff'd sub nom. General Auto Supplies, Inc.* v. *Federal Trade Commission,* 346 F.2d 311 (7th Cir. May 28, 1965), the Commission in holding that automobile parts suppliers violated Section 2(a), held that limited partners rather than the partnership were the true purchasers from the suppliers. In *Fred Meyer, Inc.,* Docket No. 7492, 63 F.T.C. 1 (July 9, 1963), the Commission held that a violation of Section 2(d) occurred where the supplier failed to offer or otherwise make available promotional allowances on proportionally equal terms to wholesalers whose retail customers competed with the respondent, the favored retailer. In deciding that these respondents possessed the requisite knowledge, the question was not whether the respondent knew that the lower price or the promotional allowance violated the Clayton Act when granted. Instead, the question was whether the respondent knew or should have known the facts upon which the findings of illegality were based.

In the present case, therefore, the fact that such payments when made had not been declared violative of Section 2(d) under applicable Commission decisions does not affect the "knowledge" element in the charge, and thus does not prevent the Commission from finding that the respondent possessed the requisite knowledge. Instead, this is a question relative to the retroactive application of Commission orders. The courts have stated on several occasions that Commission orders to cease and desist are remedial in nature and have only prospective application to protect the public from future violations. *Federal Trade Commission* v. *Ruberoid Co.,* 343 U.S. 470 (1952); *Atlantic Refining Co.* v. *Federal Trade Commission,* 344 F.2d 599 (6th Cir. 1965); *Drath* v. *Federal Trade Commission,* 239 F.2d 452 (D.C. Cir. 1956), *cert. denied,* 353 U.S. 917 (1957); *Gimbel Bros.* v. *Federal Trade Commission,* 116 F.2d 578 (2d Cir. 1941); *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission,* 13 F.2d 673 (8th Cir. 1926). Thus, we think that there is a valid legal basis for the issuance of an order to cease and desist in this case.

Where the Commission is convinced that a particular practice has been fully stopped and will not be resumed in the future, it has the power to refrain from issuing an injunctive order and may instead terminate the proceeding by a declaration of its position. *E.g., Chesebrough-Ponds, Inc.*, Docket No. 8491, 66 F.T.C. 252 (July 27, 1964). In this case, we do not think that the public interest requires the issuance of an order to cease and desist. A reading of the entire record convinces the Commission that respondent will not again engage in the practice which is the subject of the instant complaint and, therefore, that issuance of an order is not necessary to insure against future violations. Accordingly, the proceeding will be closed without the issuance of an injunctive order.

Since no order is being issued, the Commission will not review the examiner's findings that the remaining six suppliers dealt with by the evidence did not violate Section 2(d) of the amended Clayton Act by making payments to respondent. However, we think that the standard of proof applied by the examiner was too strict. The examiner thought it necessary that complaint counsel show by exact proof that individual stores affiliated with chain organizations were in competition with individual Furr's stores and that each individual store alleged to compete with each Furr's store actually had on its shelves identical products of the supplier in question. While such proof is desirable when available, we think that the standard set forth by the court in *Tri-Valley Packing Ass'n* v. *Federal Trade Commission*, 329 F.2d 694 (9th Cir. 1964), is more appropriate. The court there stated:

> Questioning the Commission findings with regard to the first of the three section 2(d) elements referred to above, Tri-Valley contends that there is no substantial evidence to support the finding that customers of Tri-Valley who did not receive allowances proportional to those given Central Grocers and Meyer, in fact competed in the distribution of Tri-Valley products with customers of Tri-Valley who did receive allowances. Actual competition was not proved, petitioner contends, because Tri-Valley products were not traced to the shelves of any two Tri-Valley customers who were in such geographical proximity as to indicate that they were in competition with each other, one of whom had received the allowance, and the other of whom had not.
>
> In our opinion, where a direct customer of a seller, operating solely on a particular functional level such as wholesaling or retailing, receives a promotional allowance not made available to another direct customer operating solely on the same functional level, it is unnecessary to trace the seller's goods of like grade and quality to the shelves of competing outlets of the two in order to establish competition. It is sufficient in that case to prove that one has outlets in such geographical proximity to those of the other as to establish that the two customers are in general competition, and that the two customers purchased goods of the same grade and quality from the

seller within approximately the same period of time. Actual competition in the sale of the seller's goods may then be inferred even though one or both of the customers have other outlets which are not in geographical proximity to outlets of the other customer.[21]

While we do not comment on other issues involved in the examiner's findings that the remaining suppliers did not violate Section 2(d) of the amended Clayton Act when making payments to respondent, our silence is not to be construed as approval of the findings themselves or of the legal standards used in reaching these findings.

For the aforementioned reasons, an order will issue closing the proceedings. Should it appear that violations similar to those dealt with by the evidence herein have not been surely stopped, thus indicating that our conclusions with respect to respondent's good faith are misplaced, the Commission will reopen the proceeding and utilize the record as presently constituted together with the evidence of such future violations as a basis for further proceedings and, if appropriate, the issuance of an order to cease and desist.

FINAL ORDER

This matter having been heard by the Commission on appeal of counsel supporting the complaint from the initial decision of the hearing examiner dismissing the complaint, and upon briefs and argument in support thereof and in opposition thereto, and the Commission having concluded for the reasons stated in the accompanying opinion that the proceeding should be closed without the issuance of an order to cease and desist:

It is ordered, That the proceeding be, and it hereby is, closed.

IN THE MATTER OF

K-V BUILDERS, INC., ET AL.

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

Docket C-1003. Complaint, Oct. 20, 1965—Decision, Oct. 20, 1965

Consent order requiring a St. Louis, Mo., residential siding and roofing company to cease making deceptive savings and guarantee claims and other misrepresentations in advertisements, as indicated in the order below.

[21] 329 F.2d at 708.