

IN THE MATTER OF
THE NITRAGIN 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

Docket 3266. Complaint, Nov. 10, 1937—Decision, Jan. 12, 1938

Where a corporation engaged in the development of nitrogen fixing bacteria and in the sale and distribution of such inoculants, costs of growing, selling, and delivering which are generally not substantially affected by quantity purchases, in competition with others engaged as members of the commercial legume inoculant industry, to customers whom it classified as consumers, retailers, and jobbers, but who included, as purchasers of a large portion and of a considerable portion of its product, respectively, county farm bureaus reselling to farmers and occasionally to local elevators and other dealers, and mail order catalog houses reselling to consumers, and of whom farm bureaus competed with retailers in sale of its said product to farmers, jobbers resold to consumers at lower price than did other competitor-customers classified and sold to as retailers, and mail order houses competed with retailer-dealers in sale to farmers, and of which customers, specially favored county farm bureaus competed generally with both jobbers and retailers, and certain similarly favored jobbers were enabled to sell to such bureaus at jobbers' prices—

- (a) Discriminated in prices through sale to its said customers at prices based on, and varying in accordance with, aforesaid classifications, and through according some, but not all, mail order houses, ordinarily sold at jobbers' prices, twenty percent off list, and some, but not all, jobbers, similar concession, and through according jobber prices to retailers purchasing \$100 or more yearly; and
- (b) Discriminated in prices through according twenty percent off list, denied to certain competitor jobbers, to certain county farm bureaus purchasing at jobbers' prices and selling, in some instances, to jobbers, retailers, and consumers, and in competition generally with both aforesaid distributive classes, and through according aforesaid twenty percent concession from jobbers' price to favored jobber customers, thereby enabled to sell at jobber prices to county farm bureaus, and through granting of such prices to certain retailers above noted, an additional twenty percent concession from jobbers' list to some, but not all, mail order houses;

With result that effect of said discriminations in price and price differentials, which did not make only due allowance for differences in cost of manufacture, sale or delivery resulting from different methods or quantities in which such commodity was to such purchasers sold or delivered, and were not in response to changing conditions affecting market for, or marketability of, goods concerned, might be substantially to lessen competition and tend to create monopoly in line of commerce in which its distributors were engaged, and to injure, destroy, or prevent competition with it and with certain favored distributors and customers of such distributors;

Held, That such acts and practices constituted a violation of the provisions of Subsec. (a) of Sec. 2 of an Act of Congress approved Oct. 15, 1914, as amended.

Mr. A. W. DeBirny for the Commission.

COMPLAINT

The Federal Trade Commission, having reason to believe that The Nitragin Company, Inc., hereinafter called respondent, since June 19, 1936, has been and is now violating the provisions of Section 2 (a) of the Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Public No. 212, the Clayton Act), as amended by Section 1 of the Act of Congress 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," approved June 19, 1936 (Public No. 692, the Robinson-Patman Act), hereby issues this its complaint against respondent and states its charges with respect thereto as follows, to wit:

PARAGRAPH 1. Respondent is a corporation organized and existing under the laws of the State of Wisconsin and has its principal office and place of business at 3747 North Booth Street in the city of Milwaukee, Wis.

PAR. 2. For many years prior hereto and since June 19, 1936, respondent has been and is now engaged in the business of developing, manufacturing, selling, and distributing certain nitrogen-fixing bacteria, which is a commodity commonly known as a commercial inoculant and is useful in promoting the growth of leguminous plants and crops. In the course and conduct of its said business the respondent has been and is now developing and manufacturing said bacteria at its place of business in the State of Wisconsin and has been and is now, in direct active competition with other persons, partnerships and corporations similarly engaged, selling, shipping, and distributing said bacteria in commerce from its said place of business in the State of Wisconsin to various purchasers of said bacteria located in the State of Wisconsin and the several other States of the United States and in the District of Columbia. For many years prior hereto and since June 19, 1936, there has been and is now between respondent and purchasers of said bacteria a course of trade and commerce in said bacteria in and between the State of Wisconsin and the several other States of the United States and the District of Columbia.

PAR. 3. Since June 19, 1936, in the course and conduct of its business described in paragraph 2 hereof and while engaged in trade and commerce between the State of Wisconsin and the other States of the United States and the District of Columbia as therein described, the respondent has been and is now, in the course of such commerce, discriminating in price between different purchasers of bacteria of like grade and quality sold and shipped in commerce, as aforesaid, by respondent to said purchasers and by them purchased from respondent in commerce for use, consumption, or resale within the State of Wisconsin and the several other States of the United States and the District of Columbia, in that the respondent has been and is now selling bacteria to some of said purchasers at prices lower than the prices at which respondent has been and is now selling bacteria of like grade and quality to other of said purchasers, and the respondent has been and is now allowing to some of said purchasers a larger discount from the prices at which bacteria was and is sold to them by respondent than the discount, if any, which respondent has been and is now allowing to other purchasers of bacteria of like grade and quality purchased from respondent at the same prices.

PAR. 4. Since June 19, 1936, many purchasers of bacteria and customers of respondent receiving the benefit of the aforesaid discriminations in price, hereinafter referred to as favored customers, have been and are now in substantial competition in the use, consumption, sale, resale, and distribution of said bacteria with many other purchasers of bacteria and customers of respondent not receiving the benefit of said discriminations in price, hereinafter referred to as disfavored customers, and many customers of said favored customers have been and are now in like competition with many customers of said disfavored customers, and the effect of the aforesaid discriminations in price may be substantially to lessen competition in the sale or distribution of said bacteria or to injure, destroy, or prevent competition in the use, consumption, sale, resale, or distribution of said bacteria between and among said favored customers and said disfavored customers and between and among the customers of said favored customers and the customers of said disfavored customers and between and among the respondent and other persons, partnerships, and corporations similarly engaged in the sale and distribution of commercial inoculants.

PAR. 5. The aforesaid acts of respondent constitute a violation of the provisions of Section 2 (a) of the above-mentioned Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved

October 15, 1914 (Public No. 212, the Clayton Act), as amended by Section 1 of the Act of Congress 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," approved June 19, 1936 (Public No. 692, the Robinson-Patman Act).

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress 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), the Federal Trade Commission on November 10, 1937, issued and served its complaint in this proceeding upon the respondent, The Nitragin Company, Inc., a corporation, charging it with discriminating in price between different purchasers of inoculants in violation of subsection (a) of section 2 of the aforesaid act.

After the issuance of said complaint and the filing of respondent's answer, the Commission, by order entered herein, granted respondent's motion for permission to withdraw said answer and to substitute therefor an answer admitting all the material allegations of the complaint to be true and waiving the taking of further evidence and all other intervening procedure, which substitute answer was duly filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on the said complaint and the substitute answer, briefs, and oral arguments of counsel having been waived, and the Commission having duly considered the same and being now fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Said corporate respondent, The Nitragin Company, Inc., now is, and at all times since June 19, 1936, has been a corporation organized under the laws of the State of Wisconsin, with its principal office and plant located at 3747 North Booth Street, Milwaukee, Wis. At all times herein mentioned, said respondent has been engaged in the business of developing, selling, and distributing certain nitrogen fixing bacteria, useful for inoculating the seeds of leguminous plants, from its said place of business in the State of Wisconsin to various purchasers of said bacteria located in the State of Wisconsin and the several States of the United States and there has been and is now between respondent and purchasers of said

Findings

26 F. T. C.

bacteria a course of trade and commerce in said bacteria in and between the State of Wisconsin and the several States of the United States.

PAR. 2. The respondent is the largest member of the commercial legume inoculant industry of the United States which industry grows, sells and distributes commercial inoculants to the value of approximately \$1,000,000 in gross annual sales. There are approximately fourteen members of this industry, all competitively engaged one with the other in the sale and distribution in commerce of commercial inoculants. The bacteria are grown for the inoculation of seeds of leguminous plants. The bacteria are encouraged to multiply from various strains and are then placed in a carrier, which is either a jelly or a humus medium such as peat or charcoal, for commercial distribution. Seeds of leguminous plants are saturated with the bacteria before planting. These bacteria have the function of associating with legume plants, with the result that an adequate number of bacterial nodules are formed on the roots of the plants to extract nitrogen from the air for the purpose of aiding luxuriant growth of the plant. Principally these inoculants are placed upon alfalfa and sweet clover seeds, soy beans, peas and other legumes.

PAR. 3. Said respondent classifies its customers as consumers, retail dealers and jobbers. One who sells to consumers is considered to be a retail dealer and one who sells to dealers a jobber. However, in this industry there are very few distributors who sell only as dealers or jobbers. Generally distributors called jobbers sell both to consumers and to dealers. Additionally a large portion of the respondent's product is sold through county farm bureaus which, in turn, sell the inoculants to farmers and occasionally to local elevators and other dealers. A considerable portion of the respondent's product is also sold to mail order catalog houses who resell to consumers.

PAR. 4. Some of respondent's customers are competitively engaged in commerce in the resale and distribution of the inoculant product with other of respondent's customers. The farm bureaus compete with retail dealers in selling to the farmers. Customers classified by the respondent as jobbers usually purchase in commerce respondent's inoculant, which they resell to consumers at a lower price than do other of respondent's customers competing for the same consumer business but who are classified and sold at retailers' list. Mail order catalog houses compete with retail dealers in selling to farmers.

PAR. 5. Said respondent, The Nitragin Company, Inc., issued a 1937 Distributor Price List effective January 1, 1937. Respondent has been and now is generally selling its products to its customers at such list prices. However, some mail order catalog houses and some

320

Findings

jobbers also receive an additional 20% off jobbers' list price, said distributors' price list being as follows:

Alfalfa and All Clovers
Cultures "A" and "B"

To inoculate	Jobber Price	Dealer Price	Consumer Price
1/4 bu.—30 lbs.	\$0.17	\$0.23	\$0.35
1 bu.—60 lbs.	.28	.36	.55
2 1/2 bu.—150 lbs.	.60	.78	1.20

Lespedeza
Culture "L"

1 bu.—30 lbs.	\$0.17	\$0.23	\$0.35
2 bu.—60 lbs.	.28	.36	.55
5 bu.—150 lbs.	.60	.78	1.20

Soy Beans
Culture "S"
Cowpeas and Lima Beans
Culture "E"

1 bu.—60 lbs.	\$0.17	\$0.23	\$0.35
2 bu.—120 lbs.	.28	.36	.55
5 bu.—300 lbs.	.60	.78	1.20

Vetch and Peas
Culture "C"
Beans
Culture "D"

1/4 bu.—30 lbs.	\$0.15	\$0.20	\$0.30
1 bu.—60 lbs.	.22	.29	.45
1 3/4 bu.—100 lbs. ¹	.33	.42	.65
5 bu.—300 lbs.	.93	1.20	1.85

¹ Only culture "E" packed in this size.

Left over cultures are returnable, prepaid, for credit or exchange.

The consumer's price is placed on the labels of the products. The inoculant, whether distributed under private label or under the producer's label is of like grade and quality. Prices to county farm bureaus vary but are generally jobbers' prices and in some instances an additional 20% off the jobbers' price is allowed.

PAR. 6. County farm bureaus purchasing at jobbers' price less 20% sell in some instances to jobbers, retailers and consumers and are generally in competition with both jobbers and retailers. Certain of these competing jobbers do not receive the 20% additional

discount and thus competition with the county farm bureaus, receiving the additional 20% in addition to the jobbers, discount, is practically impossible. County farm bureaus sell in competition with independent retailers to non-members as well as to their own members.

PAR. 7. Certain jobbers receiving the jobbers' price less the additional 20% sell to county farm bureaus at jobbers' prices whereas other customers not receiving the 20% additional allowance are prevented from doing so.

PAR. 8. The respondent sells to retailers who purchase \$100 or more in a year at jobbers' prices. Mail order catalog houses buy at jobbers' prices and some but not all receive an additional 20% off such jobbers' list.

PAR. 9. The difference in prices, resulting from the said classifications as set forth in paragraphs 3, 6, and 8, of inoculant of like grade and quality to customers competitively engaged in reselling the same to consumers is, as to that portion of such inoculant under the circumstances hereinbefore set forth, a discrimination in price in commerce between purchasers of respondent's inoculant.

PAR. 10. The difference in prices, resulting from the said classifications as set forth in paragraphs 6, 7, and 8, of inoculant of like grade and quality to customers competitively engaged in reselling the same to dealers is, as to that portion of such inoculant under the circumstances hereinbefore set forth, a discrimination in price in commerce between purchasers of respondent's inoculant.

PAR. 11. The effect of said discriminations in price may be substantially to lessen competition and tend to create a monopoly in the line of commerce in which its distributors are engaged; and the effect of said discriminations may be to injure, destroy or prevent competition with the respondent and with certain favored distributors and with customers of such favored distributors.

PAR. 12. The costs of growing, selling, and delivery are generally not substantially affected by quantity purchases, largely due to the practice of accepting the return of goods unsold, which returned goods are then practically valueless.

PAR. 13. The discriminations in price set forth above do not make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodity is to such purchasers sold or delivered. That such price differentials were not in response to changing conditions affecting the market for or the marketability of the goods concerned.

CONCLUSION

The aforesaid acts and practices of respondent as set out in paragraphs 9 and 10 hereof are in violation of Section 2 (a) of said Act of Congress 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, Section 13), and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the respondent admitting all the material allegations of the complaint to be true and waiving the taking of evidence and all other intervening procedure, and the Commission having made its findings as to the facts and its conclusion, which findings and conclusion are hereby made a part hereof, that said respondent has violated the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended.

It is ordered, That the respondent, The Nitragin Company, Inc., its officers, representatives, agents, and employees, in connection with the offering for sale, sale and distribution of commercial inoculant in interstate commerce or in the District of Columbia, do forthwith cease and desist from the unlawful discriminations in price found in paragraphs 9 and 10 of the aforesaid findings as to the facts and conclusion.

It is further ordered, That the said respondent, The Nitragin Company, Inc., within 60 days from the date of the service upon it of this order, shall file with the Commission a report in writing, setting forth in detail the manner and form in which it is complying and has complied with the order to cease and desist hereinabove set forth.

IN THE MATTER OF

K & S SALES COMPANY, IN ITS OWN NAME AND RIGHT,
AND TRADING AS GARDEN CITY NOVELTY MANU-
FACTURING COMPANY, ETC.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF
SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 1857. Complaint, Feb. 25, 1937¹—Decision, Jan. 13, 1938*

Where a corporation engaged in sale and distribution of women's and men's hosiery, clocks, cameras, fountain pens, radios, toys, novelties, and other articles—

- (a) Furnished, along with instructions for agent or operator, various devices and plans of merchandising involving variety of punchboards, push cards or similar devices for retailer's or operator's use in selling and delivering to purchasing public its said products, under schemes by which chance purchaser received more costly article, or nothing further, dependent upon success or failure in selection of right number or name, and paid, in accordance with particular plan, fixed, or varying, amount, dependent upon number secured; operators were compensated by receipt of article; and makers of last punch or push were, in some cases, also awarded prize thereof; and thereby supplied to and placed in hands of others means of conducting lotteries, games of chance, or gift enterprises in distribution of its said merchandise, with knowledge and intent that such various plans were and would be used in such distribution to public by lot or chance and in competition with many who are opposed to use of punchboards, push cards and other devices in sale and distribution of their merchandise, and, as contrary to public policy, refrain from furnishing the same;

With result that many dealers in and ultimate purchasers of merchandise similar to or identical with that thus dealt in by it were attracted by said methods and element of chance involved in sale thereof as aforesaid, and were thereby induced to buy, sell or distribute its said merchandise in preference to that offered and sold by competitors who do not use such or equivalent methods, and trade was thereby diverted to it from them, to the prejudice and injury of the public and competitors, and there was a restraint upon and a detriment to the freedom of sale and legitimate competition; and

- (b) Represented and caused to be represented, through firm name word "Manufacturing," that it was manufacturer of some or all of merchandise sold and distributed by it, notwithstanding fact it neither owned, controlled, nor operated any factory whatsoever and did not make any merchandise sold by it;

With effect of misleading and deceiving many customers into erroneous belief that it made some or all of such merchandise, and that persons dealing with it were buying directly from the manufacturer and thereby eliminating profits of middlemen and obtaining advantages not had by those buying from such persons, and of diverting trade to it from others, and those who do not falsely represent that they manufacture their said products; and

¹ Amended and supplemental.