

Syllabus

IN THE MATTER OF
E. J. BRACH & SONS

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 2 (f) OF AN ACT OF CONGRESS APPROVED OCTOBER 15, 1914,
AS AMENDED BY AN ACT APPROVED JUNE 19, 1936

Docket 4548. Complaint, July 28, 1941—Decision, Dec. 21, 1944

Where a corporation which (1) was engaged in the manufacture and competitive interstate sale and distribution of candy and confectionery products; (2) was one of the few large candy manufacturers with annual sales in excess of \$8,000,000; (3) sold many of its candies containing as much as 90 percent glucose, at but a few cents a pound, to large buyers such as chain and syndicate stores, who purchase for resale and buy from one manufacturer rather than another on the basis of a difference in price of a small fraction of a cent only; (4) purchased from various manufacturers, through its Director of Purchases, accurately informed, as in duty bound, as to prices, products and terms, about 30 million pounds or 315 railroad tank carloads of glucose annually, price of which since June 19, 1936, ranged between \$2.09 and \$3.59 per cwt., and, at any given time, was substantially the same in the case of all manufacturers, as was the quality of their glucose—relative cost of which product, in high glucose content candies, was of importance to competing manufacturers thereof in attracting patronage of aforesaid buyers, and in which a saving to said corporation of 10 cents per cwt. in cost amounted to from 5 to 10 percent of said corporation's annual profit—

- (a) Knowingly received benefit of discriminations in price from some of the manufacturers who were concerned in concurrent sales of glucose of like grade and quality to it and some of its competitors, and who charged and invoiced to it glucose at the price preceding its increase to the trade generally, including, as typical, 92 tank cars of about 95,000 pounds each, sold and delivered to it at \$2.29 per cwt. over a five month period, by a certain concern, during which time its prices to the trade generally varied between \$2.39 and \$2.64 per cwt.;
- (b) Knowingly received the benefit of discriminations in price in the purchase of glucose by deducting from the current prices at which some manufacturers invoiced glucose to it and to the trade generally, amounts sufficient in some instances, and almost sufficient in others, to make the cost to it equal to the discriminatory prices it was receiving from others including aforesaid concern, and received thereby, as typical, prices ranging from \$2.29 to \$2.39 on 85 tank cars through deducting 10 cents to 20 cents from prices ranging from \$2.39 to \$2.59, charged to and received from its competitors by the two manufacturers concerned, from whose said prices it made deductions as aforesaid;
- (c) Knowingly induced discrimination in prices in its favor by some of aforesaid various manufacturers by making deductions from their invoice prices in remitting, and informing them falsely that competing manufacturers were then selling to it at such lower price; continuing, as illustrative, after the refusal of the concern first referred to, to sell to it further at said discriminatory price, deductions predicated on said price on 150 tank cars of glucose, sold it by the two manufacturers, whom it led to believe, upon their objecting, that more than one manufacturer was selling to it for less;

Complaint

39 F. T. C.

- (d) Induced and received the benefit of price discriminations giving it an advantage over its competitors of from 15 cents to 90 cents per cwt. on 93 tank cars, and an advantage on a substantial number of said cars of 90 cents, through ordering from each of several manufacturers, following announcement of a general increase by all manufacturers and pursuant to the manufacturers' long established "booking" practice, quantities at the old price which, in the aggregate, were far in excess of its requirements and delivery of all of which it could not possibly have taken during such period; and—through neglecting or refusing to take shipment of all the glucose thus booked within the shipping period, and securing the shipment of the remaining portion after the expiration thereof, and informing some of the manufacturers that their competitors were so doing and that they would lose sales if they did not likewise continue to extend the old price on the orders thus placed—obtained the benefit of the old and lower price at a time when the trade generally was paying the new and higher price;

Effect of which discriminations in price—which violated the prohibitions of Section 2(a) of the Act against price discrimination and which said corporation did not seek to justify under said Act—knowingly induced and received by it—and receipt of which decreased the cost to it of one of the principal ingredients of its products as compared with the cost thereof to its competitors and might thereby give it a price advantage in their sale and afford it the financial power to further such sale by advertising and other forms of non-price competition—was substantially to lessen competition and tend to create a monopoly in some of said manufacturers by causing said corporation to purchase its large requirements of glucose from them and not from their competitors, and to tend to create a monopoly in it as well as to injure, destroy and prevent competition with it:

Held, That such acts and practices constituted violations of subsection (f) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Before *Mr. John L. Hornor*, trial examiner.

Mr. Frank Hier, *Mr. P. R. Layton* and *Mr. A. H. Forkner* for the Commission.

Ryan, Condon & Livingston and *Mr. Henry Junge*, of Chicago, Ill., for respondent.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, since June 19, 1936, has violated and is now violating the provisions of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C. title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, *E. J. Brach & Sons*, is a corporation, organized and existing under and by virtue of the laws of the State of Illinois, and has its office and principal place of business at 4600 West Kinzie Street, Chicago, Ill.

PAR. 2. Respondent is now, and since June 19, 1936 has been, engaged in the business of manufacturing, distributing, and selling candy and confectionery products, consisting principally of low and medium-priced bulk and boxed candies. Such products are manufactured by respondent

in the State of Illinois, sold by it to purchasers located in the several States of the United States and in the District of Columbia, and as a result thereof are shipped and caused by respondent to be transported from the State of Illinois to such purchasers located in the State of Illinois and in other States.

PAR. 3. Respondent in the course and conduct of its business, as aforesaid, is now, and since June 19, 1936, has been, competitively engaged with other persons, firms and corporations who similarly manufacture, distribute and sell similar candy and confectionery products. Respondent, incorporated in 1916, commenced business, however, in 1904, and has grown until it is one of the few large candy manufacturers, with annual sales exceeding \$8,000,000, although the products manufactured and sold by it are of a type which may be readily manufactured by small, local plants.

PAR. 4. One of the principal ingredients of the candy manufactured by respondent and its competitors is corn syrup, unmixed, or glucose, which respondent has purchased from one or more of the several manufacturers thereof, among whom are Corn Products Refining Co. and Corn Products Sales Co., with plants located at Kansas City, Mo., and Argo, Ill.; American Maize-Products Co., with a plant located at Roby, Ind.; Union Starch & Refining Co. and the Union Sales Co., with a plant located at Granite City, Ill.; A. E. Staley Manufacturing Co. and The Staley Sales Corporation, with a plant located at Decatur, Ill.; Anheuser-Busch, Inc., with a plant located at St. Louis, Mo.; the Clinton Co. and the Clinton Sales Co., with a plant located at Clinton, Iowa; Penick & Ford, Ltd., Inc., with a plant located at Cedar Rapids, Iowa; and the Hubinger Co., with a plant located at Keokuk, Iowa.

Such syrup, when purchased, is shipped and caused to be transported by said syrup manufacturers from the State in which their respective plants are located to respondent's plant in the State of Illinois to be used as an ingredient up to approximately 90 percent of the weight of the finished candy manufactured by it and distributed and sold in interstate commerce as aforesaid.

Said corn syrup manufacturers also sell such corn syrup in interstate commerce to competitors of respondent who similarly use it as an ingredient in the manufacture of the candy which they make and sell.

Many of the candies manufactured by respondent which contain a large proportion of such syrup are sold by it at but a few cents per pound and large purchasers thereof for resale, especially chain and syndicate stores, buy such candies from one candy manufacturer rather than from another when there is a difference in price of only a small fraction of a cent per pound. The relative cost of such syrup to competing manufacturers of such high glucose content candies under such circumstances is of considerable importance in being able to attract the business of such large purchasers thereof.

Respondent's aggregate yearly purchases of such syrup from said manufacturers are approximately 30,000,000 pounds, or approximately one railroad tank car per day, each of which contains approximately 95,000 pounds of such syrup. The price of corn syrup, unmixed, f.o.b. Chicago, since June 19, 1936, has been from \$2.09 to \$3.59 per cwt. and a saving of 10¢ per cwt. in the cost thereof to respondent would amount approximately to from 5 percent to 10 percent of its net annual profits.

Complaint

39 F. T. C.

PAR. 5. Respondent, while engaged in commerce, and in the course of such commerce, since June 19, 1936, has knowingly induced some of said corn syrup manufacturers to discriminate in price in favor of respondent and has knowingly received the benefit of discriminations in price from some of said corn syrup manufacturers in concurrent sales by said manufacturers to respondent and some of its competitors of such corn syrup of like grade and quality purchased by them for use, consumption and resale within the several States of the United States and in the District of Columbia, in which concurrent sales either the sales to respondent or the sales to respondent's competitors, or both of such sales, were in interstate commerce.

PAR. 6. One method, among others, by which respondent knowingly received the benefit of discriminations in price, as alleged in paragraph 5, was that after an increase in the price per cwt. of such syrup, which increased price was charged by said syrup manufacturers to the trade generally, including respondent's competitors, some of said syrup manufacturers continued to charge and invoice such syrup to respondent at the price per cwt. prevailing before the increase.

Thus, for instance, beginning on or about July 1, 1940, and continuing until on or about November 30, 1940, the Clinton Co. and the Clinton Sales Co., sold and delivered to respondent approximately 92 tank cars of 43 degree corn syrup, unmixed, each car containing approximately 95,000 pounds, at an invoice price of \$2.29 per cwt. f.o.b. Chicago; whereas, said corn syrup manufacturer had not charged to, or received from, the trade generally, including respondents' competitors, as little as \$2.29 per cwt. f.o.b. Chicago for 43 degree corn syrup, unmixed, since on or about April 4, 1940, for delivery at that price until approximately April 25, 1940, after which dates said corn syrup manufacturer sold such syrup f.o.b. Chicago to the trade generally, including respondent's competitors, at \$2.39 per cwt., and such price fluctuated thereafter and until on or about November 30, 1940, between \$2.39 per cwt. and \$2.64 per cwt., all of which respondent well knew.

PAR. 7. Another method, among others, by which respondent knowingly received the benefit of discriminations in price, as alleged in paragraph 5, was that respondent did not remit to some of said syrup manufacturers the full invoice prices at which said manufacturers invoiced such syrup sold and delivered to respondent, which invoice prices said manufacturers were concurrently charging and receiving from the trade generally, including some of respondent's competitors; but respondent made unauthorized deductions from such invoice prices when remitting to said manufacturers, in some instances sufficient, and in other instances almost sufficient, to make the price to respondent equal to discriminatory prices concurrently being received by respondent from other syrup manufacturers.

Thus, for instance, after beginning to receive the discriminations in price alleged in paragraph 6, and during all the time which they were received, namely from on or about July 1, 1940, until on or about November 30, 1940, respondent, when remitting to the Hubinger Co. and to the A. E. Staley Manufacturing Co., deducted from 10¢ to 20¢ per cwt. from their invoice prices of from \$2.39 to \$2.59 per cwt., at which approximately 85 tank cars of such syrup were sold, delivered and invoiced to respondent

during said period by said two corn syrup manufacturers so as to make the price to respondent \$2.29 or \$2.39 per cwt., \$2.29 per cwt. being the discriminatory price then being received by respondent from the Clinton Co., a competitor of said two syrup manufacturers, as alleged in paragraph 6; and during all of which period competitors of respondent were being charged by and paying to said two syrup manufacturers prices equal to the prices at which respondent was invoiced. All of which respondent well knew.

PAR. 8. One method, among others, by which respondent knowingly induced some of said corn syrup manufacturers to discriminate in price in favor of respondent, as alleged in paragraph 5, was by making unauthorized deductions from the invoice prices of some of said manufacturers when remitting to them and by seeking to secure their concurrence in such action by informing them that competitive syrup manufacturers were then selling such syrup to the respondent at the price resulting after respondent had made the deductions, when in truth and in fact, such sales had not been made to respondent.

Thus, for instance, beginning on or about December 1, 1940, and continuing up to the present time, and after respondent was no longer purchasing corn syrup from the Clinton Co. and no longer receiving from it the benefit of the discriminations in price alleged in paragraph 6, respondent continued to make deductions similar or identical to the deductions resulting in the discriminations alleged in paragraph 7, in remitting to the Hubinger Co. and the A. E. Staley Manufacturing Co. for approximately 150 tank cars of such syrup, when competitors of respondent were being charged by and paying to said two syrup manufacturers prices equal to the prices at which respondent was invoiced by them.

When said two syrup manufacturers objected and protested such deductions, respondent led them to believe that the situation, which was alleged in paragraph 6, continued to exist, when it did not in fact, by assuring said two syrup manufacturers that more than one other corn syrup manufacturer was selling such syrup to respondent at less than the price at which each of them was invoicing such syrup to respondent. Said two syrup manufacturers requested respondent to furnish them with a written statement of any sales made to respondent at less than their respective invoice prices, which prices they were charging to and receiving from the trade generally, including competitors of respondent, but respondent refused.

Subsequent to the sales made to respondent, by the Clinton Co., as alleged in paragraph 6 above, the Clinton Co. attempted to secure further orders from respondent at the prices it was then selling such syrup to the trade generally, including competitors of respondent, and respondent refused to purchase unless said syrup manufacturer sold to respondent at a price which resulted after making said deductions from the invoices of the Hubinger Co. and the A. E. Staley Manufacturing Co., which deductions, as alleged in paragraph 7 above, were originally made by respondent on the basis of the Clinton Co.'s sales to respondent, as alleged in paragraph 6 above. All of which respondent well knew.

PAR. 9. For many years, and continuing since June 19, 1936, each of said syrup manufacturers has followed a long established trade practice, under which, after an increase in price, all purchasers of corn syrup are

permitted to enter orders at the old and lower price for a stated number of days, usually 5 or 10 days, after the date of the announcement of the increase for such a quantity of such syrup as the purchaser will require and receive shipment of within a stated number of days, usually 30 days, after the date of the announcement, after which time shipments are to be at the new and higher price. Although each corn syrup manufacturer may have a fairly accurate knowledge as to a purchaser's total requirements for the specified shipping period, it cannot know, unless informed by the purchaser, how much such purchaser has ordered from all said manufacturers.

Another method, among others, by which respondent knowingly induced some of said syrup manufacturers to discriminate in price in favor of respondent was that, after the announcement of a general increase in price by all of said syrup manufacturers in accordance with the terms of said trade practice above alleged, respondent ordered from each of several corn syrup manufacturers an amount of such syrup which respondent could well use within the stated shipping period, but which orders, in the aggregate, were for an amount of such syrup far in excess of respondent's requirements within such shipping period; and respondent neglected or refused to take shipment of all of the syrup so ordered from all said manufacturers within such shipping period. Respondent thereupon solicited those manufacturers from whom it had so neglected or refused to take shipment to continue shipments after the expiration of such shipping period, until completed under such orders, at the old and lower price, although said syrup manufacturers were then charging to and receiving from the trade generally, including respondent's competitors, the new and higher price on shipments made after the expiration of the stated shipping period. Some of said corn syrup manufacturers so solicited by respondent were prevailed upon to so continue such shipments upon being informed by respondent that competitors were so doing and that refusal would result in loss of sales.

Thus, for instance, on or about July 6, 1936, each of said corn syrup manufacturers announced an increase in the price of 43 degree corn syrup f.o.b. Chicago from \$2.44 per cwt. to \$2.59 per cwt. with the privilege of entering orders within the ensuing 5 to 10 days for delivery prior to on or about August 20, 1936. Thereupon, respondent entered orders for 93 tank cars, more or less, approximately three months' supply, with all of the corn syrup manufacturers at a price of \$2.44 per cwt. f.o.b. Chicago, the number of cars ordered from each of said corn syrup manufacturers, together with the date of the delivery of each car, being as follows:

American Maize-Products Co., 10 tank cars, delivered between approximately July 5 and July 11, 1936; Union Starch and Refining Co. and Union Sales Co., 8 tank cars, delivered between approximately July 11 and July 23, 1936; the Hubinger Co., 10 tank cars, delivered between approximately July 13 and July 28, 1936; A. E. Staley Manufacturing Co., 15 tank cars, delivered between July 20 and August 3, 1936; Anheuser-Busch, Inc., 10 tank cars, delivered between approximately July 20, and September 17, 1936; Corn Products Refining Co. and Corn Products Sales Co., 15 tank cars, delivered from approximately July 28 to October 17, 1936; the Clinton Co., 10 tank cars, delivered between approximately August 7 and September 21, 1936; and Penick & Ford, Ltd., Inc., 15 tank cars, delivered between approximately August 7 and October 17, 1936.

During the period after July 6, 1936, the prices charged by said corn syrup manufacturers to the trade generally, including respondent's competitors, within the terms of the trade practices hereinabove alleged, were increased from \$2.59 to \$2.79 per cwt. on or about July 17, 1936, to \$2.94 per cwt. on or about July 30, 1936, to \$3.14 per cwt. on or about August 3, 1936, to \$3.34 per cwt. on or about August 19, 1936, after which the price was reduced to \$3.19 per cwt. on or about August 25, 1936, to \$3.04 on or about October 5, 1936, which latter price remained until after on or about October 17, on which date respondent received the last of the tank cars ordered on or about July 6, 1936.

Such extensions of the time within which such shipments were made were accomplished by respondent as hereinabove alleged.

By this method, in this one instance alone, respondent induced and received the benefit of price discriminations giving it an advantage over its competitors of from 15¢ to 90¢ per cwt. on approximately 40 tank cars of corn syrup or on approximately 38,000 cwt., the advantage on a substantial number of such cars being 90¢ per cwt. All of which respondents well knew.

PAR. 10. The effect of said discriminations in price, knowingly induced and knowingly received by respondent in the manner and form, as hereinabove alleged, was substantially to lessen competition and tend to create a monopoly in some of said syrup manufacturers by causing respondent to purchase from them and not from their competitors the large requirements of respondent for corn syrup; and to lessen competition, tend to create a monopoly as well as to injure, destroy and prevent competition with respondent, who received the benefits of said discriminations by decreasing the cost to it of one of the principal ingredients of its said products which may give respondent a price advantage in the sale of said products, or some of them, and confer upon respondent a financial power to further the sale of its said products by advertising and other forms of non-price competition.

PAR. 11. Each of said corn syrup manufacturers, during all the times mentioned herein, continuously and regularly informed respondent by mail, telephone and personal visits of salesmen and brokers of the price at which each of them respectively was offering for sale and selling such corn syrup to the trade generally, including respondent's competitors.

Respondent also knew from the same sources the terms of sale of each of said manufacturers, particularly the trade practice of accepting orders from purchasers for five or ten days after the announcement of a price increase and the old and lower price for such syrup to be delivered within a stated period after the announcement, usually thirty days.

The quality of corn syrup, as manufactured by said syrup manufacturers is substantially the same, and candy manufacturers, including respondent and its competitors, purchase and use the corn syrup manufactured by each of said manufacturers interchangeably with the corn syrup manufactured by the others. As a result, the price of each of said manufacturers and their terms of sale are substantially the same. All of which respondent well knew.

Respondent has for many years and since June 19, 1936, employed a director of purchases who has had charge of all of the purchases of corn syrup made by respondent and whose duty it is to keep and who has kept

accurately and currently informed of the prices and terms of sale of such syrup; and all of the purchases of corn syrup herein referred to have been made by him or under his direction and with his knowledge.

PAR. 12. The foregoing alleged acts of said respondent. E. J. Brach & Sons, while engaged in interstate commerce, in knowingly inducing and in knowingly receiving in the course of such commerce, since June 19, 1936, discriminations in price prohibited by Section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C. title 15, sec. 13), are in violation of Section 2 (f) of said 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 (Clayton Act), as amended by Act approved June 19, 1936 (Robinson-Patman Act), the Federal Trade Commission on July 28, 1941, issued and subsequently served its complaint in this proceeding upon E. J. Brach & Sons, a corporation, charging it with violation of the provisions of subsection (f) of Section 2 of the said Clayton Act as amended in the purchase of glucose or corn sirup unmixed. After the issuance of said complaint and the filing of respondent's answer, at hearings before an examiner of the Commission theretofore duly designated by it, respondent withdrew its answer and admitted on the record certain allegations of the complaint, testimony and other evidence in support of and in opposition to the other allegations of said complaint were introduced and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on the complaint and the record, including testimony and other evidence (report of the trial examiner and filing of briefs having been waived and oral argument not having been requested); and the Commission, having duly considered the matter 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. Respondent, E. J. Brach & Sons, is a corporation, organized and existing under the laws of the State of Illinois, with its office and principal place of business located at 4600 West Kinzie Street, Chicago, Ill. It is now, and for many years last past has been, engaged in the manufacture, sale, and distribution of candy and confectionery products, consisting principally of low-priced and medium-priced bulk and boxed candy.

PAR. 2. (a) In the course and conduct of its aforesaid business, pursuant to sales made, respondent transports, or causes its said products to be transported, from its place of business in Illinois to purchasers thereof at their various locations in the several States of the United States and in the District of Columbia, and respondent thus maintains, and has maintained, a course of trade in said products in commerce among and between the several States of the United States.

(b) In the conduct of its business as aforesaid, respondent is now, and for many years last past has been, in competition with other persons, firms, and corporations similarly engaged in the manufacture, sale, and distribution of like candy and confectionery products.

PAR. 3. (a) Glucose or corn sirup unmixed is one of the principal ingredients of candy manufactured by respondent and its competitors. Respondent has purchased its supplies of glucose from various of the several manufacturers thereof, among whom are Corn Products Refining Co. and Corn Products Sales Co., with plants at Kansas City, Mo., and Argo, Ill.; American Maize-Products Co., with its plant at Roby, Ind.; Union Starch & Refining Co. and Union Sales Co., with a plant at Granite City, Ill.; A. E. Staley Manufacturing Co. and The Staley Sales Corporation, with a plant at Decatur, Ill.; Anheuser-Busch, Inc., with its plant at St. Louis, Mo.; Clinton Co. and Clinton Sales Co., with a plant at Clinton, Iowa; Penick & Ford, Limited, Inc., with its plant at Cedar Rapids, Iowa; and The Hubinger Co., with its plant at Keokuk, Iowa. When said glucose is purchased by respondent the manufacturers thereof transport, or cause it to be transported, from the State in which their respective plants are located to respondent's place of business in Chicago, Ill., where it is used as an ingredient in the candy manufactured and sold by respondent as aforesaid. Said glucose manufacturers also sell glucose in interstate commerce to competitors of respondent who similarly use it as an ingredient of candy which they manufacture, sell, and distribute.

(b) Many of the candies manufactured by respondent which contain a large proportion of glucose—in some cases up to 90 percent of the weight of the finished candy—are sold by respondent at but a few cents per pound. Large buyers of such candies who purchase for resale, especially chain and syndicate stores, buy such candies from one manufacturer rather than from another when there is a difference in price of only a small fraction of a cent per pound. The relative cost of the glucose to competing manufacturers of high-glucose-content candies is, under such circumstances, of considerable importance in attracting the patronage of such large buyers for resale.

(c) Respondent, although not incorporated until 1916, commenced business in 1904 and has grown until it is one of the few large candy manufacturers having annual sales in excess of \$8,000,000, although the products manufactured and sold by it are of a type which may be readily manufactured by small local plants. Respondent's aggregate yearly purchases of glucose from the manufacturers thereof amount to approximately 30,000,000 pounds, or about 315 railroad tank carloads of glucose annually. A tank carload of glucose amounts to about 95,000 pounds. The price of glucose or corn sirup unmixed, f.o.b. Chicago, since June 19, 1936, has ranged between \$2.09 and \$3.59 per hundredweight. A saving in the cost to respondent of 10¢ per hundredweight amounts to from 5 to 10 percent of its net annual profits.

PAR. 4. In the course of commerce as aforesaid, since June 19, 1936, respondent has knowingly induced some of the manufacturers of glucose heretofore named to discriminate in price in its favor and has knowingly received the benefit of discriminations in price from some of said manufacturers. These discriminations in price have occurred in concurrent sales of glucose of like grade and quality by said manufacturers to respondent

and to some of its competitors, and either the sales to respondent or the sales to respondent's competitors, or both of such sales, have been in interstate commerce. Said purchases of glucose by respondent and its competitors have been for use, consumption, and resale within the several States of the United States and in the District of Columbia.

PAR. 5. One of the methods through which respondent knowingly received the benefit of discriminations in price was that after an increase in the price of glucose, which increased price was charged by glucose manufacturers to the trade generally, including respondent's competitors, some of said manufacturers continued to charge and invoice such glucose to respondent at the price prevailing before the increase. For example, beginning about July 1, 1940, and continuing until about November 30, 1940, the Clinton Co. and the Clinton Sales Co. sold and delivered to respondent approximately 92 tank cars of 43° glucose, each car containing approximately 95,000 pounds of glucose, at an invoice price of \$2.29 per hundredweight, f.o.b. Chicago. The prices charged and received by said manufacturer from the trade generally, including respondent's competitors, from about April 25, 1940, to about November 30, 1940, varied between \$2.39 and \$2.64 per hundredweight, all of which respondent well knew.

PAR. 6. Another method through which respondent knowingly received the benefit of discriminations in price in the purchase of glucose was by making deductions from the prices at which some glucose manufacturers invoiced glucose to the respondent. The invoice prices by said manufacturers to respondent were those currently being charged and received from the trade generally, including some of respondent's competitors. Respondent made deductions from the prices at which glucose was invoiced to it by said manufacturers, which deductions in some instances were sufficient and in other instances almost sufficient to make the cost to respondent equal to the discriminatory prices it was receiving from other glucose manufacturers. For example, during the time respondent was receiving discriminations in price from the Clinton Co. and the Clinton Sales Co. as set out in the preceding paragraph, respondent in remitting to The Hubinger Co., and to the A. E. Staley Manufacturing Co. deducted from 10¢ to 20¢ per hundredweight from their invoice prices of from \$2.39 to \$2.59 per hundredweight. Such deductions were made on approximately 85 tank cars of glucose sold to respondent during said period by The Hubinger Co. and the A. E. Staley Manufacturing Co., and said deductions made the price to respondent \$2.29 to \$2.39 per hundredweight. The discriminatory price then being received by respondent from the Clinton Co. was \$2.29 per hundredweight. During the period from July 1, 1940, to November 30, 1940, The Hubinger Co. and the A. E. Staley Manufacturing Co., competitors of the Clinton Co., were charging and receiving from respondent's competitors prices equal to the prices at which they invoiced respondent. These facts were well known to respondent.

PAR. 7. Another method through which respondent knowingly induced discriminations in price in its favor by some of said manufacturers of glucose was by making deductions from the invoice prices of such manufacturers when remitting to them and seeking to secure their concurrence in such deductions by informing them that competitive manufacturers of glucose were then selling to respondent at a price equivalent to that proposed by respondent after the deductions made by it, when in truth and in

fact sales at such lower prices had not been made to respondent. For example, beginning about December 1, 1940, and continuing until July 1941 or thereafter, when respondent was no longer purchasing glucose from the Clinton Co. and was no longer receiving from it the benefit of the discriminations in price heretofore described, respondent in remitting to The Hubinger Co. and the A. E. Staley Manufacturing Co. for approximately 150 tank cars of glucose, continued to make deductions similar or identical to those which resulted in the discriminations set out in the preceding paragraph. The Hubinger Co. and the A. E. Staley Manufacturing Co. were concurrently charging and receiving from competitors of respondent prices equal to the full price at which they invoiced the respondent for its purchases of glucose before the deductions were made by it. When these two manufacturers of glucose objected and protested the deductions made by respondent, it led them to believe that more than one other glucose manufacturer was selling glucose to respondent at less than the price at which they were invoicing their glucose to respondent. These two manufacturers requested respondent to furnish them with a written statement of any sales made to it at less than their invoice prices, which prices they were charging to and receiving from the trade generally, including competitors of respondent, but respondent refused so to do. Subsequent to the sales made to respondent by the Clinton Co. as heretofore described, the Clinton Co. attempted to secure further orders from respondent at the prices it was then selling glucose to the trade generally, including competitors of respondent. Respondent refused to purchase unless the Clinton Co. sold to it at the price resulting from the deductions being made from the invoices of The Hubinger Co. and the A. E. Staley Manufacturing Co., which deductions were originally made by respondent on the basis of the Clinton Company's sales to respondent. Respondent was well aware of all these facts.

PAR. 8. (a) For many years last past glucose manufacturers have followed a long-established practice of permitting all purchasers of glucose, after an increase in the price thereof is announced, to enter orders at the old and lower price during a period of a few days following the announcement of such increase for the customers' requirements during a specified shipping period, usually 30 days. After the expiration of the shipping period for glucose "booked" pursuant to this practice, shipments are made at the new and higher price. Following the announcement of a general increase in price by all manufacturers of glucose, respondent, pursuant to the "booking" practice described, ordered from each of several manufacturers an amount of glucose which it could well use within the stated shipping period, but its orders in the aggregate were for an amount far in excess of its requirements during the shipping period granted. Respondent neglected or refused to take shipment of all the glucose thus "booked" with various manufacturers within the specified shipping period and secured shipment of the remaining portion of such "bookings" after the expiration of the shipping period and thus obtained the benefit of the old and lower price at a time when glucose manufacturers were charging to and receiving from the trade generally, including respondent's competitors, the new and higher price on shipments made after the expiration of the stated shipping period.

(b) An example of respondent's practice with respect to such "bookings" occurred about July 6, 1936, when all glucose manufacturers announced an increase in the price of 43° glucose f.o.b. Chicago from \$2.44 to \$2.59 per hundredweight, with the privilege of entering orders within the ensuing 5 to 10 days for delivery prior to about August 20, 1936. During the "booking" period thus allowed respondent entered orders with each of the several glucose manufacturers at the price of \$2.44 per hundredweight f.o.b. Chicago. None of these orders alone called for an excessive amount, but in the aggregate were excessive and amounted to approximately 93 tank cars of glucose. A manufacturer of glucose may know respondent's requirements of glucose, but cannot know, unless informed by respondent, the amount "booked" with other manufacturers by respondent. The quantities thus ordered by respondent from each of the several manufacturers and the approximate periods during which delivery actually made were as follows: American Maize-Products Co., 10 tank cars, delivered between July 5 and July 11, 1936; Union Starch & Refining Co. and Union Sales Co., 8 tank cars, delivered between July 11 and July 23, 1936; The Hubinger Co., 10 tank cars, delivered between July 13 and July 28, 1936; A. E. Staley Manufacturing Co., 15 tank cars, delivered between July 20 and September 3, 1936; Anheuser-Busch, Inc., 10 tank cars, delivered between July 20 and September 17, 1936; Corn Products Refining Co. and Corn Products Sales Co., 15 tank cars, delivered between July 28 and October 17, 1936; Clinton Co., 10 tank cars, delivered between August 7 and September 21, 1936; and Penick & Ford, Limited, Inc., 15 tank cars, delivered between August 7 and October 17, 1936. Following the increase to \$2.59 per hundredweight announced about July 6, 1936, the several manufacturers of glucose announced further changes in the price for glucose as follows: An increase on or about July 17, 1936, from \$2.59 to \$2.79 per hundredweight; about July 30, 1936, an increase from \$2.79 to \$2.94 per hundredweight; about August 3, 1936, an increase from \$2.94 to \$3.14 per hundredweight; about August 19, 1936, an increase from \$3.14 to \$3.34 per hundredweight; about August 25, 1936, a decrease from \$3.34 to \$3.19 per hundredweight; and about October 5, 1936, a decrease from \$3.19 to \$3.04 per hundredweight, which price remained in effect until after October 17, 1936, on which date respondent received the last of the tank cars ordered by it on or about July 6, 1936.

(c) At the time respondent entered the orders described above for 93 tank cars of glucose, its storage capacity was fully utilized and it could not possibly have taken delivery of all of the 93 tank cars within the shipping period specified in the "bookings" which it entered. Some of the manufacturers, upon being informed by respondent that their competitors were so doing and that they would lose sales if they did not, continued to make deliveries to respondent after the expiration of the specified shipping period and received therefor the price of \$2.44 per hundredweight. By this method, in this instance respondent induced and received the benefit of price discriminations giving it an advantage over its competitors of from 15¢ to 90¢ per hundredweight on approximately 40 tank cars of glucose and an advantage on a substantial number of such cars of 90¢ per hundred weight.

PAR. 9. The effect of the discriminations in price knowingly induced and knowingly received by respondent as hereinabove set forth was substan-

tially to lessen competition and tend to create a monopoly in some of said glucose manufacturers by causing respondent to purchase its large requirements of glucose from them and not from their competitors, and to lessen competition with and tend to create a monopoly in respondent, as well as to injure, destroy, and prevent competition with respondent. The receipt of the benefits of said discriminations in price decreased the cost to respondent of one of the principal ingredients of its products as compared with the cost of such ingredient to its competitors, which may give respondent a price advantage in the sale of its said products, or some of them, and afford respondent the financial power to further the sale of its products by advertising and other forms of nonprice competition.

PAR. 10. (a) Respondent has for many years and at all times since June 19, 1936, employed a director of purchases who has had charge of all the purchases of glucose made by respondent and who had the duty of keeping himself, and who has kept himself, accurately and currently informed of the prices and terms of sale for glucose. All of the purchases of glucose made by respondent as heretofore described have been made by such director of purchases or under his instructions and with his knowledge.

(b) Each of the manufacturers of glucose during all the times mentioned herein continuously and regularly informed respondent by mail, telephone, and personal visits of salesmen and brokers of the price at which each of them was offering and selling glucose to the trade generally, including respondent's competitors. Respondent also knew from the same sources the terms of sale of each of said manufacturers and was thoroughly familiar with the "booking" privileges granted by glucose manufacturers as heretofore described.

(c) The glucose produced by each of the manufacturers thereof heretofore mentioned is of substantially the same quality and candy manufacturers including the respondent and its competitors, purchased and used the glucose of one such manufacturer interchangeably with that produced by any other such manufacturer. At any given time the prices and terms of sale of all glucose manufacturers are substantially the same. These facts were well known to respondent.

PAR. 11. Respondent did not seek to show that the discriminatory prices received by it were not discriminations in price prohibited by subsection (a) of Section 2 of the Clayton Act as amended. The discriminations in price having been established and the competitive effects thereof shown, the Commission concludes, and therefore finds, that said discriminations in price are discriminations prohibited by subsection (a) of Section 2 of the said Clayton Act as amended.

CONCLUSION

The aforesaid acts and practices of respondent constitute violations of subsection (f) of Section 2 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 (Clayton Act), as amended by Act approved June 19, 1936 (Robinson-Patman Act).

Order

39 F. T. C.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, admissions made on the record of certain allegations of the complaint, testimony and other evidence in support of and in opposition to certain other allegations of the complaint taken before an examiner theretofore duly designated by it (report of the trial examiner and the filing of briefs having been waived and oral argument not having been requested), and the Commission having made its findings as to the facts and its conclusion that respondent E. J. Brach & Sons has violated the provisions of subsection (f) of Section 2 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 (Clayton Act), as amended by Act approved June 19, 1936 (Robinson-Patman Act).

It is ordered, That respondent E. J. Brach & Sons, a corporation, its officers, representatives, agents, and employees, directly or indirectly, in or in connection with the purchase of glucose or corn sirup unmixed in commerce, as "commerce" is defined in the aforesaid Clayton Act as amended, do forthwith cease and desist from:

1. Knowingly purchasing from any seller at prices lower than the prices concurrently charged by such seller to the trade generally, including competitors of respondent, when the discriminations thus received are substantially similar to those described in the findings as to the facts herein.

2. Making deductions from the invoice price of any seller in remitting payment for the purpose of reducing such price on the basis of a discriminatory price actually being received or falsely represented as being received from another seller, when the invoice price from which deduction is made is known to be that concurrently charged by the seller to the trade generally, including competitors of respondent, and the discriminations obtained through such deductions are substantially similar to those described in the findings as to the facts herein.

3. Inducing the sale by or purchasing from any seller at prices known to be less than the prices concurrently charged by such seller to the trade generally, including competitors of respondent, through excess "bookings" or other manipulation of the "booking" privilege, when the discriminations thus obtained are substantially similar to those described in the findings as to the facts herein.

4. Knowingly inducing or receiving any discriminations in price prohibited by subsection (a) of Section 2 of the aforesaid Clayton Act as amended.

It is further ordered, That respondent shall, within 60 days after the service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

Syllabus

IN THE MATTER OF

SAMUEL L. COHN, ALSO KNOWN AS PAT CASEY, AND
CHARLES C. COHN, ALSO KNOWN AS CHARLES CAHN,
INDIVIDUALS AND COPARTNERS TRADING AS COLONIAL
ALLOYS COMPANY, COLONIAL STOVE COMPANY AND
BASE PRODUCTS COMPANY, AND EDWARD ENGEL

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

Docket 4943. Complaint, Apr. 15, 1943—Decision, Dec. 30, 1944

Where two partners, engaged in the competitive interstate purchase and resale of aluminum base alloys, which they purchased under the trade name "Colonial Stove Company" and, to a very minor extent, under the name "Base Products Company," and sold, after subjecting it assertedly to a secret process, as "Colalloy," and under the trade name "Colonial Alloys Company," making use of various assumed personal names in the conduct of their business, together with a third individual, variously represented as Chief Metallurgist, Chief Engineer, and Director of Engineering for Colonial Alloys Company, who cooperated with them in carrying out the acts and practices below described;

- (a) Misrepresented the history, nature, size and extent of their business, and the physical property owned, used or occupied thereby, and falsely represented themselves as manufacturers, with manufacturing facilities, through using such statements, on letterheads, envelopes, billheads and in other ways, as "COLONIAL ALLOYS COMPANY and Associated Companies Base Products Co. Colonial Stove Co. Since 1851 Colonial Philadelphia Bldg. East Somerset—Trenton Ave. and Martha Streets Philadelphia, Pa., U.S.A. * * * Since 1851 Researchers—Developers—Manufacturers Chemical—Metallurgical—Electro-chemical Processes and Electronics," and through such statements in connection with advertising, advertising depictions and correspondence as "Hundred of Dies and Tools are available to make many sizes of Industrial and Commercial Equipment" "GIANT TABLE-TOPS FABRICATED * * * of 11 gauge No. 93 COLALLOY," "BASE MILL PRICES COLALLOY FLAT STRIPS AND COILS" " * * * it is not in accordance with Company policy, to permit visitors or inspection at the mills" (to the British Air Commission), "Any patterns, jigs, dies, tools or other equipment which we construct for the purchaser will be used in connection with shop equipment and will be used exclusively for the manufacture of material for the purchaser," "A new COLALLOY floor system saved 750 tons of dead-weight and added another quarter century to the life of this bridge. It also saved the taxpayers a million and a half dollars," and others of the same tenor;
- The facts being that it was not until about 1936 that exploitation of said secret process, upon the asserted efficacy of which their said business was based, was undertaken, nor until about 1937—following the death of said partners' father who developed a method for treating aluminum in connection with his stove business—that the individuals concerned began to designate aluminum base alloys, said to have been subjected to their combined chemical and electrical treatment or process, by the trade name "Colalloy," and undertook an extensive and elaborate advertising campaign in its behalf, during which period, also, they registered the various assumed