

IN THE MATTER OF
H. C. BRILL COMPANY, INC.

COMPLAINT, FINDINGS, CONCLUSION, OPINION 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 3299. Complaint, Jan. 15, 1938—Decision, Feb. 10, 1938

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2, SUBSEC. (a)—CUMULATIVE QUANTITY DISCOUNTS—WHERE IRRELATED SIZE OF INDIVIDUAL SHIPMENTS, ORDERS, ETC.

Savings in the cost of serving different customers, aside from differences in methods of sale and delivery, result from the differences in the size of the individual order placed by such customers, irrespective of the aggregate purchases for a given period of time, and a distinction in price between shipping cartons or shelf packages and broken packages is readily understood, and a difference in price based upon the size of individual purchases and shipments is likewise appreciated, large orders ordinarily being obtained, assembled, priced, packed, billed, and delivered at a lower cost per dollar of sales than small orders. Under discount plan, however, based on aggregate volume purchases for given period, it may cost seller more per dollar of sales to serve customer who places large number of small orders, sufficient in aggregate to earn discounts, than customer who places few large orders, total of which is not sufficient to obtain discount, since, while purchasers of large annual amount sometimes buy in larger individual shipments than do buyers whose purchases do not amount to as large a sum, large buyers also place numerous small orders, average size of which is frequently less than that of orders placed by buyers whose aggregate annual purchases are less in volume. There is no certainty and scarcely any probability that the business of the buyer who purchases from \$5,000 to \$10,000 in the aggregate of merchandise within a year will cost the seller more or less in proportion to quantity than the one who purchases more than \$30,000 or less than \$35,000, and cumulative discount is sound only where savings have been achieved by the seller with respect to individual sales made to a particular buyer over a period of time, not reflected in price at which buyer purchased and reserved for purpose of refunding at end of such period.

DISCRIMINATION IN PRICE—CLAYTON ACT, SEC. 2, SUBSEC. (a)—COMPETITIVE EFFECT—SMALL DIFFERENTIALS—WHERE RELATIVE IMPORTANCE PRODUCT, NOT GREAT.

While price differential of 2¼ percent on single product such as ice cream powder, is not sufficient to give chain store organization of national scope any appreciable competitive advantage in all of its business, such organization does receive definite advantage in sale of that particular commodity, and such competitive advantage becomes greater when such company is permitted to obtain such differential from considerable number of sellers; such sum, i. e., 2¼ percent, in case of Nation-wide and of many food chains represent-

ing difference between profit and loss, and such differentials, even though individually of relatively little importance, in the aggregate giving buyer, whether retail or wholesale, decided competitive advantage, and tending inevitably toward centralization of retail or wholesale trade, by tending to eliminate smaller buyer and building up larger one at former's expense, through securing of lowest price by largest.

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2, SUBSEC. (a)—LARGE CUSTOMER DIFFERENTIALS AND SELLER INTEREST AS NOT ALONE CONTROLLING.

While it may be to seller's interest to favor large customers, often doing a Nation-wide business, seller cannot regard his interest exclusively, but must subordinate same to requirement that his prices do not reflect unlawful discrimination.

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2, SUBSEC. (a)—CUMULATIVE QUANTITY DISCOUNTS—WHERE DIFFERENTIALS UNRELATED INDIVIDUAL ORDER SIZE AND SHIPMENTS OR DELIVERY OR OTHER COSTS.

Where a corporation engaged in manufacture or preparation for making home-made ice cream, and in sale and distribution thereof (1) to and through Nation-wide and two other retail grocery chains competitively engaged in commerce in resale and distribution of its said preparation, and in dealing with whom it followed practice of treating various warehouses of each as individual customers and soliciting, independently, sales thereof, and shipping merchandise involved to, and billing, such individual warehouses, and (2) to and through wholesalers, and chains, other than aforesaid, under practice pursuant to which, without other exception, it sold all on basis of trade discounts, f. o. b. destination, specified minimum shipping quantities of 10 percent less 1 percent cash, for its liquid product, and 20 percent, less 1 percent cash, for its powder—

Entered into contracts with said three chains providing, in view of "purchases in large quantity, present and prospective," for 12-month period therein named, for cumulative quantity discounts of 1 percent on purchases aggregating therein from \$5,000 to \$10,000, 2 percent on those from 10 to 15, 3 percent on those ranging from 15 to 20, and similar increase for similar additional step, with 5 percent on purchases aggregating over \$30,000 during contract year, and, pursuant to provisions of said contract, or method and amount claimed and insisted on thereunder, paid Nation-wide chain rebates exceeding \$400 and amounting to 3 percent on contract periods aggregate excess purchases of chain's various warehouses, no one of which alone bought sufficient quantity to earn discount in any amount under contract agreement, and to second chain on similar excess aggregate of purchases of such separate warehouse units, no single one of which bought in sufficient quantity to earn rebate, as aforesaid, \$3.53 or 1 percent on such excess aggregate, and to third, for aggregate purchases under contract discount minimum of various warehouses thereof, nothing;

With result that first referred-to chain received definite advantage in sale of particular commodity, and such discrimination tended toward centralization of retail or wholesale trade through giving largest retailer or wholesaler lowest price, and thus tending to build up large, at expense of small, buyer, and latter's elimination:

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Held, That such contract did not result in economy in selling, credit, ordering, shipping, advertising, or other elements that can be considered as producing a differential in cost, and so-called discount granted aforesaid Nation-wide chain cannot be justified on basis of savings in distribution costs, and so-called discounts paid as aforesaid constituted discriminations in price in violation of provisions of Section 2 (a) of an Act of Congress approved October 15, 1914, as amended.

Mr. A. W. DeBirny for the Commission.

COMPLAINT

The Federal Trade Commission, having reason to believe that the H. C. Brill 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 New Jersey and has its principal office and place of business at 101-111 New Jersey Railroad Avenue in the city of Newark, N. J.

PAR. 2. For many years prior hereto and since June 19, 1936, respondent has been and is now engaged in the business of manufacturing, selling, and distributing certain bakers' supplies such as pie fillings, icings, and flavoring preparations and also liquid and powder preparations for the manufacture of home made ice cream. The preparation for making ice cream is a commodity manufactured, sold, and distributed under the trade name E-Zee Freez. In the course and conduct of its said business the respondent has been and is now manufacturing said commodity at its place of business in the State of New Jersey and has been and is now selling, shipping, and distributing said commodity in commerce from its said place of business in the State of New Jersey to various purchasers of said commodity located in the several 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 commodity a course of trade and commerce in said commodity

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in and between the State of New Jersey and the several other States of the United States and the District of Columbia. The said respondent in the course and conduct of its business as aforesaid has been and is now in direct active competition with other persons, partnerships, and corporations similarly engaged.

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 New Jersey 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 said commodity 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 resale within the several States of the United States and the District of Columbia, in that the respondent has been and is now allowing to some of said purchasers a larger rebate from the prices at which said commodity was and is sold to them by respondent than the rebate, if any, which respondent has been and is now allowing to other purchasers of said commodity of like grade and quality purchased from respondent at the same prices.

PAR. 4. Shortly after the effective date of the Robinson-Patman Act, June 19, 1936, a representative of The Great Atlantic & Pacific Tea Company presented a so-called quantity discount agreement to the respondent herein, which agreement was executed by respondent in words and figures as follows:

QUANTITY DISCOUNT AGREEMENT

Purchaser: The Great Atlantic & Pacific Tea Company.

Address: Graybar Building, New York City.

No. of Stores, 14,938.

Manufacturer: H. C. Brill Company, Inc.

Address: Newark, N. J.

Commodity: E-Zee Freez.

The purchaser has obligated itself to buy from the manufacturer a large quantity of merchandise and, in view of the purchases in large quantity, present and prospective, the manufacturer agrees to allow the following quantity discount on amounts bought by the purchaser, between the period commencing on

June 20, 1936 and expiring on June 19, 1937

\$5,000 to \$10,000—	1%
10,000 to 15,000—	2%
15,000 to 20,000—	3%
20,000 to 30,000—	4%
30,000 to over	5%

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Payable at expiration of agreement.

The manufacturer avows its willingness to make the same agreement as is here made with any other purchaser similarly situated and on proportionally equal terms.

This agreement may be cancelled by either the purchaser or the manufacturer upon notice.

H. C. BRILL COMPANY, INC.,
Manufacturer.

By HARRY C. BRILL, *Pres.*
THE GREAT ATLANTIC & PACIFIC TEA CO.,

Purchaser.

By G. F. MORROW.

PAR. 5. The respondent sold and shipped from its said plant to The Great Atlantic & Pacific Tea Company's various warehouses between June 20, 1936 and June 19, 1937 said commodity as follows:

PURCHASES VARIOUS A & P UNITS

	6/20/36-12/31/36	1/1/37-6/19/37
Altoona, Pa.....	\$355.71	\$128.00
Albany, N. Y.....	81.60	
Atlanta, Ga.....		729.00
Baltimore, Md.....	244.80	545.09
Broux, N. Y.....	458.99	964.58
Brooklyn, N. Y.....		184.50
Buffalo, N. Y.....	46.82	
Charlotte, N. C.....	3.40	
Cincinnati, Ohio.....	232.05	266.22
Cleveland, Ohio.....	234.60	119.34
Dallas, Texas.....	452.20	292.23
Des Moines, Iowa.....	17.00	550.80
E. Aurora, N. Y.....	10.20	
Pittsburgh, Pa.....	862.83	540.13
Garden City, N. Y.....	173.40	523.01
Grand Rapids, Mich.....	85.00	
Indianapolis, Ind.....		430.44
Louisville, Ky.....	272.25	679.32
Hartford, Conn.....	151.72	295.65
Newark, N. J.....	913.29	1,081.01
Paterson, N. J.....	360.79	721.77
Philadelphia, No. Side.....	1,225.27	
Philadelphia, So. Side.....	872.52	951.98
Providence, R. I.....	168.26	124.20
Somerville, Mass.....	136.22	
Springfield, Mass.....	101.89	230.63
St. Louis, Mo.....	14.45	86.40
Syracuse, N. Y.....	326.40	837.93
Washington, D. C.....	153.00	
Youngstown, Ohio.....	527.00	244.80
Total.....	\$8,144.64	\$10,525.93

PAR. 6. The total purchases of the various warehouses of The Great Atlantic & Pacific Tea Company, as aforesaid, amounted to \$18,670.57. No single unit purchased in sufficient quantity to earn any rebate under the contract agreement. Each of said warehouses is treated by respondent as an individual customer, sales are solicited independently and the merchandise was shipped and billed to the individual warehouses. On July 21, 1937, respondent sent The Great Atlantic & Pacific Tea Company a check for \$260.12. This amount was arrived at by granting to The Great Atlantic & Pacific Tea Company a rebate of 1 percent on its purchases between \$5,000 and \$10,000, 2 percent on its purchases between \$10,000 and \$15,000, and 3 percent on its purchases in excess of \$15,000. The Great Atlantic & Pacific Tea Company objected to this method of computing its rebate, claiming that it was entitled to the full 3 percent rebate on all purchases in excess of \$5,000. Accordingly, on July 26th, 1937, respondent paid to The Great Atlantic & Pacific Tea Company an additional sum of \$150.00, making the total rebate \$410.12.

PAR. 7. Respondent executed a contract in the same form with The Kroger Grocery and Baking Company covering the period commencing on June 20, 1936 and expiring June 19, 1937. The respondent sold and shipped said commodity from its said plant to the various warehouses of The Kroger Grocery and Baking Company between June 20, 1936 and June 19, 1937 as follows:

PURCHASES KROGER UNITS

	6/20/36-12/31/36	1/1/37-6/19/37
Charleston, W. Va.....	\$280. 50	\$96. 39
Chicago, Ill.....	91. 80	
Cincinnati, Ohio.....	2, 147. 09	600. 63
Dayton, Ohio.....	57. 37	33. 66
Detroit, Mich.....	112. 20	
Evanston, Ill.....	28. 05	
Indianapolis, Ind.....	40.80	36. 72
Louisville, Ky.....	680. 00	549. 27
Oak Park, Ill.....	55. 25	
Pittsburgh, Pa.....	91. 80	114. 75
St. Louis, Mo.....	957. 36	
	<u>\$4, 542. 22</u>	<u>\$1, 431. 42</u>
	1, 431. 42	
Total purchases.....	\$5, 973. 64	
Less Returns 6/20/36-6/19/37.....	620. 20	
Net Purchases.....	\$5, 353. 44	

PAR. 8. The total purchases of the various warehouses of The Kroger Grocery and Baking Company, as aforesaid, amounted to \$5,353.44. No single unit purchased in sufficient quantity to earn any rebate under the contract agreement. Each of said warehouses is

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treated by said respondent as an individual customer, sales are solicited independently and the merchandise is shipped and billed to the individual warehouses. On September 20, 1937 respondent sent The Kroger Grocery and Baking Company a check in the amount of \$3.53. This amount was arrived at by granting to The Kroger Grocery and Baking Company a 1 percent rebate on its purchases in excess of \$5,000, namely \$353.44.

PAR. 9. Respondent executed a contract in the same form with the American Stores Company covering a period commencing on October 20, 1936 and expiring October 19, 1937, during which period the American Stores Company purchases amounted to the sum of \$4,150.01. The respondent sold and shipped said commodity from its said plant to seven warehouses of the American Stores Company located respectively in Baltimore, Md.; Syracuse, N. Y.; Johnstown, Pa.; Orange, N. J.; Wilkes-Barre, Pa., and two warehouses located in the city of Philadelphia, Pa. No rebate was paid to the American Stores Company inasmuch as the total purchases did not aggregate more than the sum of \$5,000.

PAR. 10. The aforesaid rebate agreements were entered into by respondent with the aforesaid three large corporate chain store companies and with no other customers. Respondent made an additional special arrangement with most customers by which a special discount of 5 percent on E-Zee Freez powder was allowed and 10 percent on all purchases of liquid E-Zee Freez in consideration of the distributor contracting for and agreeing to purchase an agreed number of dozens of said commodities during a year's time and such discounts or allowances were granted, paid, or allowed to the aforesaid corporate chains in addition to the rebate, if any, which each of said corporate chains received. Purchasers who would not contract for their purchases at the beginning of the year were not allowed the additional special discounts or if they did not take the amount contracted for respondent was entitled to a charge-back of 5 percent on all E-Zee Freez powder drawn against the said contract or 10 percent on all liquid E-Zee Freez drawn against said contract.

PAR. 11. Upon the termination of the aforesaid rebate contract with The Great Atlantic & Pacific Tea Company, a second contract in the same form was executed by respondent covering the period commencing on June 20, 1937 and expiring June 19, 1938. This second contract had an additional clause providing that Canadian purchases applied.

PAR. 12. Since June 19, 1936 many purchasers of said commodity, E-Zee Freez, from respondent and who did not receive any rebate have been and are now in substantial competition in the sale, resale,

and distribution of said commodity with The Great Atlantic & Pacific Tea Company and many units of The Kroger Grocery and Baking Company and American Stores Company, as aforesaid, are likewise in substantial competition with The Great Atlantic & Pacific Tea Company.

PAR. 13. The effect of the discriminations in price referred to in paragraph 3 may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged or to injure, destroy, or prevent competition with the respondent or The Great Atlantic & Pacific Tea Company, or other beneficiary of like discrimination.

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 January 15, 1938, issued and served its complaint in this proceeding upon the respondent, H. C. Brill Company, Inc., a corporation, charging it with discriminating in price between different purchasers of liquid and powder preparations for the manufacture of home made ice cream in violation of subsection (a) of Section 2 of the aforesaid act.

After the issuance of said complaint, respondent filed answer thereto admitting all the material allegations of the complaint to be true and waiving intervening procedure, briefs, argument, and final hearing, which 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 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 conclusions drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Said corporate respondent, the H. C. Brill Company, Inc., now is, and at all times since June 19, 1936, has been a corporation organized under the laws of the State of New Jersey with its principal office and plant located at 101-111 New Jersey Railroad Avenue in the city of Newark, N. J. At all times herein mentioned, said respondent has been engaged in the business of manufacturing, selling, shipping, and distributing a preparation for the

making of home made ice cream from its said place of business in the State of New Jersey to various purchasers of said preparation located in the State of New Jersey and the several States of the United States and there has been and is now between the respondent and purchasers of said preparation a course of trade and commerce in said preparation in and between the State of New Jersey and the several States of the United States. The said respondent in the course and conduct of its business as aforesaid has been and is now in direct active competition with other persons, partnerships, and corporations similarly engaged.

PAR. 2. Said respondent's customers are generally food wholesalers and retail grocery chain stores. Certain of the chain stores are competitively engaged in commerce in the resale and distribution of the said preparation with other of respondent's customers. The Great Atlantic & Pacific Tea Company is generally in competition in the resale and distribution of the said preparation with most of respondent's other customers. The Great Atlantic & Pacific Tea Company directly competes with The Kroger Grocery and Baking Company and the American Stores Company in the resale and distribution of the said preparation.

PAR. 3. Shortly after the effective date of the Robinson-Patman Act, June 19, 1936, a representative of The Great Atlantic & Pacific Tea Company presented a so-called quantity discount agreement to the respondent herein, which agreement was executed by respondent and The Great Atlantic & Pacific Tea Company in words and figures as follows:

QUANTITY DISCOUNT AGREEMENT

Purchaser: The Great Atlantic & Pacific Tea Company.

Address: Graybar Building, New York City.

No. of Stores: 14,938.

Manufacturer: H. C. Brill Company, Inc.

Address: Newark, N. J.

Commodity: E-Zee Freez.

The Purchaser Has Obligated Itself to Buy from the Manufacturer a Large Quantity of Merchandise and, in View of the Purchases in Large Quantity, Present and Prospective, the Manufacturer Agrees to Allow the Following Quantity Discount on Amounts Bought by the Purchaser, Between the Period Commencing on

June 20, 1936 and Expiring on June 19, 1937

\$5,000 to \$10,000—1%
10,000 to 15,000—2%
15,000 to 20,000—3%
20,000 to 30,000—4%
30,000 to over —5%

Findings

Payable at Expiration of Agreement

The Manufacturer Avows its Willingness to Make the Same Agreement as is Here Made With Any Other Purchaser Similarly Situated and on Proportionally Equal Terms.

This Agreement May Be Cancelled by Either the Purchaser or the Manufacturer Upon Notice.

H. C. BRILL COMPANY, INC.,
Manufacturer.

By HARRY C. BRILL, *Pres.*

THE GREAT ATLANTIC & PACIFIC TEA CO.,
Purchaser.

By G. F. MORROW.

PAR. 4. The respondent sold and shipped from its said plant to The Great Atlantic & Pacific Tea Company's various warehouses between June 20, 1936 and June 19, 1937 said commodity as follows:

PURCHASES VARIOUS A & P UNITS

	6/20/36-12/31/36	1/1/37-6/19/37
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Bronx, N. Y.-----	458.99	964.58
Brooklyn, N. Y.-----		184.50
Buffalo, N. Y.-----	46.82	
Charlotte, N. C.-----	3.40	
Cincinnati, Ohio-----	232.05	266.22
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Dallas, Tex.-----	452.20	292.23
Des Moines, Iowa-----	17.00	550.80
E. Aurora, N. Y.-----	10.20	
Pittsburgh, Pa.-----	862.83	540.13
Garden City, N. Y.-----	173.40	523.01
Grand Rapids, Mich.-----	85.00	
Indianapolis, Ind.-----		430.44
Louisville, Ky.-----	272.25	679.32
Hartford, Conn.-----	151.72	295.65
Newark, N. J.-----	913.29	1,081.01
Paterson, N. J.-----	360.79	721.77
Philadelphia, No. Side-----	1,225.27	
Philadelphia, So. Side-----	872.52	951.98
Providence, R. I.-----	168.26	124.20
Somerville, Mass.-----	136.22	
Springfield, Mass.-----	101.89	230.63
St. Louis, Mo.-----	14.45	86.40
Syracuse, N. Y.-----	326.40	837.93
Washington, D. C.-----	153.00	
Youngstown, Ohio-----	527.00	244.80
Total-----	\$8,144.64	\$10,525.93

PAR. 5. The total purchases of the various warehouses of The Great Atlantic & Pacific Tea Company, as aforesaid, amounted to \$18,670.57. No single unit purchased in sufficient quantity to earn any amount under the contract agreement. Each of said warehouses was treated by respondent as an individual customer, sales were solicited inde-

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pendently and the merchandise was shipped and billed to the individual warehouses. On July 21, 1937, respondent paid The Great Atlantic & Pacific Tea Company \$260.12. This amount was arrived at by combining all purchases and granting to The Great Atlantic & Pacific Tea Company 1 percent on its purchases between \$5,000 and \$10,000, 2 percent on its purchases between \$10,000 and \$15,000, and 3 percent on its purchases in excess of \$15,000. The Great Atlantic & Pacific Tea Company objected to this method of computation and claimed it was entitled to the full 3 percent on all purchases in excess of \$5,000. Accordingly, on July 26th, 1937, respondent paid to The Great Atlantic & Pacific Tea Company an additional sum of \$150.00, making the total rebate \$410.12.

PAR. 6. Respondent executed a contract in the same form with The Kroger Grocery and Baking Company covering the period commencing on June 20, 1936, and expiring June 19, 1937. The respondent sold and shipped said commodity from its said plant to the various warehouses of The Kroger Grocery and Baking Company between June 20, 1936, and June 19, 1937, as follows:

PURCHASES KROGER UNITS

	6/20/36-12/31/36	1/1/37-6/19/37
Charleston, W. Va.....	\$280.50	\$96.39
Chicago, Ill.....	91.80	
Cincinnati, Ohio.....	2,147.09	600.63
Dayton, Ohio.....	57.37	33.66
Detroit, Mich.....	112.20	
Evanston, Ill.....	28.05	
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Louisville, Ky.....	680.00	549.27
Oak Park, Ill.....	55.25	
Pittsburgh, Pa.....	91.80	114.75
St. Louis, Mo.....	957.36	
	\$4,542.22	\$1,431.42
	1,431.42	
Total purchases.....	\$5,973.64	
Less Returns 6/20/36-6/19/37.....	620.20	
Net Purchases.....	\$5,353.44	

PAR. 7. The total purchases of the various warehouses of The Kroger Grocery and Baking Company, as aforesaid, amounted to \$5,353.44. No single unit purchased in sufficient quantity to earn any rebate under the contract agreement. Each of said warehouses is treated by said respondent as an individual customer, sales are solicited independently and the merchandise is shipped and billed to the individual warehouses. On September 20, 1937 respondent sent The Kroger Grocery and Baking Company a check in the amount of

\$3.53. This amount was arrived at by granting to The Kroger Grocery and Baking Company a 1 percent rebate on its purchases in excess of \$5,000, namely \$353.44.

PAR. 8. Respondent executed a contract in the same form with the American Stores Company covering a period commencing on October 20, 1936 and expiring October 19, 1937, during which period the American Stores Company purchases amounted to the sum of \$4,150.01. The respondent sold and shipped said commodity from its said plant to seven warehouses of the American Stores Company located respectively in Baltimore, Md.; Syracuse, N. Y.; Johnstown, Pa.; Orange, N. J.; Wilkes-Barre, Pa., and two warehouses located in the city of Philadelphia, Pa. No rebate was paid to the American Stores Company inasmuch as the total purchases did not aggregate more than the sum of \$5,000.

PAR. 9. Respondent sells to wholesalers and to chain stores as follows:

Liquid E-Zee Freez is packed in cases containing 2 dozens and 12 dozens. The price is 85 cents a dozen with a trade discount of 10 percent, less 1 percent cash discount f. o. b. destination. Minimum shipping quantity 24 dozens. Powder E-Zee Freez is packed 1 dozen to the carton, 15 cartons to the shipping case. The price is 90 cents a dozen with a trade discount of 20 percent, less 1 percent cash discount f. o. b. destination. Minimum shipping quantity 30 dozens. Brokerage is allowed and paid to independent food brokers on all sales within such brokers' territory and was allowed and paid on the sales to the said retail food chains.

PAR. 10. The 10 percent trade discount allowed on liquid E-Zee Freez was originally intended as a special trade discount for contract as distinguished from spot purchases; similarly, 5 percent of the 20 percent allowed on the powder E-Zee Freez was so intended. However, only a few of such contracts were entered into when respondent changed its plan and sold all, whether on spot or contract purchases, on the same terms with the exception of the so-called quantity discount allowances referred to in paragraph 3.

CONCLUSION AND OPINION

From the facts as herein found, the first question that arises concerns the offer by respondent of varying discounts to customers based on the amount each customer purchased annually.

The consideration on which the offer is made, as stated in the contract, is "in view of the purchases in large quantity, present and prospective, the manufacturer agrees to allow the following quan-

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tity discount on amounts bought by the purchaser, between the period commencing on June 20, 1936 and expiring on June 19, 1937.

\$5,000 to	\$10,000—1%
10,000 to	15,000—2%
15,000 to	20,000—3%
20,000 to	30,000—4%
30,000 to	over—5%

The consideration is the purchase "in large quantity" of the goods sold by respondent. However, the offer neither expressly nor by implication can be construed to relate to the purchase of single shipments of the value specified nor was it so construed by the parties as evidenced by the settlements.

Purchasers of large annual amounts sometimes buy in larger individual shipments than do buyers whose purchases do not amount to as large a sum. Large buyers, however, also place numerous small orders and the average size of such orders is frequently less than the average size of orders placed by buyers whose aggregate annual purchases are less in volume. Indeed under a discount plan based on aggregate volume purchases for a given period, such as that contained in the aforesaid contract, it may cost the seller more per dollar of sales to serve a customer who places a large number of small orders which are sufficient in the aggregate to earn the discounts, than to serve the customer who places a few large orders whose total is not sufficient to obtain the discount.

Large wholesalers and chain retailers often obtain concessions in the form of cumulative discounts in the belief that their transactions, in proportion to the amount purchased, are fewer in number, take less of the time and attention of the seller, and cost the seller less. However, when such a belief is not supported by the facts the conclusion obviously is erroneous and an offer predicated thereon discriminatory. There is no certainty and scarcely any probability that the business of the buyer who purchases from \$5,000 to \$10,000 in the aggregate of merchandise within a year will cost the seller more or less in proportion to quantity than the business of one who purchases more than \$30,000 or less than \$5,000.

A distinction in price between shipping cartons or shelf packages and broken packages is readily understood and a difference in price based upon the size of individual purchases and shipments is likewise appreciated but no such distinction is made in this offer. One whose individual purchases were in thousand dollar lots would if his purchases amounted to, let us assume, \$8,000 be required to pay a higher price than another whose individual purchases were in hundred dollar lots but whose total for the year amounted to more

than \$10,000. Such a differential producing an injurious effect in any line of commerce cannot be justified.

No justification has been affirmatively shown for the discrimination in price found herein and the Commission finds no substantial difference between the respondent's cost of selling and delivering ice cream powder to the individual warehouses of The Great Atlantic & Pacific Tea Company, and its cost of serving the individual warehouses of any other chain store company, or any other customer purchasing the said merchandise in quantities comparable to those purchased by the individual warehouses of The Great Atlantic & Pacific Tea Company. Aside from differences in methods of sale and delivery, savings in the cost of serving different customers aside from result from the differences in the size of the individual orders placed by such customers, irrespective of the aggregate purchases for a given period of time. Ordinarily large orders are obtained, assembled, priced, packed, billed, and delivered at a lower cost per dollar of sales than small orders. In the instant case, the respondent employed the same methods of sale and delivery in serving the individual warehouses of The Great Atlantic & Pacific Tea Company as it used in serving its other customers. The record contains no evidence that the individual orders for ice cream powder placed with the respondent by the several warehouses of The Great Atlantic & Pacific Tea Company were any larger than the orders placed with the said respondent by other customers. Indeed, for the year covered by the aforesaid contract, the aggregate amount of ice cream powder purchased from the respondent by the individual warehouses of The Great Atlantic & Pacific Tea Company ranged from less than \$3.40 to not more than \$1,994.30, while the individual orders of the said warehouses were even smaller. It cannot be assumed that the respondent's individual sales or shipments to The Great Atlantic & Pacific Tea Company were fewer in number, and therefore larger, than its sales to other customers, or that it cost said respondent less per dollar of sales to make these individual sales or shipments to the said Great Atlantic & Pacific Tea Company than it did to make individual sales or shipments to other customers. In view of these facts, the Commission finds, therefore, that the so-called discount granted to The Great Atlantic & Pacific Tea Company cannot be justified on the basis of savings in distribution costs. The contract did not result in economy of selling, credit, ordering, shipping, advertising, or other elements that can be considered as producing a differential in cost.

A cumulative discount is sound only where savings have been achieved by the seller with respect to individual sales made to a particular buyer over a period of time, which savings were not reflected

in the price at which the buyer purchased and which are reserved for the purpose of refunding at the end of a period of time. But any system of discounts based on the amount of annual sales is a price discrimination contrary to Section 2 (a) of the Clayton Act, as amended, if it has any of the injurious effects on competition enumerated in the statute, unless justified as by making only due allowance for differences in cost not previously allowed and resulting from the quantities sold or delivered.

Many food chains, including the three aforesaid grocery chains, operate on a net margin of profit of $1\frac{1}{2}$ percent to 2 percent. The sum of $2\frac{1}{4}$ percent represents a difference between profit and loss. Of course a price differential of $2\frac{1}{4}$ percent on a single product of no greater importance than ice cream powder is not sufficient to give The Great Atlantic & Pacific Tea Company any appreciable competitive advantage in all of its business, but it does receive a definite advantage in the sale of that particular commodity. The competitive advantage becomes the greater when a company doing a Nation-wide business is permitted to obtain a $2\frac{1}{4}$ percent differential from a considerable number of sellers. Even though individually they are of relatively little importance, the sum of the differentials would undoubtedly give the buyer a decided competitive advantage. Such discrimination inevitably tends toward centralization of retail or wholesale trade, for the largest retailer or wholesaler gets the lowest price—it thus tends to eliminate smaller buyers and builds up the large buyer at the expense of small ones.

It may be to respondent's interest to favor large customers often doing a Nation-wide business. However, the seller cannot regard his interests exclusively and must subordinate such interest to the requirement that his prices not reflect an unlawful discrimination.

The so-called discounts paid, as provided for and more fully set forth in paragraph 3 hereof, constitute discriminations in price in commerce 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, H. C. Brill Company, Inc., its officers, representatives, agents, and employees, in connection with the offering for sale, sale, and distribution in interstate commerce or in the District of Columbia of liquid and powder preparations for the manufacture of home made ice cream, do forthwith cease and desist from granting or paying, or agreeing to grant or pay, sums amounting to discriminations in price in the form of cumulative discounts described in paragraph 3 of the findings as to the facts and conclusion; and from granting or paying, or agreeing to grant or pay, sums amounting to discriminations in price in the form of cumulative discounts, except where such discount makes only due allowance for differences in cost which have been achieved with respect to individual sales made to a particular buyer over a period of time, which differences in cost were not reflected in the price at which the buyer purchased.

It is further ordered, That the said respondent, H. C. Brill 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

J. W. McPHEETERS, TRADING AS MID-WEST SOAP COMPANY, AND AS SAVON PRODUCTS

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 2995. Complaint, Nov. 27, 1936—Decision, Feb. 11, 1938

Where an individual engaged in manufacture of a cheap, inferior cold process soap of a grade and quality generally not used as a toilet soap, and in the sale and distribution thereof to wholesalers and dealers at various points in other States for resale to house-to-house canvassers or peddlers, at cost thereto of approximately $4\frac{1}{2}\text{¢}$ per three-cake carton, in competition with many who sell, in commerce as aforesaid, soap similar in grade and quality to that sold by him, and many who sell soap of a far superior grade and quality and which has a retail value of, and sells for, price marked by him on his said containers, and who do not in any way misrepresent the price, quality, or character of their products—

Placed on three-bar containers of brands of his aforesaid cheap and inferior soap, words "3 bars—75¢," together with words "Toilet," "Bath," "Shampoo," and trade name and address, notwithstanding fact price thus marked and indicated was many times in excess of selling price of said soaps to aforesaid canvassers, and many times in excess of true value thereof, and much greater than actual price at which such containers were sold to ultimate purchaser, and price indicated was not intended to be true retail price of products in question, but was wholly false and fictitious and in no way represented true value or selling price of products so marked; and thereby put in hands of its purchasers and of said house-to-house canvassers or peddlers instrument or means whereby they could and did commit a fraud upon substantial portion of purchasing and consuming public, through enabling them to represent to purchasers and prospective purchasers, and to cause such purchasers to believe, that said products were in fact high grade and of a retail value substantially as marked and indicated, and represented through statements on containers in question;

With result that such canvassers or peddlers could and did sell said soap at price greatly in excess of fair and reasonable value thereof and of prices at which soap of similar grade and quality was usually and customarily sold, and of aiding and abetting them in misleading and deceiving purchasing and consuming public through such fictitious markings, and of furthering deception thus occasioned through placing on said containers statements falsely indicating soap in question was of grade and quality of soap which had retail value of, ordinarily sold for, price marked thereon, and with tendency and capacity to mislead and deceive substantial portion of purchasing public into erroneous belief that such soap had the value of and ordinarily retailed for the price thus marked and indicated, and that said representations and statements as to grade and quality thereof were true, and with result that substantial number of consuming public, as true consequence of mistaken and erroneous beliefs induced by his said acts and practices, purchased substantial volume of his said products and trade was unfairly diverted to him from