

Syllabus

IN THE MATTER OF
CURTICE BROTHERS COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SUBSECS. (a) and (d) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY SEC. 1 OF AN ACT OF CONGRESS APPROVED JUNE 19, 1936

Docket 3381. Complaint, Apr. 16, 1938—Decision, Apr. 15, 1940

Where a corporation engaged in packing, offering, selling, and distributing fruits, vegetables, and vegetable products to various types of food distributors, and, as thus engaged, in using, for future orders for goods to be shipped when harvested and packed, price lists R, A, and S, use of which, in selling at various prices therein listed, it did not make known to all customers, and which were respectively designated for customers who placed orders for less than 300 cases of its products, for those who placed minimum orders for 300 cases thereof for shipment in quantities of not less than 50, and for those who placed minimum orders for 1,000 cases for shipment in quantities of not less than 250, with A prices ranging from 2.5 percent to 8.3 percent, and with S prices ranging from 5.1 percent to 16.6 percent, lower than the prices at which its said products were sold through use of R list—

- (a) Discriminated in price between competing purchasers of products of like grade and quality sold by it in interstate commerce for use, consumption and resale, through selling its products to some of its customers at price fixed or determined by use of R, A, or S price lists, while selling products of like grade and quality to other customers competitively engaged therewith in use, consumption or resale of such products at prices fixed or determined by use of either of the other said lists; and
- (b) Discriminated in price between competing purchasers of its products of like grade and quality sold by it as above set forth, through selling its products at prices specified by said S list to customers who did not take required 1,000 minimum cases;

With the result that the effect of such discriminations in prices made by it as above set forth might be substantially to lessen competition and to injure, destroy, and prevent competition (1) between it and its competitors in the packing, sale and distribution of fruits, vegetables, and vegetable products; and (2) in the use, consumption, and resale of such products, between some of customers receiving the lower prices and some of the customers competitively engaged with former receiving such lower prices, and who deal in products in question and do not receive said prices, and with result that effect of such discriminations might also tend to create a monopoly in it in said line of commerce:

Held, That such corporation, under facts and circumstances set forth, discriminated in price in sale of its products between different purchasers in violation of subsection (a) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act; and

Complaint

30 F. T. C.

Where such corporation, engaged as aforesaid—

Discriminated between different purchasers of its canned fruits, vegetables and vegetable products by paying, granting, and contracting to pay certain sums of money to and for the benefit of some of its customers, in consideration for advertising services furnished by them in connection with sale or offer of its said products, without making such payments or advertising allowances available on proportionally equal terms to all of its customers competing in sale and distribution thereof:

Held, That the granting to favored customers of advertising allowances without making same available to competing customers on proportionally equal terms, constituted violation by corporation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. John T. Haslett for the Commission.

Goodwin, Nixon, Hargrave, Middleton & Devany, of Rochester, N. Y., for respondent.

COMPLAINT

Pursuant to the provisions of an act of Congress, approved October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" (the Clayton Act), as amended by an act 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" (the Robinson-Patman Act), the Federal Trade Commission having reason to believe that Curtice Brothers Co., a corporation, is violating and has been violating the provisions of the said Clayton Act as amended, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Curtice Brothers Co. is a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal office and place of business located at 20 Curtice Street, Rochester, N. Y. Said respondent operates and maintains packing plants at Rochester, Bergen, Mount Morris, and Wilson, all in the State of New York.

PAR. 2. Respondent corporation is now, and has been since prior to June 19, 1936, engaged in the business of packing and offering for sale, selling, and distributing fruits, vegetables, and vegetable products. Respondent sells said products to every type of food distributor, jobber, corporate chain, voluntary chain, and independent retailer. Respondent sells and distributes said products in commerce between and among the various States of the United States and the District of Columbia, and, preliminary to or as a result of such sales, causes such products to be shipped and transported from the places of origin of shipment to the purchasers thereof who are located in States of the

United States other than the State of origin of the shipment, and there is, and has been at all times herein mentioned, a continuous current of trade and commerce in said products across State lines between respondent's plants or factories and the purchasers of such commodities. Said products are sold and distributed for use, consumption, and resale within the various States of the United States and the District of Columbia.

PAR. 3. In the course and conduct of its business as aforesaid, respondent is now, and during the time herein mentioned has been, in substantial competition with other corporations, individuals, partnerships, and firms engaged in the business of packing, selling, and distributing fruits, vegetables, and vegetable products in commerce between and among the various States of the United States and the District of Columbia.

PAR. 4. In the course and conduct of its business as aforesaid since June 19, 1936, respondent has been, and is now, discriminating in price between different purchasers buying such products of like grades and qualities so sold by the respondent in interstate commerce for use, consumption and resale, by giving and allowing some of its said purchasers of such products lower prices than given or allowed other of its said purchasers competitively engaged one with the other in the resale of said products within the United States. Said discriminations in price are brought about by the following practice and policy pursued by respondent to wit:

Respondent sells its products under three different price lists which price lists are designated by the following letters: R, A, and S. Customers in order to purchase respondent's products at the prices under the S classification must place a minimum order for 1,000 cases for shipment in quantities of not less than 250 cases. Customers in order to purchase respondent's products at the prices under the A classification are required to place a minimum order for 300 cases for shipment in quantities of not less than 50 cases. All other customers purchase respondent's products under the R classification. The prices at which respondent's products are sold under the A classification are lower by from 2.5 percent to 8.3 percent than the prices at which said products are sold under the R classification; and the prices at which said products are sold under the S classification are lower by from 5.1 percent to 16.6 percent than the prices at which said products are sold under the R classification. The differentials in price at which said products are sold are not constant and not only vary between different commodities, but also as between different sizes of the same commodity.

Complaint

30 F. T. C.

Said respondent has in some instances sold its products at prices under the S classification to customers who do not take the required shipments as designated for said classification.

Respondent does not make known to all its customers that it sells its products at the prices set forth in the various classifications, and, as a result thereof, many customers purchase respondent's products either under the A or R classification, whereas if they had known of other or more favorable prices they would have purchased sufficient quantities to entitle them to said favorable prices.

PAR. 5. In the course and conduct of its business, as hereinabove described, respondent, contrary to the provisions of subsection 2 (d) of section 1 of said act of Congress, Public, 692, is now, and since June 19, 1936, has been, discriminating between different purchasers of the said products, by paying, or contracting to pay, certain sums of money to, or for the benefit of, certain of its customers, in consideration for advertising services furnished by said customers in connection with the sale, or offering for sale, of respondent's said products, without making such payments or advertising allowances available on proportionately equal terms to all of their said customers competing in the sale and distribution of their said products.

PAR. 6. The general effect of said discriminations in price so made by respondent as above set forth has been, or may be, substantially to lessen competition and to injure, destroy, and prevent competition between the respondent and its competitors in the packing, sale, and distribution of fruits, vegetables, and vegetable products and also has been or may be substantially to lessen competition and to injure, destroy, and prevent competition in the resale of such products between some of the favored purchasers of such products and some of the competitive customers dealing in said products not receiving such favorable prices. The effect of said discriminations in price also has been, or may be, to tend to create a monopoly in respondent in said line of commerce and to tend to create a monopoly in the said favored purchasers receiving such discriminatory prices in the resale of said products in the various localities or trade territories in the United States in which such purchasers respectively are engaged in business.

PAR. 7. The foregoing alleged acts and practices of said respondent are violations of subsection 2 (a) and 2 (d) of section 1 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."

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 (the Clayton Act), as amended by section 1 of an act 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 (the Robinson-Patman Act), the Federal Trade Commission, on April 16, 1938, issued and served its complaint in this proceeding upon the party respondent named in the caption hereof charging respondent with violating the provisions of subsections (a) and (d) of section 2 of said act as amended.

After the issuance of said complaint and the filing of respondent's answer, a stipulation was entered into between W. T. Kelley, chief counsel for the Commission, and counsel for the respondent, containing a statement of certain facts in this proceeding. Thereafter 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, the stipulation and the substitute answer, brief and oral argument 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. Respondent, Curtice Brothers Co., is a corporation organized and existing under and by virtue of the laws of the State of New York with its principal office and place of business located at 20 Curtice Street, Rochester, N. Y. The respondent operates and maintains packing plants at Rochester, Bergen, Mount Morris, and Wilson, all in the State of New York.

PAR. 2. Respondent is now and has been since June 19, 1936, engaged in the business of packing, offering for sale, selling, and distributing fruits, vegetables, and vegetable products. Said products are sold to the various types of food distributors. The respondent

sells and distributes such products in commerce between and among the various States of the United States and the District of Columbia, and, preliminary to or as a result of such sales, causes such products to be shipped and transported from the State of origin of shipment to the purchasers thereof who are located in States of the United States other than the State of origin of the shipment, and there is, and has been at all times herein mentioned, a continuous current of trade and commerce in fruits, vegetables, and vegetable products across State lines between respondent's plants or factories and purchasers of such products. Said products are sold and distributed by the respondent for use, consumption, and resale within the various States of the United States and the District of Columbia.

PAR 3. In the course and conduct of its business as aforesaid respondent is now, and has been at all times since June 19, 1936, in substantial competition with other corporations, individuals, partnerships, and firms engaged in the business of packing, selling, and distributing fruits, vegetables, and vegetable products in commerce between and among the various States of the United States and the District of Columbia.

PAR. 4. Since June 19, 1936, in the course and conduct of the business engaged in by the respondent, the respondent has used three different price lists, which price lists were and are designated by the letters R, A, and S. The S price list is designated for those customers who place a minimum order for 1,000 cases of the respondent's products for shipment in quantities of not less than 250 cases. The A price list is designated for those customers who place a minimum order for 300 cases of the respondent's products for shipment in quantities of not less than 50 cases. The R price list is designated for customers who place orders for less than 300 cases of the respondent's products. The prices at which respondent's products were and are sold by use of the A price list were and are lower by from 2.5 percent to 8.3 percent than the prices at which said products were and are sold by the use of the R price list, and the prices at which said products were and are sold by the use of the S price list were and are lower by from 5.1 percent to 16.6 percent than the prices at which said products were and are sold by the use of the R price list.

The respondent sold its products to some of its customers at a price fixed by or determined by the use of one of the price lists designated by the letters R, A, or S, while selling products of like grade and quantity to other customers competitively engaged with such customers in the use, consumption or resale of such products at a price fixed by or determined by the use of either of the other price lists.

The respondent sold its products at prices specified by the S price list to some customers who did not take the required minimum number of 1,000 cases of respondent's products.

The sales, as set forth above, so made by the respondent have resulted and do result in discriminations in price between competing purchasers of products of like grade and quality sold by the respondent in interstate commerce for use, consumption, and resale.

PAR. 5. In practice the respondent has confined its sales made by the use of the price lists referred to as R, A, and S, and set out more particularly in paragraph 4 hereof, to "future orders" for goods to be shipped when harvested and packed.

PAR. 6. Said respondent does not make known to all customers that it sells its products at the various prices set forth in the several price lists.

PAR. 7. The effect of said discriminations in prices so made by respondent as above set forth may be substantially to lessen competition and to injure, destroy, and prevent competition between the respondent and its competitors in the packing, sale, and distribution of fruits, vegetables, and vegetable products, and also may be substantially to lessen competition and to injure, destroy, and prevent competition in the use, consumption, and resale of such products between some of the customers receiving the lower prices and some of the customers competitively engaged with those customers receiving such lower prices and who deal in said products and who do not receive such lower prices. The effect of said discriminations in price also may tend to create a monopoly in respondent in said line of commerce.

PAR. 8. In the course and conduct of its business as heretofore described respondent is now, and since June 19, 1936, has been discriminating between different purchasers of its canned fruits, vegetables, and vegetable products by paying, granting, and contracting to pay certain sums of money to and for the benefit of some of its customers in consideration for advertising services furnished by said customers in connection with the sale or offering for sale of respondent's said products without making such payments or advertising allowances available on proportionally equal terms to all of its customers competing in the sale and distribution of its products.

CONCLUSION

Under the facts and circumstances as set forth in the foregoing findings as to the facts, the Commission concludes that the respondent, Curtice Brothers Co., has discriminated in price in the sale of its products between different purchasers in violation of subsection (a) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

The Commission further concludes that the respondent, Curtice Brothers Co., has granted to favored customers advertising allowances without making such allowances available to competing customers on proportionally equal terms in violation of subsection (d) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the stipulation as to certain facts entered into between the respondent herein and W. T. Kelley, chief counsel for the Commission, and the substitute answer filed herein on April 8, 1940, by the respondent, admitting all the material allegations of the complaint to be true and waiving the taking of further evidence and all other intervening procedure, and the Commission having made its findings as to the facts and conclusions herein, which findings and conclusions are hereby made a part hereof, and the Commission having concluded that said respondent has violated the provisions of "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, Curtice Brothers Co., its officers, representatives, agents, and employees, in connection with the sale of canned fruits, vegetables, and vegetable products sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States where either or any of the sales thereof are in commerce, do forthwith cease and desist:

1. From selling canned fruits, vegetables, and vegetable products to some customers at a price fixed by or determined by the use of, one of the price lists designated by the letter R, A, or S, referred to in paragraph 4 of the findings as to the facts herein, while selling products of like grade and quality to other customers competitively engaged with such customers in the use, consumption or resale of such products at a price fixed by or determined by the use of either of the other of said price lists.

2. From continuing or resuming the discriminations in price referred to and described in paragraph 4 of the Commission's findings as to the facts herein.

3. From otherwise discriminating in price between purchasers of canned fruits, vegetables, and vegetable products of like grade and quality in a manner and degree substantially similar to the manner

971

Order

and degree of the discriminations referred to in paragraph 4 of the Commission's findings as to the facts herein, and in any other manner resulting in price discriminations, substantially equal in amount to such discriminations, except as permitted by section 2 of the Clayton Act, as amended.

4. From paying, giving, allowing, or contracting to pay, give or allow anything of value to or for the benefit of some of its customers for advertising services furnished by such customers without making such payments or allowances available to all competing customers on proportionally equal terms.

It is further ordered, That the said respondent Curtice Brothers Co., within 60 days after 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

ROSE HEIFLER AND FRED JACKSON DOING BUSINESS
UNDER THE FIRM NAME OF HEIFLER & JACKSONCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3893. Complaint, Sept. 14, 1939—Decision, Apr. 15, 1940*

Where two individuals engaged in sale and distribution of their "Morgan's Pomade" for scalp and hair, to purchasers in various other States and in the District of Columbia, in substantial competition with those engaged in sale and distribution in commerce of similar treatments and devices designed for and useful in treatment of scalp and hair, and including many who do not in any manner misrepresent their treatment and devices; in advertisements of their said product in circulars, pamphlets, and other advertising matter which they distributed and caused to be distributed to members of the purchasing public—

- (a) Represented, directly or by implication, that product in question was not a tint or dye, and that when applied to gray hair it caused hair to change its color without dyeing, and that use thereof would restore original natural color to gray hair; and
- (b) Represented that use of such product supplied the hair shaft with materials in which gray hair was deficient and that use thereof would prevent hair from falling out and that preparation penetrated to the roots of and nourished the hair and was a competent and effective cure and remedy for and preventive of dandruff—

Facts being that product in question was a lead and sulphur dye, dyed exterior of hair shaft when applied to gray hair and did not produce natural but artificial color, did not restore original natural color to gray hair, had no effect on pigment cells of hair shaft, and did not supply thereto color pigments, deficiency of which causes such hair, it would not prevent hair falling out and was not a cure or remedy for or preventive of dandruff and would not penetrate to roots of hair nor nourish same, but might be injurious to tender skin or that on which there were lesions which had broken continuity of integument; and

- (c) Failed to reveal in its said advertisements that application of its said preparation as above set forth might be injurious and represented thereby that preparation in question, when thus applied, was harmless and would produce no injurious effect;

With effect of misleading and deceiving substantial portion of purchasing public into erroneous and mistaken belief that such statements and representations were true and of causing portion thereof, because of such belief, to buy said product, and with result that trade was thereby diverted unfairly to them from their competitors engaged in sale and distribution in commerce, as aforesaid, of preparations, treatments, and devices for use in treatment of ailments, diseases, and conditions for which they recommend their said product, and who truthfully advertise effectiveness and therapeutic value thereof; to the substantial injury of competition in commerce: