

IN THE MATTER OF
BIRD & SON, INC., BIRD FLOOR COVERING SALES CORPORATION, MONTGOMERY WARD & COMPANY, INC.

COMPLAINT, OPINION, AND ORDER OF DISMISSAL IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT OF CONGRESS APPROVED JUNE 19, 1936

Docket 2937. Complaint, Sept. 30, 1936—Decision, July 17, 1937

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2, SUBSEC. (a)—SELECTION OF CUSTOMERS—ACT'S SCOPE

The Act declares that nothing in it "shall prevent persons engaged in selling goods, wares, and merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade." So the Act does not purport to interfere with the right of a seller to select his customers. He may discriminate in the choice of his customers. Not until there is a discrimination in price among those chosen does Section 2 (a) of the Act have any application.

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2, SUBSECS. (a) AND (f)—SELECTION OF CUSTOMER—CHANGE OF POLICY AND TRANSITION PERIOD—WHERE SUPPORTING COSTS FOR DIFFERING PRICES AND BUSINESS INVOLVED NEGLIGIBLE

Where, on complaint charging respondent manufacturer of hard-surfaced felt base floor coverings sold as yard goods or in form of rugs under trade names "Neponset" and "Economy," and its sales subsidiary, with unlawfully discriminating in price in prices allowed to mail-order houses as compared with prices allowed to competitively engaged retailers, in violation of subsec. (a) of Sec. 2 of aforesaid act, and respondent mail-order house with violation of subsec. (f) of said Sec. 2, in knowingly receiving from said first described seller respondents such discrimination, it appeared that (1) at time of passage of aforesaid amending act only about 1 percent of all sales of said seller respondents was made to ordinary retailers direct, as a result of change in sales policy inaugurated about a year and a half prior to said time, and not long thereafter such seller respondents had discontinued all their warehouses and sales agents, no goods were sold direct to retailers, and jobbers and mail-order houses were sold at same net prices; (2) difference between cost of selling direct to ordinary retailers during period of discrimination concerned and cost of selling to mail-order houses exceeded difference in alleged unlawful discriminatory prices involved; (3) new sales policy of seller respondents was not one of discrimination in price between or among the two classes of customers which, exclusively, they had selected to sell to in order to reduce distribution costs; and (4) any discrimination involved was only during four months' period of transition of policy of selling ordinary retailers direct, to one of supplying them through sales made to jobbers, and was incidental thereto and involved negligible proportion and amount of seller respondents' business:

Held, No violation by seller respondents and, case failing against them, so does case against buyer respondent, and entry of order for dismissal of complaint and termination of proceeding directed.

Before *Mr. Charles F. Diggs*, trial examiner.

Mr. William L. Pencke and *Mr. James I. Rooney* for the Commission.

Warner, Stackpole & Bradlee, of Boston, Mass., for Bird & Son, Inc., and Bird Floor Covering Sales Corp.

Mr. Stuart Ball, Scott, MacLeish & Falk and *Winston, Strawn & Shaw*, of Chicago, Ill., for Montgomery Ward & Co., Inc.

COMPLAINT

Pursuant to the provisions of an Act of Congress, approved June 19, 1936, Public 692 (the Robinson-Patman Act), amending Section 2 of an Act approved October 15, 1914 (the Clayton Act), the Federal Trade Commission hereby issues its complaint against Bird & Son, Inc., Bird Floor Covering Sales Corporation and Montgomery Ward & Co., Inc., stating its charges in that respect as follows:

I

PARAGRAPH 1. Respondent, Bird & Son, Inc., is a corporation organized and existing under the laws of the State of Massachusetts, with its office and principal place of business in the city of East Walpole, Mass. It maintains branch offices in New York and Chicago.

Respondent, Bird Floor Covering Sales Corporation is a subsidiary selling corporation wholly owned and operated by respondent Bird & Son, Inc., whose office and principal place of business is the same as that of respondent, Bird & Son, Inc.

Respondents, Bird & Son, Inc. and Bird Floor Covering Sales Corporation, are now and for many years have been engaged in the business of manufacturing, selling and distributing a hard surfaced felt base floor covering sold as yard goods or in the form of rugs under the trade names of "Neponset" and "Economy."

Respondent, Montgomery Ward & Co., Inc. is an Illinois corporation, with its office and principal place of business in the city of Chicago, State of Illinois, and is engaged in selling, among other articles of commerce, floor covering direct to consumers in the United States by means of mail orders and catalogs, and also through retail stores owned or controlled by it.

Respondents sell and distribute their products in commerce to their customers located in the several States of the United States causing said products when sold to be shipped from their respective places of business in the States of Massachusetts, New York, and

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Illinois to purchasers thereof located in the several States of the United States other than said stores.

PAR. 2. In the course and conduct of their businesses as aforesaid, respondents are now and for many years have been in substantial competition with other corporations, individuals, partnerships, and firms engaged in the business of selling and distributing floor covering in commerce between and among the various States of the United States.

PAR. 3. In the course and conduct of their businesses, as described in paragraphs 1 and 2 hereof, respondents, Bird & Son, Inc. and Bird Floor Covering Sales Corporation, since June 19, 1936, have been and are now discriminating in price, between different purchasers of their said product of like grade and quality by giving and allowing certain purchasers of floor covering different prices than given or allowed other of their said purchasers, competitively engaged in the resale of their product within the United States, as is more specifically shown in the following price list, #19-A dated July 1, 1936, issued by the respondent, Bird Floor Covering Sales Corporation. The prices shown below are net, after deducting rebates, cash allowances and handling allowances. The prices at which mail order house retail stores are sold refer to any quantity and are lower than the prices at which competing retailers are sold.

	<i>Heavy Weight (Neponset) 9 x 12 Rugs</i>	<i>Light Weight (Economy) 9 x 12 Rugs</i>
<i>Retailers—Purchasing less than 15 rolls</i> -----	\$ 4.85 Net	\$ 3.72 Net
“ — “ 15 to 29 rolls	4.54 “	3.42 “
“ — “ 30 to 49 rolls	4.42 “	3.34 “
“ — “ 50 to 74 rolls	4.33 “	3.28 “
“ — “ 75 to 99 rolls	4.28 “	3.24 “
“ — “ 100 rolls or more	4.24 “	3.21 “
<i>Wholesalers</i> -----	3.57 “	2.71 “
<i>Mail Order Houses—(Warehouse & Carload</i>		
Shipments) -----	3.64 “	2.71 “
“ “ “ —(Retail Stores)-----	3.82 “	2.85 “
	<i>Heavy Weight (Neponset) 8 1/4 Yard Goods</i>	<i>Light Weight (Economy) 8 1/4 Yard Goods</i>
<i>Retailers—Purchasing less than 15 rolls</i> -----	\$0.337 Net	\$0.276 Net
“ — “ 15 to 29 rolls	.316 “	.254 “
“ — “ 30 to 49 rolls	.309 “	.247 “
“ — “ 50 to 74 rolls	.303 “	.242 “
“ — “ 75 to 99 rolls	.299 “	.240 “
“ — “ 100 rolls or more	.296 “	.238 “
<i>Wholesalers</i> -----	.254 “	.206 “
<i>Mail Order Houses—(Warehouse & Carload</i>		
Shipments) -----	.257 “	.204 “
“ “ “ —(Retail Stores) -----	.271 “	.219 “

PAR. 4. The effect of said discriminations in price made by respondents, Bird & Son, Inc. and Bird Floor Covering Sales Corporation, as set forth in paragraph 3 hereof, has been, or may be substantially to lessen competition, or to injure, destroy, or prevent competition, in the sale and distribution of the said floor covering between the said respondents and other manufacturers and distributors of floor covering, and also between the respondent, Montgomery Ward & Co., Inc. and other purchasers of said product in granting said discriminatory prices; and the effect of said discriminations has been, or may be, to tend to create a monopoly in the said favored customer receiving said discriminatory price from said respondents in the distribution of said product in the United States.

PAR. 5. The foregoing alleged acts of said respondents, Bird & Son, Inc. and Bird Floor Covering Sales Corporation are a violation of Section 2 (a) of said Act of Congress, approved June 19, 1936, entitled "An Act to amend Section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), and for other purposes."

II

PARAGRAPH 1. Paragraphs 1 and 2 of the first charge hereof are hereby adopted and made a part of this charge as fully as if set out herewith verbatim.

PAR. 2. In the course and conduct of its business as described in paragraphs 1 and 2 of charge 1 hereof, respondent, Montgomery Ward & Co., Inc., since June 19, 1936, has knowingly received and is now knowingly receiving from respondents Bird & Son, Inc., and Bird Floor Covering Sales Corporation, a discrimination in price as more fully set forth in paragraph 3 of the first charge hereof, by receiving a lower price than given or allowed other purchasers of like grade and quality of floor covering purchased from the aforesaid respondents. Respondent Montgomery Ward & Co., Inc. is enabled to purchase floor covering, by reason of, to wit, a certain contract entered into on or about June 10, 1936 with Bird Floor Covering Sales Corporation, 9 x 12 rugs for \$3.82 apiece, regardless of quantities purchased and by warehouse and carload lot shipments at a price of \$3.64 apiece, whereas rugs of like grade and quality are purchased by retailers from said respondents, Bird & Son, Inc. and Bird Floor Covering Sales Corporation for from \$4.85 to \$4.24 apiece and similar differences in price exist on the other floor covering, as more fully set forth in paragraph 3 of charge 1 hereof.

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PAR. 3. The foregoing alleged acts of said respondent, Montgomery Ward & Co., Inc. are in violation of Section 2 (f) of said Act of Congress approved June 19, 1936 entitled "An Act to amend Section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), and for other purposes."

MEMORANDUM OPINION

This case involves a complaint charging respondents with unlawful discrimination in price contrary to the provisions of the so-called Clayton Act of 1914, as amended by the so-called Robinson-Patman Act approved June 19, 1936. Respondents, Bird & Son, Inc., and Bird Floor Covering Sales Corporation, are charged with selling at discriminatory prices in favor of respondent, Montgomery Ward & Company, Inc., in violation of Section 2 (a) of the act, and Montgomery Ward & Company is charged with knowingly receiving such prices, all to the injury of retail dealers competing with the latter concern. The commodity involved is hard surfaced felt base floor covering.

The case was tried and a record of the evidence presented in support and in defense of the charges is before the Commission.

The facts are that between the passage of the Robinson-Patman Act and issuance of the complaint on September 30, 1936, retailer-competitors of Montgomery Ward & Company, when purchasing from the seller-respondents, were subject to prices that were higher than those paid by Montgomery Ward & Company and other mail order houses by as much as 14 and 18 per cent. At the time of passage of the Robinson-Patman Act, however, only about 1 per cent of all the sales of seller-respondents was made to ordinary retailers direct. The remainder was being sold to jobbers for resale to retailers and to mail order houses such as Montgomery Ward. This was the outcome of a change in sales policy inaugurated about a year and a half before the Robinson-Patman Act was passed. Under the new policy, direct sales to retailers were discontinued and their needs were supplied through jobbers. By the time the complaint could be tried, the seller-respondents had discontinued all their warehouses and sales agencies, and in fact, most of them had been discontinued before the act was passed. By the end of October 1936, no goods were being sold direct to retailers, while jobbers and mail order houses were being sold at the same net prices.

With reference to the amount of the price discrimination which existed during the 4-month period following passage of the Act,

evidence was introduced by seller-respondents showing that the cost of selling to mail order houses was 18.6 percent as against a cost of selling direct to ordinary retailers at 47.1 percent. Thus, costs differed by over 28 percent while the difference in price was less than 20 percent. This evidence was corroborated by an accountant for the Commission. Since the Act specifically permits differentials in price that "make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered," the amount of discrimination existing in this case was apparently within the terms of this proviso. These considerations would appear to be controlling.

It also appears, however, that the present sales policy of seller-respondents is not one of discrimination in price between or among the only two classes of customers they have chosen to sell. The Act declares that nothing in it "shall prevent persons engaged in selling goods, wares, and merchandise in commerce from selecting their own customers in bona fide transaction and not in restraint of trade." So the act does not purport to interfere with the right of a seller to select his customers. He may discriminate in the choice of his customers. Not until there is a discrimination in price among those chosen does Section 2 (a) of the act have any application. There is no suggestion that the selection of customers here involved was the result of any combination in restraint of trade. Rather, it was in order to reduce seller-respondents' costs of distribution. The courts have consistently upheld the right of individual traders to select their customers in the absence of such combination.

The price discrimination alleged is to be found only during a 4-month period of transition from a policy of selling ordinary retailers direct, to one of supplying them through sales made to jobbers. Any price discrimination during that period was incidental to that transition and involved a negligible proportion and amount of seller-respondents' business.

Since the case against seller-respondents fails for the reasons above stated, the case against buyer-respondent, for receiving an unlawful price discrimination, also fails.

The Commission therefore directs the entry of an order for dismissal of the complaint and termination of the proceeding herein.

ORDER DISMISSING COMPLAINT

This matter coming on to be heard upon the complaint of the Commission, testimony and evidence in support of the allegations of the

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complaint, and testimony and evidence in opposition thereto, and the Commission having duly considered the same, and being fully advised in the premises;

Now, therefore, it is hereby ordered, That the complaint in this proceeding be, and the same hereby is dismissed, for the reasons set forth in a memorandum opinion filed simultaneously herewith.

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IN THE MATTER OF
HOLLYWOOD HAT COMPANY, INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SUBSEC. (A) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT OF CONGRESS APPROVED JUNE 19, 1936, AND OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 3020. Complaint, Dec. 23, 1936—Decision, July 17, 1937

Where a corporation engaged in manufacture, sale, and distribution of women's hats to customers in the several States, largest customer of which was a syndicate maintaining in excess of 200 millinery departments in stores located throughout the United States, in competition with, in many cases, other customers of such hat manufacturer—

- (a) Sold, to said customer, in practically all instances, assorted suede hats at \$21.00 per dozen and assorted velours at \$36.00 per dozen, while contemporaneously selling competitor-purchasers, of much smaller volume, assorted suede and assorted velour hats of same style, grade, and quality at prices of \$24.00 or \$27.00 per dozen for the former, and \$39.00 or \$42.00 per dozen for the latter; without justification therefor by reason of differences in cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such commodities were to such purchasers sold and delivered, or other justification under the saving exceptions or provisos of the statute, and with result that effect of such discrimination might be to destroy, injure, or prevent competition with such customers who received benefit thereof;

Held, That such discriminations were in violation of Section 2 of the Clayton Act, as amended; and

Where aforesaid corporation—

- (b) Shipped, pursuant to order offered a customer of style line #200 hats at \$27.00 per dozen, and placed and accepted, at \$24.00 a dozen, substituted hats of a cheaper grade and quality than that shown and priced in sample line at \$27.00, as above set forth, without knowledge or consent of customer placing order for the superior grade and quality; and
- (c) Shipped a jobber, pursuant to order therefrom for its assorted #100 line of Ballibuntl hats at a price of \$25.50 per dozen, Ballibuntl hats of the cheapest grade customarily sold by it for \$24.00 a dozen;

With result of misleading its customers, in that articles of millinery of a grade and quality inferior to that ordered were received:

Held, That such acts and practices were to the prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. Edward M. Averill*, trial examiner.

Mr. A. W. DeBirny for the Commission.

Roberts & McInnis, of Washington, D. C., for respondent.

COMPLAINT

Pursuant to the provisions of an Act of Congress, approved October 15, 1914, (the Clayton Act) as amended by an Act approved