

Syllabus

IN THE MATTER OF

MINNEAPOLIS-HONEYWELL REGULATOR CO.

COMPLAINT, FINDINGS, ORDER, OPINION OF THE COMMISSION, AND OPINION DISSENTING IN PART AND CONCURRING IN PART, IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914, AND OF SUBSEC. (a) OF SEC. 2, AND SEC. 3, OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT OF CONGRESS APPROVED JUNE 19, 1936

Docket 4920. Complaint, Feb. 23, 1943—Decision, Jan. 14, 1948

Section 2 (b) of the Clayton Act, as stated in *Federal Trade Commission v. Staley Mfg. Co.*, 324 U. S. 746, at 753, "does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. This section speaks only of the seller's 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor.' The act thus places emphasis on individual competitive situations rather than upon a general system of competition." Accordingly, the defense is not available as a justification either for a challenged practice of allowing off-scale prices, or for certain prices, challenged as unlawfully discriminatory, as made available by certain quantity brackets and not shown as justified by differences in cost of manufacture, sale, or delivery resulting from the differing quantities in which the products involved are sold or delivered to purchasers.

Cost studies of the sort involved in an effort to justify quantity price differentials, based upon annual quantity purchases graduated according to various brackets, and challenged as unlawfully discriminatory under the provisions of section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act, ordinarily do not afford precise accuracy, but must necessarily embrace a number of conjectural factors and allocations, and there is inherent in them a reasonable margin of allowable error. Where they are made in good faith and in accordance with sound accounting principles, they should be given a very great weight, and a respondent in such a proceeding, whose burden under the act is very great, should have a liberal measure of consideration when it becomes apparent that it has made sincere and extensive efforts to discharge that burden.

As respects attempted cost justifications of quantity price differentials based upon annual quantity purchases graduated according to various brackets, and the contention that there is necessarily a failure of cost justification where the quantities purchased by two competing customers at applicable price differentials are nearly the same, with one being just below and the other being at or slightly above the minimum quantity for a particular bracket, the argument may be persuasive in a case where such a situation is actually shown and where there is some indication that it is a matter of competitive importance. Any annual quantity system of pricing is vulnerable to such an argument and it may be controlling where it has practical aspects, but where it is purely theoretical it does not constitute a satisfactory basis for disallowing the whole effort at cost justification.

If a method of selling and pricing involves practical difficulties which make it hard to comply with the requirements of section 2 (a) of the act prohibiting discriminations in price as therein set out, such as the practice of a respondent of entering into annual contracts with its customers at the beginning of a year, based on past experience, such difficulties must be held to constitute a calculated risk, since the respondent voluntarily chose its method of selling and pricing. Thus instances in which certain bracket prices were granted to certain customers who did not purchase the quantities required under its schedule for such prices, and thereby secured a differential not shown as justified by the cost study, due to a respondent's said practice of entering into annual contracts with its customer at the beginning of a year based on past experience, without increasing the contract price if the customer failed to purchase the quantity provided for in the contract, so that said sales were at off-scale prices, while giving the customer a lower price in the event his purchases exceeded the contract quantity and qualified him therefor under the next bracket by means of retroactive discounts or otherwise, cannot be justified on the ground that said practice with respect to annual contracts and the subsequent price procedure with respect thereto, is a business necessity, since it is impossible to determine at the beginning of the year the unusual factors which may adversely affect the quantity of a customer's purchases, and it would be prohibitively difficult to require a customer during the year to adjust the price upward. While from a practical standpoint such is no doubt a valid and sufficient reason to such a respondent, it is the respondent's responsibility, in spite of such practical difficulties, to comply with the law. Otherwise, the seller could set up a schedule of annual quantity prices, justify the differentials, and then sell freely to favored customers at off-scale prices so long as the customer agreed in advance to buy the quantities required for the prices made to them—a basis upon which the law could not be effectively applied.

When price differentials of an established schedule reach a point where they cannot be justified by cost differences, it is unsound and inconsistent to urge that they then become prices, having in mind the saving proviso of section 2 (b) of the Clayton Act as amended by the Robinson-Patman Act, which have been made in good faith to meet equally low or lower prices of competitors simply because they may not be lower than competitors' prices. To accept such a proposition would mean that any seller of a commodity which generally sells at a premium price might freely discriminate among its customers so long as it did not undercut the prices of competitors. Such an interpretation would make the Act largely unworkable and would, to a substantial extent, defeat its objectives.

Annual quantity prices tend to encourage customers to concentrate their purchases with a single source of supply rather than to distribute their business among competitors. Thus when a prospective purchaser sees that his total requirements, if concentrated with the concern offering the same, will entitle him to a certain favorable bracket price, but, if divided among other sources of supply, may secure him a price in less favorable brackets, the competitive tendency of the discriminatory higher bracket price is apparent. The very nature of quantity price differentials, indeed, is to divert business to the seller granting such differentials, and, insofar as they cannot be justified, by cost differences or otherwise defended, any substantial injury to competition due to them falls within the ban of the act.

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The contention that challenged discriminatory prices have not resulted in injury to competition within the meaning of the act, in that, as asserted, the relative position of a respondent in the industry has become distinctly less favorable and that, accordingly, the practices with which it is charged have not substantially lessened competition or tended to create a monopoly, cannot be accepted, since the law does not permit one to resort to unfair or discriminatory practices in order to maintain a competitive position in the industry, and if use of unfair or discriminatory practices substantially interferes with or impedes the progress or growth of competitors, there has been a substantial injury to or lessening of competition within the meaning of the law.

The contention as respects the effect of certain challenged discriminatory prices for a component part of a finished product, that various other parts, made and sold by other producers, and subject likewise to volume discounts, enter into said finished product, and that accordingly the proper place in the competitive picture cannot be traced with certainty as respects the effect of the discriminatory prices of the part first referred to, cannot be accepted since, while each seller of the component parts concerned who may have contributed to the aggregate price or cost advantages obtained by the favored manufacturers of the finished product is, in part, responsible for the aggregate competitive result, the fact that the whole competitive effect cannot be traced to the respondent concerned alone, does not relieve such respondent of its share of responsibility for advantages thus conferred, which may be reflected in the competition of selling the finished products, either in lower prices, more extensive advertising, better service to customers, more effective selling methods, or improved quality, or in a combination of such potent competitive factors.

As respects the competitive effect of selling a certain part, component of a finished product, at discriminatory prices, and the contention that other parts are available to manufacturers of the finished product at lower prices, and that, therefore, said prices do not injure competition among such manufacturers, said contention cannot be accepted where there is a substantial demand for the part concerned, and where, in order to be competitive, manufacturers of the finished product must be able to supply said part, which, since dealers frequently request it for the finished product, manufacturers must buy at the prices charged therefor, while still competing with other manufacturers for the dealer's business, so that, where competitive manufacturers receive discriminatory prices from the seller of such part, competition between the manufacturers for the dealer's business may be very substantially affected.

In an opinion and decision of the Commission with respect to certain discriminations and competitive effects which resulted from the lower prices granted to some buyers than to others, such references could just as well have been to the discriminations and competitive effects which resulted from the higher prices being charged some buyers than others. And, as respects the order issued with respect to the unlawful discriminations found, it is neither its intent nor effect to prevent or restrain respondent from reducing prices to the trade or to consumers, since the order which directs respondent to cease and desist from discriminating in prices, as the result of proceedings involving unlawful discriminations in price, may be complied with through eliminating the discriminations by reducing the respondent's high prices as well

as by increasing its low prices. The Commission, as respects such matters, has no authority or desire to intrude in the field of price control either by enhancement, curtailment or stabilization, and its effort is not directed to that end. The law does require, however, that the discriminations be eliminated, and, while the Commission thinks the requirement sound, and one which yields results of great benefit to the trade and to consumers, it is its obligation, regardless of its choice of economic philosophies, to enforce it.

Where a corporation which (1) was engaged in the manufacture and interstate sale and distribution of automatic temperature controls for domestic oil burners of the gun and rotary type, sold usually in sets of three units consisting of the primary control—essential element in every oil burner installation of said type—limit control, and a room thermostat; (2) since its organization in 1927, as a result of a combination of two prior companies, made and sold the greater part of all such controls used in the United States, and in 1939, 1940, and 1941 sold about 60 percent of the total number sold annually to manufacturers of oil burners, and to wholesalers, contractors, and dealers in such burners and in such controls; (3) from 1936 to 1941 entered into annual contracts with more than 50 percent of all the manufacturers of oil burners within the United States for the purchase of sets or units of such automatic temperature controls; (4) owned and controlled many of the patents relating to primary controls, and sold its controls in competition with the products of competitors, many of which were interchangeable with its own said products; and (5) had developed a large customer demand for and public acceptance of its said products through extensive advertising, including the expenditure in national advertising of nearly \$4,000,000 since its formation in 1927, and was thereby enabled at all times to sell the same at prices higher than those charged by its competitors, and manufacturers of oil burners in many instances charged from \$2.50 to \$5 more for burners equipped with its automatic controls than for the same burners equipped with those of its competitors;

In entering into written agreements with its customer manufacturers of domestic oil burners for the purchase of controls in sets (consisting of a thermostat, a limit control, and a primary control) at a combination price per set, customarily prepared on a calendar-year basis and submitted in December for the following year—

- (a) Included provisions which required the purchaser to purchase at least 90 percent as many room thermostats and 100 percent as many limit controls as primary controls, and thereby in effect contracted for the sale of goods on the condition and with the agreement and understanding, that such oil burner manufacturers should not use or deal in automatic temperature controls of its competitors;

With tendency to induce a substantial number of manufacturers of such burners to purchase from it all or substantially all of their requirements of thermostats and limit controls, used with its primary controls; and with result that its competitors were prevented from selling thermostats and limit controls in substantial quantities to such customers purchasing primary controls from it; and there was a tendency to deprive purchasers and the general public of the benefit of free and active competition in the manufacture and sale of such products; said provisions operated, through use of the primary control as a gauge for determining the number of sets a customer would

agree to purchase, to preclude the sale of limit controls by competitors to such manufacturers under contract with it, at least to the extent of the number of primary controls purchased by them, and confined the sale of thermostats by competitors to its contract customers to one tenth of the quantity of primary controls which they purchased from it; and

Effects of which contracts, by reason of its dominant position in the sale and distribution of such controls, and the number of contracts negotiated by it, were substantially to lessen competition and tend to create a monopoly in it of automatic temperature controls;

Held, That such acts and practices constituted unfair methods of competition in commerce, within the intent and meaning of section 5 of the Federal Trade Commission Act, and a violation of the provisions of section 3 of the Clayton Act; and

Where said corporation, (1) owner of the Freeman patent No. 1,813,732 covering systems of hot air furnace control, in which, upon rise in the temperature of a furnace or like heating device, the source of heat was reduced or shut down but the blower or other circulating means was permitted to operate and, upon fall of temperature, said blower or device was stopped but the source of heat permitted to heat the furnace or other heating device; and (2) exclusive licensee of the Cross patent No. 1,758,146, which was a combination or system patent composed of three main elements; namely, a motor-driven stoker, a room thermostat, and a combustion stoker switch—

(b) Granted, under threat of infringement suit if necessary, license to certain of its competitors under said Freeman patent, to make, use and sell a combination furnace control (defined as a thermostatic switch specially designed for carrying out the system of said patent to control the fan and limit circuits), use of which carried with it a license for one installation employing the sequence of operation of said patent; provided that a royalty of 25 cents be paid on each said control sold by the licensee; required that the licensee maintain certain specified minimum selling prices for the combination furnace controls sold; and granted said license on the express condition that the licensee would sell said controls only at prices and on terms not more favorable to the customer than those fixed by it for its own products embodying the invention covered by said license agreement; and

(c) Granted a license to the purchaser of its combination stoker switch (an unpatented article necessary for installations under the Cross patent system, which was among the controls made and sold by it) to install the Cross system of furnace control, which it did not itself manufacture or install, and thereby precluded the use of combination stoker switches as an element in the assembly covered by said Cross patent unless such switches were made by it and purchased from it or from its sublicensees;

With tendency and capacity, through said acts, whereby competition in the sale of unpatented combustion stoker switches and "combination furnace controls" was sought to be controlled through an extension of the patents to embrace unpatented devices, as held in the *Mercoid* Supreme Court cases, to restrain, restrict, and lessen competition in the manufacture and sale of controls in heating systems employing the Cross or Freeman combination of controls:

Held, That its said acts and practices—in attempting to require users of the furnace-control system under the Cross patent to purchase automatic stoker

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switches for use in said system only from it, and to exclude competitors from supplying combination furnace controls for use in systems covered by the Freeman patent unless such competitors held a sublicense from it, paid it a royalty on each combination furnace control sold, and maintained prices for such controls established by it—had a tendency and capacity to restrain, restrict, and lessen competition in the manufacture and sale of controls in heating systems employing the Cross and Freeman combination of controls, and constituted unfair methods of competition in commerce; and,

Where said corporation, in the course and conduct of its business since June 19, 1936, in connection with the sale and distribution of its automatic temperature controls—

- (d) Discriminated in price between different purchasers buying its automatic temperature controls by selling the same to some at lower prices than it sold controls of like grade and quality to others competitively engaged therewith, in that the differences in price per set, as based upon the annual volumes of sets purchased or agreed to be purchased by an oil-burner manufacturer, and the schedules of quantity brackets set up by it and the prices assigned thereto, were not shown, as respects the three larger brackets, to be justified by reason of differences in the cost of manufacture, sale, or delivery resulting from different methods or quantities in which the controls were sold or delivered to its various oil burner manufacturer customers; nor, as respects some of the total number of accounts thus favored, as justified by prices made to meet competition;

With the result that oil-burner manufacturers who received the benefit of the various discriminatory prices, discounts, or rebates granted by it had a substantial advantage in selling oil burners equipped with its controls, in competition with purchasers who did not receive such benefits and were obliged to pay its higher cost bracket price, and who were compelled either to sell at competitive prices and so reduce their possible profits by the amounts of discriminations against them, or to attempt to sell at higher prices than the favored customers charged, with resulting inability to secure business and a reduction in the volume of their sales; customers who paid a higher price under said method of selling were discriminated against with respect to customers who paid a lower price, and latter were correspondingly favored as against the others; and with capacity and tendency to induce the purchase of its controls by oil burner manufacturers, and with effect of diverting trade to it from its competitors, to the substantial injury of competition in the sale and distribution of such controls in commerce;

- (e) Discriminated also in price through "off-scale sales" to various customers in that such sales were made to a customer at a bracket price lower than he was entitled to by reason of the quantity purchased by him, and discriminated thereby in his favor as against other customers who were paying a higher price, including those who were in fact purchasing as many controls as such off-scale customer, but who were not granted the same differentials, which were not shown as justified by differences in cost due to differences in cost of manufacture, sale, or delivery resulting from the differing quantities in which said controls were sold or delivered to such off-scale purchasers, or as justified to meet specific competition; and
- (f) Further discriminated in price through so-called dual transactions in which it allowed an oil-burner manufacturer to count for bracket price purposes,

in addition to his own purchases, automatic temperature controls purchased by his furnace-manufacturer customer, to whom he had supplied the oil burner without controls, and thereby received the benefit of a lower price bracket to which, on the basis of his own purchases alone, he was not entitled, and which was not justified by cost study referred to:

Held, That such discriminations in price, as above set forth, constituted violations of subsection (a) of section 2 of an act of Congress approved October 15, 1914, as amended by an act approved June 19, 1936.

In a proceeding in which the complaint charged, among other things, that respondent—which, during the period concerned, made and sold about 60 percent of the total number of automatic temperature controls used in connection with oil burners of the pressure and rotary types for domestic heating plants—in selling its controls in sets of three units consisting of a thermostat, a limit control, and a primary control, entered into annual contracts with manufacturers of oil burners or furnaces which provided in part that the purchaser would buy at least 90 percent as many room thermostats and 100 percent as many limit controls as primary controls, or which contained substantially similar provisions, and in some cases contained provisions which required its customers to buy its controls exclusively or which limited the extent to which they might buy controls from its competitors; and in which proceeding the evidence disclosed that a number of contracts entered into by it with its manufacturer customers near the end of 1936, for 1937 business, required such customers to purchase at least 95 percent of their control requirements from it, but in which it further appeared that said contracts, on advice of counsel, were amended on January 28, 1937, by deleting said provision, and its customers advised that they were not bound thereby; that the provision never had any substantial effect and was not repeated, and that it was abandoned by said respondent in recognition of its illegality and there was no reason to believe that it would be resumed: the order accordingly included no prohibition with respect thereto.

In said proceeding in which respondent manufacturer conceded that the provision of its contracts requiring customers to purchase from it as many limit controls as primary controls, was improper, but contended that it should not be prohibited from requiring its customers to purchase from it 90 percent as many thermostats as primary controls in order to require the use of its thermostats exclusively with its primary controls, for the reason that its said products differed from those of its competitors in certain scientifically important respects and were designed to operate together, and that it was inefficient and dangerous to use its primary controls in the same installation with thermostats of other makes; but in which it was stipulated, among other things, that thermostats and limit controls of the proper type made and sold by a number of competitors of respondent manufacturer could be and were satisfactorily and safely used by manufacturers of oil burners, furnace manufacturers, and contractors, interchangeably for thermostats and controls of the same type as respondent's, on installations where respondent's primary controls were used—said provision being also supported by evidence appearing elsewhere in the record:

The Commission was of the opinion that oil-burner manufacturers should be left free to judge for themselves in an atmosphere of competition whether

or not thermostats of one manufacturer would work with the primary controls of another (*Thompson Manufacturing Co. v. Federal Trade Commission*, 150 F. (2d) 952; *United Shoe Machinery Corp. v. U. S.*, 258 U. S. 451; and *International Business Machines Corp. v. U. S.*, 298 U. S. 131); and that, since the use of proper type thermostats and primary controls of different makes in the same installation was safe, it must leave for local regulation any problem of hazardous conditions which might result from the improper mixing of controls.

As respects the fact that the annual contracts with oil-burner manufacturers contained a blank space intended for the insertion of the number of sets of controls which the manufacturer agreed to buy from the respondent during the life of the contract, and which, in some of the 1937 and 1938 contracts, carried the words "season's requirements" or "estimated requirements" in lieu of specific number; and the argument, on the one hand, that such language committed the oil-burner manufacturer to purchase all of its automatic control requirements during the life of the contract, from the respondent, and, on the other, that it committed the oil-burner manufacturer to purchase from respondent only that number of respondent's controls which the customer might need during the season and did not limit the right of the customer to purchase controls from others; and the fact that it further appeared that respondent apparently recognized the questionable nature of such language and discontinued its use; it did not seem necessary to include in the order any specific prohibition with respect to the point.

In said proceeding in which said respondent was charged with misuse of two system patents; namely, the Freeman patent and the Cross patent, in that under the former it authorized the use of the furnace-control system covered thereby on the condition, agreement, or understanding that only automatic stoker switches made or sold by it should be used in such combination, and in that under the latter it authorized the use of the furnace-control system covered by said latter patent on the condition, agreement, or understanding that the combination furnace control or any other control used in such system be sold at the price established by it, and thus through its use of system patents undertook to require the purchase from it of any unpatented control used in said systems, and required the maintenance of prices established by it for an unpatented control; and in which, following two Supreme Court decisions, as a result of private litigation, which held unlawful such practices (i. e., *Mercoird Corp. v. Mid-Continent Investment Co. and Minneapolis-Honeywell Regulator Co.*, 320 U. S. 661, and *Mercoird Corp. v. Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680) respondent urged without contradiction that it promptly terminated all of its agreements of every kind involving the two patents, and that all of the practices condemned by the Supreme Court had been eliminated by it and were not then being carried on in any way: the allegations of the complaint with respect to such practices were sustained by the record, and the practices were accordingly prohibited by the order. Such unfair practices, as involved in the misuse of the patents, while redressable in the courts by private litigants, also substantially affected the public, and the scope and effect of the decisions of the Supreme Court, which, as aforesaid, were in private litigation, may not easily be appraised as respects the correction of such practices insofar as they may affect parties not involved in said proceedings. To the extent that there is no intention to

resume the practices, or insofar as they are restrained by the decisions of the courts, the prohibitions of the order with respect thereto constitute no burden or penalty on respondent. To the extent, however, that the practices may be resumed in a form which will not be reached by the decision of the court, the prohibitions of the order afford a measure of protection and assurance to the public which could otherwise be obtained only by instituting a new proceeding when warranted by future developments, with its consequent delays and costs.

With respect to competitive effects involved, the trial examiner was in error in concluding that the price discriminations given by the respondent had not tended to substantially lessen, injure, prevent, or destroy competition between respondent's customers, and said conclusion was not supported by the greater weight of the evidence in the record. The great majority of automatic temperature controls for domestic oil burners sold by the respondent were purchased by oil-burner manufacturers. Since a set of temperature controls represents the largest single item of cost among the various parts of a finished oil burner, changes in the price of controls to oil-burner manufacturers resulted in many instances in corresponding changes in the price of completed oil burners and necessarily affected sales and profits. Furthermore, oil-burner manufacturers testified that the question of price was important in the purchase of automatic temperature controls and that they had lost business to competitors, including a certain one who enjoyed lower control prices from respondent, although the exact volume of such lost business could not be calculated.

In said proceeding in which the differentials made available through seven quantity brackets based on annual purchases made or contracted for, were challenged as unlawfully discriminatory, and in which respondent submitted a study of costs prepared by a recognized accounting firm, and also a supplemental study, the Commission found, based upon such cost studies and the testimony in connection therewith, that the quantity prices included in the first four brackets made due allowance for differences in cost of manufacture, sale, or delivery resulting from the differing quantities in which respondent's automatic temperature controls were sold or delivered to purchasers, but that respondent's price differences based upon quantity purchases under its other three, or top, price brackets were not shown as thus justified.

In reaching its decision with respect to certain price differentials to manufacturers based upon annual quantity purchases graduated according to seven brackets, with each bracket progressively based on a larger quantity and reflecting a lower price, and challenged as unlawfully discriminatory under section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act, that the price differentials based on the first four brackets had been justified by certain cost studies submitted by the respondent, but that the price differentials based on the last three brackets had not been justified by cost differences, the Commission recognized certain practical difficulties in the case and gave effect to certain general considerations. Thus in the instant case the study in question was made by an independent firm of accountants and auditors, and was apparently made with considerable care and great particularity of detail, and, although basic questions might properly be raised with respect to the soundness of certain of the procedures and allocations upon which the cost differentials were determined, respondent's effort repre-

sented a fair and objective study of the problem which was probably done as well as it could be done under the circumstances. Accordingly, the Commission accepted the results of the cost study as fairly reflecting respondent's cost differentials within a reasonable margin of error.

As regards the fact that the three upper quantity brackets in respondent's schedule of seven quantity brackets based on annual purchases, were not justified by the cost study submitted by respondent and accepted by the Commission for the purposes of the case, and respondent's contention that the price differentials in question were based on meeting in good faith the lower prices of competitors—urging in that connection that the competition for the business of the manufacturers who purchased in small volume and paid the higher prices was not as severe as it was for that of those who purchased in larger volume, as to which there was the keenest competition throughout the period covered by the case so that it had to reduce its prices to customers in the three lowest price brackets in order to keep its share of their business—it appeared that competitors were offering lower prices to comparable accounts; no instance was shown in which respondent actually undercut competitors' prices; and that its prices in the three lowest price brackets did not represent price brackets made in particular instances to meet competitors' prices, but reflected progressive reductions in a comprehensive price schedule based on increased quantity purchases; constituted prices probably established to obtain the business of the larger oil-burner and furnace manufacturers, which they were largely effective in doing; represented no sharp departure from its general pricing policy; were established with knowledge of the price levels of its competitors and undoubtedly influenced thereby; and reflected the higher premium prices over its competitors' which respondent was able to secure by reason of the large customer demand for and public acceptance of its controls: the Commission was of the opinion that with these brackets, as in the case of its defense of off-scale prices with the other lower quantity brackets, respondent had not met the good faith requirements of section 2 (b) of the act.

As respects respondent's contention that its discriminatory prices based on annual quantity brackets, with their inherent adverse competitive tendency, had not resulted in injury to competition, competitive effects of said discriminatory prices on other manufacturers of controls were persuasively indicated by respondent's own argument that said prices were made to meet competition. Said argument showed that said prices were made to retain the business of certain customers or to secure the business of others, and that they were largely successful in doing so; and it was clear from the record that competition was adversely affected to a substantial extent, and that business was held by or diverted to respondent from its competitors by said discriminatory prices and unfair practices.

As respects the contention, with regard to adverse effect on competition among respondent's customers as a result of its discriminatory prices, that the prices of oil burners vary as much as \$60 per burner among the various manufacturers, that frequently the highest prices are charged by manufacturers who paid respondent's lowest prices for controls, that oil-burner manufacturers also purchase other parts such as motors, pumps, etc., which are subject likewise to volume discount, and that, accordingly, effect on competition among such manufacturers cannot be traced with certainty; the fact that

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the whole competitive effect cannot be traced to respondent does not relieve it of its share of responsibility, which appears to have been real and substantial, the record showing that automatic controls are the most important single item of cost of any of the components involved in the manufacture of oil burners.

Likewise, in said connection, the argument cannot prevail that other controls were available to oil burner manufacturers at lower prices, since it appeared that there was substantial demand for respondent's controls, and that, in order to be competitive, manufacturers of furnaces and oil burners had to be able to supply them.

Before *Mr. W. W. Sheppard*, trial examiner.

Mr. Everett F. Haycraft and *Mr. Lewis F. Depro* for the Commission.

Cravath, Swaine & Moore, of New York City and Washington, D. C., and *Bair & Freeman*, of Chicago, Ill., for respondent.

COMPLAINT

COUNT I

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said act, the Federal Trade Commission having reason to believe that Minneapolis-Honeywell Regulator Co., hereinafter referred to as respondent, has violated the provisions of section 5 of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Minneapolis-Honeywell Regulator Co., is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its general office and principal place of business at 2747 Fourth Avenue, South, in the city of Minneapolis, State of Minnesota. It is now and for more than 3 years last past has been engaged in the manufacture of automatic temperature controls for oil-, gas-, and coal-heating plants and industrial operations and in the sale thereof principally to oil-burner manufacturers and also to jobbers, wholesalers, and dealers in oil-burner equipment located throughout the several States of the United States, the territories thereof, and in the District of Columbia, causing said products, when sold, to be transported from the places of manufacture in the States of Minnesota, Indiana, Pennsylvania, and through distribution points in other States of the United States, to the purchasers thereof located in States other than the States of manufacture. There is now, and has

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been for more than 3 years last past, a constant current of trade and commerce in said products between and among the various States of the United States, the territories thereof and in the District of Columbia.

The said respondent is the principal manufacturer of automatic temperature controls in the United States, the total volume of sales of said products by the said respondent, annually, during the past 3 years, constituting more than 60 percent of the total number of automatic temperature controls sold annually in the United States to burner manufacturers for domestic heating plants and to contractors and dealers in domestic automatic heating equipment. The respondent in the sale of automatic temperature controls as aforesaid, has entered into and now has in effect annual contracts or agreements with manufacturers of oil burners for domestic heating plants for a number of sets and units of automatic temperature controls equal to approximately the manufacturers' annual requirements of such products, and the number of oil burner manufacturers having such contracts with said respondent has constituted for more than 3 years last past, and now constitutes a majority of all the manufacturers of oil burners for domestic plants within the United States.

In the course and conduct of its said business as herein described, respondent has been for more than 3 years last past and now is in substantial competition in the sale of automatic temperature controls in commerce between and among the various States of the United States, the territories, thereof, and in the District of Columbia, with approximately six other corporations, persons, firms, and partnerships.

PAR. 2. In the automatic operation of a domestic oil burner, three types of controls are required and used and are usually, but not necessarily sold in sets consisting of (1) a thermostat which is placed in the room or space to be heated, (2) a limit control which is a device placed on the heating plant to control the temperature or pressure in the heating plant, such as aerostat for hot air heating plants, aquastat for hot water heating plants and vaporstat for vapor heating plants, and (3) a primary control which controls the cycle of operation of the automatic burner so as to prevent an explosion, such as a protectorelay. Some domestic oil-burner manufacturers, in addition, equip their domestic oil burners with a fan control, the fan being operated as an extra limit control. Many domestic oil burner manufacturers, particularly those who also manufacture furnaces, purchase several thermostats and primary controls, using them as zone controls in the heating of large spaces.

The primary control sometimes referred to as a combustion control, a master control, or a safety control is an essential element in every domestic oil burner installation. The respondent owns or controls most of the existing patents on said primary controls (protectorelay) but there are many thermostats and limit controls being manufactured and sold by said competitors of respondent which could be and are satisfactorily and safely used by oil burner manufacturers, furnace manufacturers, and contractors interchangeably with the thermostats and limit controls manufactured and sold by the respondent.

PAR. 3. Respondent in the course and conduct of its said business as hereinbefore described in the year 1936 and prior thereto entered into, or attempted to enter into, written agreements with all its domestic oil burner manufacturer customers under the terms of which the purchaser is obligated to purchase his requirements of automatic temperature controls from the respondent, said controls to be purchased in sets consisting of one thermostat, one limit control and one primary control at a combination price per set. Said agreements contained the following provisions:

It is specifically agreed that other control equipment is not to be considered as part of a set within the terms of this contract because the Company's costs are figured to cover a complete set of controls and the following break-down prices are purely for enforcing purposes. It is agreed that the purchasers' yearly purchases will consist of at least 90% as many thermostats and 100% (but at the company's option not more than 125%) as many limit controls as primary controls. * * * The purchaser agrees that at least 95% of his control requirements consisting of thermostats, primary controls and limiting devices will be purchased from the company.

Beginning in January 1937, the respondent discontinued the foregoing provision with respect to the 95 percent of the customer's control requirements in its contracts with its domestic oil-burner manufacturer customers, and since that time has not entered into contracts with its domestic oil burner manufacturer customers containing said provision.

The respondent in the year 1939 and in subsequent years in all such agreements with its domestic oil-burner manufacturer customers has included similar set prices with the following provision:

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract * * * sets or more of the Company's automatic temperature controls. Because the Company's thermostats and primary controls are specifically designed to operate one with the other, it is unsatisfactory and often dangerous to mix controls made by different manufacturers in the same installation, and the Company

responsibility if its controls are used with other makes. It is, therefore, further agreed that each set shall consist of but one Thermostat, one Primary Control, and one Limit Control, and that the Purchaser will buy at least 90% as many Room Thermostats and 100% as many Limit Controls as Primary Controls at the following prices.

PAR. 4. As a result of the acts and practices of the respondent set forth in paragraph 3 herein for more than 3 years last past a substantial number of oil-burner manufacturers for domestic heating plants have been induced to purchase either their entire requirements or a majority of their requirements of automatic temperature controls from the respondent, and competitors of the respondent have been prevented from selling their thermostats and limit controls in substantial quantities to the oil-burner manufacturers for domestic heating plants purchasing primary controls from the respondent.

PAR. 5. Respondent in the course and conduct of its said business has for more than 3 years last past adopted or pursued the policy or practice of granting or attempting to grant, under threat of infringement suit, a nonexclusive license to certain of its competitors under license agreements to manufacture and sell a combination furnace-control system wherein the limit control, a fan control, and a thermostat, neither covered by patent, are operated together under a system patent covering furnace control issued to one Edward E. Freeman and known as the Freeman patent, owned and controlled by said respondent. In consideration for the granting of said license the respondent exacted and received royalties from licensees of 50 cents per unit manufactured under said license. In said license agreement the license is granted on the express condition that the prices, terms, and conditions of sale of combination furnace controls made in accordance with the terms of the agreement shall not be more favorable to the customer than those fixed from time to time by the licensor for its own products embodying the invention covered by the agreement, and that the licensee will sell said controls only at prices and on terms not more favorable to the customer than those set forth in a price schedule issued from time to time by the licensor. Said price schedule attached to and made a part of said agreement contains net minimum prices to be observed by the manufacturers for a combination furnace control and also those to be observed by jobbers and wholesalers as well as retail dealers.

Respondent for more than three years last past has sold a combination furnace and fan control embodying the said Freeman patent and in connection therewith it manufactures the fan switch but not the fan and manufactures the limit switch and the thermostat. The

sales of said combination furnace and fan control by the respondent have substantially increased beginning with the year 1939 when said respondent began to issue licenses to its said competitors as aforesaid.

PAR. 6. Respondent in the course and conduct of its said business manufactures and sells combustion stoker switches to furnace manufacturers throughout the United States and said respondent has followed the policy of selling said combustion stoker switches to its said customers under so-called exclusive license agreements whereby the said customers are granted licenses to use and sell said combustion stoker switches in combination with other devices under a domestic heating system of maintaining stoker fire which includes stoker switches and which is manufactured under a system patent of which the said respondent was an exclusive licensee, when as a matter of fact respondent well knew that the said patent did not cover or include the said stoker combustion switch.

PAR. 7. The acts and practices of the respondent as herein alleged are all to the prejudice of competitors of respondent and of the public; have a dangerous tendency to and have actually hindered or prevented competition in the sale of automatic temperature controls for use in domestic heating plants in commerce within the intent and meaning of the Federal Trade Commission Act; have unreasonably restrained such commerce in automatic temperature controls for use in domestic heating plants; have a dangerous tendency to create in respondents a monopoly in the sale of said products; and constitute unfair methods of competition in commerce within the intent and meaning of section 5 of the Federal Trade Commission Act.

COUNT II

The Federal Trade Commission having reason to believe that Minneapolis-Honeywell Regulator Co., a corporation, hereinafter called respondent, has violated and is now violating the provisions of section 3 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 (the Clayton Act), as amended by the Robinson-Patman Act (U. S. C. title 15, sec. 13), hereby issues its complaint against said respondent and states its charges with respect thereto as follows, to wit:

PARAGRAPH 1. For its charges under this paragraph of this count said Commission relies upon the matters and things set out in paragraph 1 of count I of this complaint to the same extent and as though the allegations of said paragraph of said count I were set out in full

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herein, and said paragraph 1 of said count I is, therefore, incorporated herein by reference and made a part of the allegations of this count.

PAR. 2. For its charges under this paragraph of this count said Commission relies upon the matters and things set out in paragraph 2 of count I of this complaint to the same extent and as though the allegations of said paragraph of said count I were set out in full herein, and said paragraph 2 of said count I is, therefore, incorporated herein by reference and made a part of the allegations of this count.

PAR. 3. For its charges under this paragraph of this count said Commission relies upon the matters and things set out in paragraph 3 of count I of this complaint to the same extent and as though the allegations of said paragraph of said count I were set out in full herein, and said paragraph 3 of count I is, therefore, incorporated herein by reference and made a part of the allegations of this count.

PAR. 4. For its charges under this paragraph of this count said Commission relies upon the matters and things set out in paragraph 4 of count I of this complaint to the same extent and as though the allegations of said paragraph 4 of count I were set out in full herein, and said paragraph 4 of said count I is therefore incorporated herein by reference and made a part of the allegations of this count.

PAR. 5. In the course and conduct of its said business described in paragraphs 1, 2, 3, and 4 of count I of this complaint respondent, in the course of commerce between and among the various States of the United States and the District of Columbia as described in said paragraphs 1 and 2 of said count I of this complaint, for more than 3 years last past or thereabouts, has made sales and contracts for the sale of automatic temperature controls for heating plants on the condition, agreement or understanding that the purchasers thereof should not deal in or use any automatic temperature control for heating plants of a competitor or competitors of said respondent. The effect of said sales and contracts for sale and of such condition, agreement or understanding have been or may be to substantially lessen competition or tend to create a monopoly in a line of commerce, namely, the interstate sale and distribution of automatic temperature controls for heating plants.

PAR. 6. The aforesaid acts of respondent, Minneapolis-Honeywell Regulator Co., constituted a violation of the provisions of section 3 of the hereinabove mentioned acts 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).

The Federal Trade Commission having reason to believe that Minneapolis-Honeywell Regulator Co., a corporation, hereinafter called respondent, has violated and is now violating the provisions of section 2 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 (the Clayton Act), as amended by the Robinson-Patman Act (U. S. C. title 15, sec. 13), hereby issues this its complaint against said respondent and states its charges with respect thereto as follows, to wit:

PARAGRAPH 1. For its charges under this paragraph of this count said Commission relies upon the matters and things set out in paragraph 1 of count I of this complaint to the same extent and as though the allegations of said paragraph of said count I were set out in full herein, and said paragraph 1 of said count I is therefore incorporated herein by reference and made a part of the allegations of this count.

PAR. 2. For its charges under this paragraph of this count said Commission relies upon the matters and things set out in paragraph 2 of count I of this complaint to the same extent and as though the allegations of said paragraph of said count I were set out in full herein, and said paragraph 2 of said count I is therefore incorporated herein by reference and made a part of the allegations of this count.

PAR. 3. In the course and conduct of its said business described in paragraph 1 and 2 of count I of this complaint respondent, Minneapolis-Honeywell Regulator Co., has been for more than 3 years last past and is now discriminating in price between different purchasers buying automatic temperature controls for heating plants of like grade and quality by selling its said products to some of its customers at lower prices than its sells said products of like grade and quality to other of its customers, many of whom are competitively engaged one with another in the resale of said products within the United States. The respondent during said period of time has engaged in the following discriminatory practices and methods of determining the prices at which it sells its said products to its said customers:

(1) Respondent has classified its customers as follows: (a) Oil burner manufacturers, (b) oil burner jobbers, (c) oil burner wholesalers—class A, (d) oil burner wholesalers—class B, and (e) dealers.

(2) Respondent publishes list prices for its said products, with discounts regularly and usually allowed to each respective class of trade, said discounts varying from 25 up to 45 percent, depending upon the product and the service rendered; that is, whether its customer

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is a dealer, jobber, or wholesaler. Oil-burner manufacturers who purchase approximately 95 percent of respondents temperature controls for oil business are usually granted the maximum trade discount or approximately 45 percent from the list price when buying in minimum quantities.

(3) Respondent sells its said products, particularly thermostats, limit controls and primary controls in units and in sets to manufacturers of oil burners under contracts providing for annual discount arrangements, including seven separate and distinct price brackets, with net prices fixed in proportion to the quantity requirements of the customer under the contract.

(4) Respondent sells its said contract customer buying up to 50 sets annually at a base price which has varied from time to time, but which is approximately 45 percent less than the list price in effect, and such customers buying in annual quantities in excess of 50 sets are sold at varying discriminatory prices applicable to the different quantity brackets in effect, the most-favored customers being sold at discriminatory prices ranging respectively from approximately 45 percent less than the base price in 1938, to approximately 30 percent less than the base price in 1940.

PAR. 4. The effect of the said discriminations in price mentioned in paragraph 2 and 3 hereof has been or may be substantially to lessen competition in the line of commerce in which respondent is engaged and to injure, destroy, and prevent competition between the respondent and its competitors, and to injure, destroy, and prevent competition between the customers of said respondent in the sale and distribution of automatic temperature controls for heating plants, and has been and may be to tend to create a monopoly in said line of commerce in the various localities or trade areas in the United States in which said respondent and its competitors are engaged in the sale and distribution of said products.

PAR. 5. The foregoing acts and practices of respondent are violations of subsection 2 (a) of section 1 of the said act of Congress approved June 19, 1936, entitled "An Act to amend Section 2 of an 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."

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, and pursuant to the provisions of an act of Congress entitled "An Act

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to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by an act of Congress approved June 19, 1936 (Robinson-Patman Act), and by virtue of the authority vested in the Federal Trade Commission by the aforesaid acts, the Federal Trade Commission on February 23, 1943, issued and subsequently served its complaint in this proceeding upon the respondent, Minneapolis-Honeywell Regulator Co., charging it with the use of unfair methods of competition in commerce in violation of the provisions of the Federal Trade Commission Act and also charging it with violation of the provisions of subsection (a) of sections 2 and 3 of said act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes." After the issuance of said complaint and the filing of respondent's answer thereto, testimony, and other evidence in support of and in opposition to the allegations of said complaint were introduced before a trial examiner of the Commission theretofore duly designated by it, 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 said complaint and answer thereto, testimony, and other evidence, report of the trial examiner upon the evidence and exceptions filed thereto, briefs filed in support of and in opposition to the complaint, and oral argument of counsel; 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, Minneapolis-Honeywell Regulator Co., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its general office and principal place of business at 2747 Fourth Avenue, South, in the city of Minneapolis, State of Minnesota. Respondent is now, and for several years last past has been, engaged in the manufacture of automatic controls for oil-, gas-, and coal-heating plants and certain industrial operations and in the sale of automatic temperature controls for oil burners, principally to oil-burner manufacturers and also to wholesalers and dealers in oil burners and automatic temperature controls located in the various States of the United States, the Territories thereof, and in the District of Columbia. Respondent causes its automatic temperature controls, when sold, to be transported from the

places of manufacture in the States of Minnesota and Indiana and through distribution points in certain other States of the United States to the purchasers thereof located in States other than the States of Minnesota and Indiana or other points of origin of said shipments. Respondent maintains, and during all times mentioned herein has maintained, a course of trade in commerce in said products between and among the various States of the United States, the Territories thereof, and in the District of Columbia.

PAR. 2. In the course and conduct of its aforesaid business, the respondent has been, and is now, engaged in active and substantial competition with other manufacturers and sellers engaged in the sale and distribution of automatic temperature controls in commerce between and among the various States of the United States, the Territories thereof, and in the District of Columbia.

PAR. 3. The respondent, Minneapolis-Honeywell Regulator Co., was organized in 1927 as a result of the combination of the Minneapolis Heat Regulator Co. of Minneapolis and the Honeywell Heating Specialties Co. of Wabash, Ind. Since that time, said respondent has manufactured and sold the greater part of the automatic temperature controls used in the United States. The total volume of sales of said products by the respondent annually during the years 1939, 1940, and 1941 constituted approximately 60 percent of the total number of automatic temperature controls sold annually in the United States to manufacturers of oil burners and to wholesalers, contractors, and dealers in oil burners and automatic temperature controls.

Respondent, in the sale of its automatic temperature controls during the years 1936 to 1941, inclusive, entered into annual contracts or agreements with manufacturers of oil burners for the purchase of sets or units of automatic temperature controls. The number of manufacturers of oil burners having such contracts with said respondent during said years constituted more than 50 percent of all the manufacturers of oil burners within the United States.

PAR. 4. "Automatic temperature controls" as the term is used in this proceeding means automatic temperature controls for domestic oil burners of the gun and rotary types. The automatic temperature controls used on domestic oil burners are usually, but not necessarily, sold in sets of three units each, comprising a room thermostat, a limit control, and a primary control. Some manufacturers of domestic oil burners also use an extra limit control, referred to as a fan control, and many manufacturers, particularly those who also produce furnaces, use several thermostats and primary controls as zone controls for the heating of large spaces.

The primary control, sometimes referred to as a stack switch, combustion control, master control, or safety control, is an essential element in every oil-burner installation of the gun or rotary type. Respondent owns and controls many of the existing patents relating to primary controls. There are many thermostats and limit controls being manufactured and sold by competitors of respondent which could be, and are satisfactorily and safely used interchangeably with thermostats and limit controls of the respondent. The primary control sold by the respondent is sold under the trade name of "Protectorelay." The limit controls of the respondent are known as the "Airstat" for warm-air heating plants, "Aqua-stat" for hot-water heating plants, and "Pressuretrol" or "Vaporstat" for steam and vapor heating plants.

PAR. 5. The respondent has developed and established a definite public acceptance for its automatic temperature controls through and by use of extensive advertising of its controls and since the formation of the respondent corporation in 1927, through 1941, respondent has spent on national advertising the sum of \$3,948,000. As a result of such advertising there has been developed a large customer demand for, and public acceptance of, respondent's line of automatic temperature controls, with the result that the respondent has been able at all times to sell its automatic temperature controls at prices higher than those charged by its competitors. In many instances manufacturers of oil burners have charged from \$2.50 to \$5 more for such burners equipped with respondent's automatic controls than for the same burners equipped with controls of respondent's competitors.

PAR. 6. The principal competitors of the respondent are the Penn-Electric Switch Co. of Goshen, Ind., Mercoid Corp. of Chicago, Ill., and the Perfex Corp. of Milwaukee, Wis., all of whom manufacture and sell the three types of temperature controls, usually in sets. In addition, there are other competitors of the respondent who manufacture controls other than the primary control. All of said competitors of respondent manufacture controls for use on oil burners, some of which controls made by each are comparable to controls made by respondent and other companies.

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PAR. 7. During the years from 1936 to 1941, the respondent, in the course of its said business, entered or attempted to enter into written agreements with all of its customers manufacturing domestic oil burners to purchase controls from respondent, such controls to be purchased in sets consisting of a thermostat, a limit control, and a primary

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control at a combination price per set. It was customary for the respondent to prepare these agreements on a calendar-year basis. The agreements were usually prepared and submitted in the month of December for the following year. These agreements were prepared either by the home office at Minneapolis or by one of its several branch offices, subject to the approval of the home office. Contracts entered into between the respondent and its customers for the years 1936 and 1937 contained, among other things, the following provisions:

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract ----- sets of the Company's automatic temperature controls, each set consisting of one Thermostat, and one Limit Control, and one Primary Control. It is specifically agreed that other control equipment is not to be considered as a part of a set within the terms of this contract. Because the Company's costs are figured to cover a complete set of controls, and the following break-down prices are purely for invoicing purposes, it is agreed that the Purchaser's yearly purchases will consist of at least 90% as many Room Thermostats and 100% (but at the Company's option not more than 125%) as many Limit Controls as Primary Controls.

In one instance, in a contract for the year 1936, the following additional agreement was inserted:

In view of the special prices listed in this agreement, it is understood that the Purchaser will standardize on and use the Company's products exclusively, except for field test or when other makes are specified by dealer.

In seven of its contracts or agreements for the year 1937, the respondent inserted in the blank space between the word "contract" and "sets," the words "season requirements," "estimated requirements," or a similar phrase. In addition, in 79 of the 165 contracts executed for the year 1937, the respondent inserted the additional proviso:

The Purchaser agrees that at least ninety-five (95) percent of his control requirements, consisting of Thermostats, Primary Controls and Limiting Devices, will be purchased from the Company.

The respondent, on January 28, 1937, sent a letter to all the customers with whom contracts had been made containing the above provision, notifying them that said provision should be eliminated and stricken from the contract, and as a result this provision never became operative during said year.

In the year 1938 the respondent entered into agreements with 131 oil-burner manufacturer-customers which included the following provision:

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract ----- sets of the Company's automatic temperature controls, each set consisting of one THERMOSTAT, and one LIMIT CONTROL, and one PRIMARY CONTROL.

It is specifically agreed that other control equipment is not to be considered as a part of a set within the terms of this contract. Because the Company's costs are figured to cover a complete set of controls, and the following breakdown prices are purely for invoicing purposes, it is agreed that the Purchaser's yearly purchases will consist of at least 90% as many Room Thermostats and 100% (but at the Company's option not more than 125%) as many Limit Controls as Primary Controls.

In the blank space between the words "contract" and "sets" the number of sets or estimated number of sets was usually inserted but in the case of contracts with 12 of its customers the words "season requirements," "estimated requirements," or a similar phrase was inserted. Subsequent to the year 1938 the phrases "season requirements," "estimated requirements," or similar phrases were omitted from said contracts.

In the year 1939 the respondent entered into agreements with 132 of its oil-burner manufacturer-customers which included the following proviso:

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract ----- sets or more of the Company's automatic temperature controls. Because the Company's thermostats and primary controls are specifically designed to operate one with the other, it is unsatisfactory and often dangerous to mix controls made by different manufacturers in the same installation, and to avoid any such difficulty and divided service responsibility, it is agreed that each set shall consist of but one Thermostat, one Primary Control, and one Limit Control, and that the Purchaser will buy at least 90% as many Room Thermostats and 100% as many Limit Controls as Primary Controls at the following prices.

In the year 1940 the respondent entered into agreements with 132 of its oil-burner manufacturer-customers which included the following proviso:

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this contract ----- sets or more of the Company's automatic temperature controls. Because the Company's thermostats and primary controls are specifically designed to operate one with the other, it is unsatisfactory and often dangerous to mix controls made by different manufacturers in the same installation, and the Company does not give any assurance of satisfactory operation nor assume any service responsibility if its controls are used with other makes. It is, therefore, further agreed that each set shall consist of but one Thermostat, one Primary Control, and one Limit Control, and that the Purchaser will buy at least 90% as many Room Thermostats and 100% as many Limit Controls as Primary Controls at the following prices.

In the year 1941 respondent entered into agreements with 122 of its oil-burner manufacturer-customers which included the following provision:

The Company agrees to sell, and the Purchaser agrees to purchase, subject to the reservations hereinafter named, during the life of this agreement ----- sets or more of the Company's automatic temperature controls. Because the Company's thermostats and primary controls are specifically designed to operate one with the other, it is unsatisfactory and often dangerous to mix controls made by different manufacturers in the same installation, and the Company does not give any assurance of satisfactory operation or assume any service responsibility if its controls are used with other makes. It is, therefore, further agreed that each set shall consist of but one Thermostat, one Primary Control, and one Limit Control, and that the Purchaser will buy at least 90% as many Room Thermostats and 100% as many Limit Controls as Primary Controls as the following prices.

PAR. 8. The Commission finds that the various provisions of respondent's contracts, as hereinabove described, which require the purchaser to purchase at least 90 percent as many room thermostats and 100 percent as many limit controls as primary controls have had the tendency to induce a substantial number of manufacturers of domestic oil burners to purchase from respondent all or substantially all of their requirements of thermostats and limit controls used with respondent's primary controls, and competitors of respondent have thereby been prevented from selling thermostats and limit controls in substantial quantities to such customers purchasing primary controls from respondent.

PAR. 9. The Commission further finds by reason of the dominant position of the respondent in the sale and distribution of automatic temperature controls, the use by the respondent of the acts and practices as herein described has substantially injured competition in the sale of automatic temperature controls, has unduly and unreasonably hindered, obstructed, restrained, and lessened competition in the manufacture and sale of said automatic temperature controls, and has a tendency to deprive purchasers and the general public of the benefit of free and active competition in the manufacture and sale of automatic temperature controls.

PAR. 10. The Commission further finds that the contracts made by the respondent with various oil-burner manufacturers which required that such manufacturers purchase at least 90 percent as many room thermostats and 100 percent as many limit controls as primary controls constituted, in effect, contracts for the sale of goods on the condition, and with the agreement and understanding, that such oil-burner manufacturers should not use or deal in automatic temperature controls of competitors of the respondent.

Since the primary control is an essential element in every domestic oil-burner installation, respondent employed the method of using such

control as a gage for determining the number of sets of controls a customer would agree to purchase. Such provisions in respondent's contracts with its oil-burner manufacturer-customers operated to preclude the sale of limit controls by competitors of respondent to such manufacturers under contract with respondent at least to the extent of the number of respondent's primary controls purchased by these manufacturers. These provisions also confined the sale of thermostats by competitors of respondents to respondent's contract customers to quantities not exceeding one-tenth of the quantity of primary controls which such customers purchased from respondent.

By reason of the dominant position held by respondent in the sale and distribution of automatic temperature controls and the number of contracts negotiated by the respondent, the effects of such contracts were substantially to lessen competition and tend to create a monopoly in the respondent in automatic temperature controls.

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PAR. 11. The respondent is the owner of the Freeman patent No. 1,813,732, which covers systems of hot-air furnace control in which, upon rise in the temperature of a furnace or like heating device, the source of heat is reduced or shut down but the blower or other circulating means is permitted to operate, and in which, upon fall of such temperature, the blower or other circulating device is stopped but the source of heat is permitted to heat the furnace or other heating device. In the course and conduct of its business for several years prior to 1943, the respondent granted, under threat of infringement suit if necessary, nonexclusive licenses to certain of its competitors; namely, Perfex Corp., Penn-Electric Switch Corp., White-Rodgers Electric Co., Cook Electric Co., and Bendix Aviation Corp., under said Freeman patent to make, use, and sell a combination furnace control, which is defined as a thermostatic switch specially designed for carrying out the system of the Freeman patent to control the fan and limit circuits. The use of the combination furnace control carries with it a license for one installation employing the sequence of operation of the Freeman patent. Such licensing agreements provided that a royalty of 25 cents be paid on each combination furnace control sold by the licensee and also required the licensee to maintain certain specified minimum selling prices for the combination furnace controls sold by them. Such licenses were granted by the respondent on the express condition that the licensee would sell combination furnace controls only at prices and on terms not more favorable to the cus-

tomers than those fixed by the respondent for its own products embodying the invention covered by said license agreement.

PAR. 12. During the times herein mentioned, the respondent was also the exclusive licensee of the Cross patent No. 1,758,146. This was a combination or system patent composed of three main elements—(1) a motor-driven stoker, (2) a room thermostat, and (3) a combustion stoker switch. The respondent did not manufacture or install heating systems under the Cross combination patent. Respondent did, however, manufacture and sell the controls necessary for installations under this patent, including a combination stoker switch, which is an unpatented article. In making sales of the combination stoker switch, the respondent granted a license to the purchaser of such stoker switch to install the Cross system of furnace control. In this manner the respondent has precluded the use of combustion stoker switches as an element in the assembly covered by the Cross Patent unless such switches were manufactured by the respondent and purchased from it or from its sub-licensees.

PAR. 13. Two proceedings, one involving the Cross patent (*Mercoird Corp. v. Midcontinent Co. et al.*, 320 U. S. 661) and the second involving the Freeman patent (*Mercoird Corp. v. Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680), came before the Supreme Court of the United States, and that Court in January 1944 held in both cases that the practices of the respondent constituted an extension of the patents to embrace unpatented devices and that the competition which was sought to be controlled was not competition in the sale of the patented combinations but merely competition in the sale of unpatented combustion stoker switches and combination furnace controls. The conduct of the respondent under said patents was therefore measured in the light of the standards imposed by the antitrust laws and the Court held that respondent may not obtain from any court of equity any decree which directly or indirectly helps to subvert the public policy which underlies the grant of its patents.

PAR. 14. The Commission finds that the acts and practices of the respondent in connection with its attempt to require users of the furnace-control system under the Cross patent to purchase automatic stoker switches for use in said system only from the respondent and in connection with the attempt to exclude competitors from supplying combination furnace controls for use in systems covered by the Freeman patent unless such competitors hold a sublicense from the respondent, pay the respondent a royalty on each combination furnace control sold, and maintain prices for such controls established by the respondent, all have a tendency and capacity to restrain, restrict, and

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lessen competition in the manufacture and sale of controls in heating systems employing the Cross or Freeman combination of controls.

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PAR. 15. The respondent recognized three channels of trade in distribution and sale of its automatic temperature controls—(a) oil-burner manufacturers, who ordinarily sell their products, including the accompanying controls, as original equipment therewith to wholesalers; (b) wholesalers or jobbers, who ordinarily sell both complete heating units and also separate automatic temperature controls to dealers; and (c) dealers, who are retailers selling to the ultimate user.

Respondent published list prices for its automatic temperature controls with discounts or net prices regularly allowed to oil-burner manufacturers, wholesalers, or jobbers and to dealers. Respondent's prices to dealers and to wholesalers or jobbers varied from 25 percent off list price to 43.75 percent (25 percent and 25 percent) off list price, and varied with the trade channels in which the purchasers are engaged. The sales of controls by the respondent to wholesalers and dealers have generally been for resale rather than as original equipment on any domestic oil burners they may resell. Such controls were ordinarily sold by wholesalers and dealers for repair, replacement, or auxiliary equipment beyond that furnished by the original oil-burner manufacturer as part of the original equipment.

PAR. 16. In addition to the acts and practices hereinabove described, the respondent, in the course and conduct of its business since June 19, 1936, in connection with the sale and distribution of its automatic temperature controls, has discriminated in price between different purchasers buying such controls of like grade and quality by selling its controls to some of such purchasers at lower prices than it sells its controls of like grade and quality to other of its customers who are competitively engaged with the former in the sale of such controls within the United States.

An example of the discriminations in price made by the respondent is the various discounts allowed to oil-burner manufacturers, who purchase the great majority of automatic temperature controls sold by the respondent. Such oil-burner manufacturers were engaged in competition with each other in the sale of oil burners to wholesalers, dealers, and other users of oil burners.

The respondent has sold its said automatic temperature controls, particularly thermostats, limit controls, and primary controls, in sets of three, comprising one each of said controls. The respondent did

not recognize as an oil-burner manufacturer any manufacturer who did not purchase a minimum of 50 sets of controls, or 150 units, annually. However, to such oil-burner manufacturers who had contracts with the respondent, the respondent allowed its maximum discount of 25 percent and 25 percent off list price. Such oil-burner manufacturers were generally designated as "discount customers."

The price per set of controls to oil-burner manufacturers who purchased in excess of 50 sets annually was determined by the annual volume of sets which such oil-burner manufacturers purchased or agreed to purchase. For this purpose the respondent established a series of price brackets based upon volume. Each bracket covered an annual volume and determined the price per set for the controls purchased by the customer in the particular volume bracket. The volume included in each bracket and the price per bracket varied from year to year. Respondent's several manufacturer quantity brackets determining its net prices for automatic temperature controls sold to the manufacturers of oil burners in the years 1937, 1938, 1939, 1940, and 1941, together with a discount equivalent to the lower prices to such manufacturers purchasing in larger quantities, are set forth in the following table:

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Statement showing annual volume and price brackets for sets¹ and discount equivalent off highest net prices to manufacturers for each year, 1937 to 1941, inclusive

Bracket No.	1937			1938			1939			1940			1941		
	Annual volume (sets) ¹	Net price scale ²	Discount equivalent off highest net price to manufacturers of \$23.85	Annual volume (sets) ¹	Net price scale ²	Discount equivalent off highest net price to manufacturers of \$21.05	Annual volume (sets) ¹	Net price scale ²	Discount equivalent off highest net price to manufacturers of \$18.10	Annual volume (sets) ¹	Net price scale ²	Discount equivalent off highest net price to manufacturers of \$18.10	Annual volume (sets) ¹	Net price scale ²	Discount equivalent off highest net price to manufacturers of \$17.35
1.	50-99	\$23.85	Percent	50-749	\$21.05	Percent	50-349	\$18.10	Percent	50-349	\$18.10	Percent	50-349	\$17.35	Percent
2.	100-349	22.60	5.24	750-2,999	19.35	8.08	350-999	17.25	4.70	350-999	17.25	4.70	350-999	16.45	5.19
3.	350-3,999	21.30	10.69	3,000-7,499	18.35	12.83	1,000-4,999	16.65	8.01	1,000-2,499	16.65	8.01	1,000-2,499	15.90	8.36
3A.										2,500-4,999	16.25	10.22	2,500-4,999	15.35	11.33
4.	4,000-7,499	19.85	16.77	7,500-14,999	17.25	18.05	5,000-9,999	15.95	11.88	5,000-7,499	15.85	12.43	5,000-7,499	14.90	14.12
4A.										7,500-9,999	15.15	16.30	7,500-9,999	14.25	17.87
5.	7,500-14,999	17.85	25.16	15,000 and up ³	16.25	22.80	10,000 and up	14.90	17.67	10,000 and up	14.65	19.06	10,000 and up	13.75	23.05
6.	15,000 and up	16.55	30.61	15,000 and up ³	14.90	29.22									

¹ Volumes shown hereon are for sets only and are not for separate units. Respondent's automatic temperature controls in all 5 years were priced on a unit basis irrespective of whether purchased by units or by sets, and the several manufacturers' price brackets were similar for those contracting to purchase sets and those contracting to purchase units, the minimum number of units necessary to reach a particular bracket, being three times the minimum number of sets necessary to reach that bracket. For example, bracket 1 prices applied to a customer contracting to purchase either 50 sets or 150 units.

² The prices set forth above are in each case the sum of the respective net prices in the particular year of a primary control, limit control, and thermostat making up a representative set. For customers receiving the discount of 25 and 25 percent, the prices of the same sets were as follows: 1939, \$20.82; 1940, \$20.82; 1941, \$20.25. Customers in this class received during 1937 a discount of 40-5 percent, making a net price of \$25.65; and during 1938 a discount of 45 percent, making a net price of \$27.23.

³ A special concession in price was offered to 4 customers under condition that they place orders for 10,000 sets prior to Sept. 1, 1938.

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As indicated by the foregoing table, respondent discriminated in price in favor of customers buying in larger quantities as against those customers buying in smaller quantities. A set of automatic temperature controls represents the largest single item of cost (in some cases approximately 40 percent of total material cost) among the various parts of a finished oil burner. Changes in the price of controls to oil-burner manufacturers resulted in many instances in corresponding changes in the price of completed oil burners and necessarily affected sales and profits. In some instances customers of respondent lost business to certain of their competitors who enjoyed lower control prices from the respondent.

The quantity or bracket prices were usually based upon the quantity set out in contract executed by the oil-burner manufacturers at the beginning of the year. The execution of a contract was not, however, essential, as bracket prices were allowed to some customers who did not execute contracts. The quantity set out in the contract was based either upon number of controls purchased the previous year, the average of two or more prior years, or the estimated quantity which the manufacturer expected to use during the year. If the manufacturer failed to purchase sufficient sets of controls to entitle him to the bracket price allotted, the respondent did not require additional payment because of the lesser quantity purchased. If, however, the manufacturer purchased a greater quantity of controls than estimated or set out in the contract and if such quantity was sufficient to place the manufacturer in a larger quantity bracket, the respondent allowed such manufacturer the larger quantity bracket price on all purchases during the year and issued refund or rebate to the manufacturer covering the difference in the bracket prices.

PAR. 17. In an effort to justify its various price brackets, respondent, after the issuance of the complaint herein, and during the pendency of this proceeding, employed a recognized accounting firm to prepare a study of costs. This study was based upon the bracket prices adopted and used by respondent during the year 1941, which were as follows:

Bracket	Unit volume	Set volume	Price per set
Discount bracket.....	1-149.....	1-49.....	\$20.25
Bracket No. 1.....	150-1,049.....	50-349.....	17.35
Bracket No. 2.....	1,050-2,999.....	350-999.....	16.45
Bracket No. 3.....	3,000-7,499.....	1,000-2,499.....	15.90
Bracket No. 3A.....	7,500-14,999.....	2,500-4,999.....	15.35
Bracket No. 4.....	15,000-22,499.....	5,000-7,499.....	14.90
Bracket No. 4A.....	22,500-29,999.....	7,500-9,999.....	14.25
Bracket No. 5.....	30,000 and over.....	10,000 and over.....	13.75

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The original study was completed on February 7, 1944, and supplemental study, May 16, 1945. Respondent did not maintain any current analysis of distribution cost for the year 1941, and the controlling factors used in the aforesaid study in allocating costs necessarily had to be estimated.

In this cost study, no attempt was made to allocate costs as between each of the three lowest price brackets (4, 4A, and 5), since the differences in price was greater than the amount of unallocated costs and it was deemed impractical to allocate additional items of cost which were excluded from the study. More than 55 percent of respondent's total volume of controls sold to oil-burner manufacturers was sold at prices applicable to brackets 4, 4A, and 5, the three lowest price brackets. Prices for each of the first five brackets, namely, the discount bracket and brackets 1 to 3A, inclusive, appear to have been justified by the study on the basis of cost differentials applicable in each case. Respondent, however, did not know the cost of selling and distributing to any particular customer within any of the price brackets, and no attempt was made to analyze its cost of distribution on an order basis.

Testimony concerning respondent's cost report disclosed that approximately 43 percent of the total cost of manufacturing used in the study was applicable to customers who paid more or less than the bracket price to which their purchases ostensibly entitled them. These were known as off-scale sales.

In order to allocate costs to the proper quantity brackets, respondent had its accountants recast its cost study and prepare a supplemental study. In recasting the off-scale sales for the supplemental study, the costs applicable in each instance were transferred from the particular price bracket to the bracket consistent with the number of units purchased. The supplemental report did not change any of the accounting principles or measuring factors used for allocating costs, the latter being based upon estimates arrived at several years subsequent to the transactions to which they referred, but the recasting did change the distribution costs, the discount bracket being increased, while brackets 1 through 3A were decreased. It also caused a change in the cost differential between brackets 3 and 3A so that the reduction in price between those two brackets exceeded the reduction in cost by two cents, whereas the original study shows a cost reduction of fourteen cents in excess of the price reduction between the same two brackets.

PAR. 18. The Commission finds that the price differences allowed by the respondent in the sale of its automatic temperature controls, based upon quantities as set out in respondent's various bracket prices,

constituted discriminations in price between purchasers of commodities of like grade and quality.

Based upon the cost studies introduced by the respondent and the testimony in connection therewith, the Commission finds that only the quantity prices included in the discount bracket and brackets 1 to 3A, inclusive, make due allowance for differences in cost of manufacture, sale, or delivery resulting from the differing quantities in which respondent's automatic temperature controls were sold or delivered to purchasers. The Commission further finds that respondent's price differences based upon quantity purchases under respondent's price brackets 4, 4A, and 5 have not been shown to be justified by reason of differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which respondent's automatic temperature controls were sold or delivered to its various oil-burner manufacturer-customers.

The Commission further finds that oil-burner manufacturers who received the benefit of the various discriminatory prices, discounts, or rebates granted by the respondent have a substantial advantage in selling oil burners equipped with respondent's controls in competition with other oil-burner manufacturers purchasing and using respondent's controls who do not receive the benefit of such discriminatory prices, discounts, or rebates and who are obliged to pay respondent's higher cost bracket price. In order to sell their oil burners equipped with respondent's automatic temperature controls in competition with customers of the respondent who receive the benefit of respondent's discriminations in price, oil-burner manufacturers who pay respondent's discount or higher bracket price or who are denied discounts or rebates allowed to such favored customers must either sell at competitive prices and, in so doing, reduce their possible profits by the amounts of discriminations against them or attempt to sell at higher prices than those which the favored customers of respondent charge for oil burners equipped with respondent's automatic temperature controls, with the result of inability to secure business and a reduction in the volume of their sales.

By respondent's method of selling and the use of the price discriminations hereinabove described, customers paying a higher price are discriminated against with respect to all other customers paying a lower price, while the customers paying a lower price are given the benefit of discrimination as against the other customers of the respondent who pay a higher price.

PAR. 19. The Commission further finds that the price discriminations based upon quantity purchases as set out in its various bracket

prices and particularly in brackets 4 to 6, inclusive, have the capacity and tendency to induce the purchase of respondent's automatic temperature controls by various oil-burner manufacturers and have tended to, and do, divert trade to the respondent from its competitors and have had a substantial injurious effect upon competition in the sale and distribution of automatic temperature controls in commerce among and between the various States of the United States.

PAR. 20. The Commission further finds that the price differentials allowed by the respondent to its customers on so-called off-scale sales constituted a discrimination in price. In 1941 there were 76 customers who were classified as off-scale sales. In the cost report submitted by the respondent, approximately 43 percent of the total cost of manufacturing was applicable to such off-scale customers. The cost study introduced by the respondent dealt principally with an effort to justify differentials in respondent's quantity or bracket prices. This study did not justify the price differentials to any particular customer. Consequently, so far as such off-scale sales are concerned, there has been no justification submitted.

These off-scale sales involve almost entirely sales to customers at a bracket price lower than the customer was entitled to by reason of the quantity purchased by him. For example, a customer might be allowed a bracket 4 or 5 price on estimated purchases for the year when in fact his yearly purchases were such as to entitle him only to a bracket 3 or 3A price. In so doing, the respondent discriminated in price in favor of such off-scale customer as against other customers who were paying a higher price for automatic temperature controls, including customers who were in fact purchasing substantially as many automatic temperature controls as such off-scale customer but who were not granted the higher bracket price enjoyed by such off-scale customer.

PAR. 21. The Commission further finds that the respondent engaged in further discriminations in price by allowing an oil-burner manufacturer to count for bracket price purposes automatic temperature controls purchased by the customer or furnace manufacturer buying from such oil-burner manufacturer. In this manner, while the furnace manufacturer obtained a discount based upon his purchase of controls from the respondent, the oil-burner manufacturer who supplied the oil burner without controls to such furnace manufacturer obtained credit on total purchases for not only the quantity of controls purchased by him from the respondent but also the controls purchased by the furnace manufacturer to whom he had sold, thereby

entitling such oil-burner manufacturer to be included in a lower price bracket. This was known as a "dual transaction."

For example, Automatic Burner Corp. in the year 1939 purchased 21,753 units from the respondent, and its customer, the Holland Furnace Co., purchased 10,224 for the same year. Although the 10,224 controls were shipped directly to the Holland Furnace Co., the Automatic Burner Corp. received credit for the purchase of the total volume of both. This practice on the part of the respondent also constituted a discrimination in price in that it allowed a lower bracket price to a customer whose purchases were not sufficient to bring it within such price bracket except when combined with automatic temperature controls purchased by its customer.

PAR. 22. The respondent, in effect, accepted the cost justification shown by its cost study as to brackets 1 to 3A, inclusive, but as to brackets 4, 4A, and 5 it contended that the quantity prices shown in those latter brackets were made to meet competition. There was a total of 76 accounts upon which off-scale prices had been allowed to the various customers in the year 1941. The respondent selected 22 accounts from these off-scale accounts and claimed that the prices allowed to those customers were lower prices made to meet competitive prices. Since there were 76 off-scale accounts and no such contention made as to the remaining 54, this defense or contention of meeting competitive prices cannot be considered as justifying respondent's practice of off-scale selling. The respondent attempted to use these accounts to prove a defense of meeting an equally low price of a competitor under Section 2 (b) of the Clayton Act, not only as to the off-scale sales but also as a defense to the lower quantity prices in brackets 4, 4A, and 5, which were not justified by its cost study.

The trial examiner in his conclusions of fact and of law has accepted the contention of the respondent that the quantity prices shown in brackets 4, 4A, and 5 were made to meet competitive prices and has found that—

In respondent's higher brackets (4, 4A, 5) respondent has lowered its prices in making sales of its controls to 22 of its oil burner customers, to meet the lower price competition of competitors.

Since all of the 22 oil-burner-customer accounts do not come within the classification of brackets 4, 4A, and 5 and do not constitute all the customers of the respondent who received the lower prices provided for in brackets 4, 4A, and 5, this conclusion by the trial examiner cannot be accepted. The record shows that of these 22 accounts, only 4—Cleveland Steel Products Co., Delco Appliance Division of General Motors, Gilbert & Barker Manufacturing Co., and Williams Oil-O-

Matic Heating Corp.—purchased in sufficient quantities in 1941 to entitle them to the quantity prices provided for in brackets 4, 4A, and 5. The remaining 18 fell within the discount bracket and brackets 1 to 3A and were so recast by respondent's supplemental cost study.

In the Williams Oil-O-Matic transaction, the meeting of a lower price of a competitor was not involved. In 1936 Williams Oil-O-Matic purchased 3,527 units from the respondent. During that year Williams was charging \$2.50 more for burners equipped with respondent's controls. Based upon 1936 purchases, the respondent gave Williams the 3,000 price for controls for 1937. This was a price higher than previously charged. Williams immediately retaliated by charging \$7.50 more for burners equipped with respondent's controls. For the purpose of inducing Williams to reduce this price differential respondent gave Williams its best price for 1938, and the differential charged by Williams was reduced to \$2.50 for 1938, no price difference for 1939, \$2.50 for 1940, and no price difference for 1941.

The Cleveland Steel Products Co. transaction also involved an effort to reduce the price differentials of \$5 charged by Cleveland for burners equipped with respondent's controls. Also this account fell within the classification of a dual transaction in that Cleveland was allowed credit for purchases of controls made by Fox Furnace Division, American Radiator Company, for whom Cleveland was furnishing burners without controls.

The Delco Appliance Division of General Motors transaction did not involve meeting the price of a competitor. This Company made its own thermostats and primary controls and purchased only limit controls from respondent with the exception of some items for replacement. Units purchased brought Delco within the 4A bracket, but it was accorded the bracket 5 price by respondent.

In the Gilbert & Barker Manufacturing Co. transaction, this company began the development and sale of a low-priced burner equipped with Penn Switch controls in 1939. On the basis of information that this company had sold 3,000 Penn-equipped burners in 1939, respondent gave Gilbert & Barker its lowest price, or bracket 5 price, for 1940. It was not until 6 months later that respondent was informed that the price of the Penn relay switch was 50 cents under respondent's price on relay switch. No further reduction was made by respondent for 1941. Consequently, respondent's price to Gilbert & Barker Manufacturing Co. was based entirely on potential output and was not made to meet the price of Penn Switch or any other competitor.

Consequently, the respondent has failed to prove that any customer whose quantity purchases placed him in brackets 4, 4A, or 5 received

a lower price, off-scale or otherwise, to meet an equally low price of a competitor. As a matter of fact, in practically all of the 22 accounts listed by the respondent, it followed its regular practice of submitting a contract in December for the following year at a time when it had no knowledge as to what the following-year price of its competitors would be.

Even if it be considered that respondent did in fact meet an equally low price of a competitor in the above-mentioned transactions, this would not constitute a justification either for respondent's practice of allowing off-scale prices or for respondent's prices for the quantities provided in brackets 4, 4A, and 5, which have been found not to be justified under the provisos of section 2 (a) of the Clayton Act. In making his conclusion of fact and of law based upon these transactions, the trial examiner has made his own interpretation of the Clayton Act, which interpretation is contrary to the express provision of the Act and contrary to the decisions of the Supreme Court construing said act.

"Section 2 (b) of the Clayton Act does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. This section speaks only of the seller's 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor.' The act thus places emphasis on individual competitive situations rather than upon a general system of competition." (*F. T. C. v. Staley Mfg. Co.*, 324 U. S. 746, 753).

The trial examiner has also erroneously concluded that the price discriminations given by the respondent have not tended to substantially lessen, injure, prevent, or destroy competition between respondent's customers. This conclusion is not supported by the greater weight of the evidence in this record. The great majority of automatic temperature controls for domestic oil burners sold by the respondent were purchased by oil-burner manufacturers. Since a set of temperature controls represents the largest single item of cost among the various parts of a finished oil burner, changes in the price of controls to oil-burner manufacturers resulted in many instances in corresponding changes in the price of completed oil burners and necessarily affected sales and profits. Furthermore, oil-burner manufacturers testified that the question of price was important in the purchase of automatic temperature controls and that they had lost business to certain competitors, including Quiet-Heet, who enjoyed lower control prices from respondent, although the exact volume of such business could not be calculated.

CONCLUSION

The acts and practices of the respondent of incorporating various provisions in its contracts as hereinabove found, such as agreements which require the purchaser to purchase at least 90 percent as many room thermostats and 100 percent as many limit controls as primary controls, have the tendency and capacity to induce a substantial number of manufacturers of domestic oil burners to purchase from respondent all or substantially all of their requirements of thermostats and limit controls used with respondent's primary controls; have substantially injured competition in the sale in commerce of automatic temperature controls; have unduly and unreasonably hindered, obstructed, restrained, and lessened competition in the manufacture and sale in commerce of respondent's automatic temperature controls; and constitute unfair methods of competition in commerce within the intent and meaning of section 5 of the Federal Trade Commission Act.

The acts and practices of the respondent in attempting to require users of the furnace control system under the Cross patent to purchase automatic stoker switches for use in said system only from the respondent and in attempting to exclude competitors from supplying combination furnace controls for use in systems covered by the Freeman patent unless such competitors hold a sublicense from the respondent, pay the respondent a royalty on each combination furnace control sold, and maintain prices for such controls established by the respondent, have a tendency and capacity to restrain, restrict, and lessen competition in the manufacture and sale of controls and heating systems employing the Cross and Freeman combination of controls and constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

The acts and practices of the respondent as hereinabove found of entering into contracts with various oil-burner manufacturers which required the purchase of at least 90 percent as many room thermostats and 100 percent as many limit controls as primary controls constituted, in effect, contracts for the sale of goods on the condition, and with the agreement and understanding, that such oil-burner manufacturers should not use or deal in automatic temperature controls of competitors of the respondent and constituted a violation of the provisions of section 3 of the act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act.

The aforesaid discriminations in price by the respondent, as hereinabove found, constitute violations of subsection (a) 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 (the Clayton Act), as amended by an act of Congress approved June 19, 1936 (Robinson-Patman Act).

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, answer of the respondent, testimony and other evidence in support of and in opposition to the allegations of said complaint taken before a trial examiner of the Commission theretofore duly designated by it, report of the trial examiner upon the evidence and exceptions filed thereto, briefs filed in support of the complaint and in opposition thereto, and oral argument of counsel; and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of the Federal Trade Commission Act and has violated the provisions of section 3 of that certain act of Congress of the United States entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, commonly known as the Clayton Act, and subsection (a) of section 2 of said Clayton Act as amended by an act of Congress approved June 19, 1936, commonly known as the Robinson-Patman Act:

I. *It is ordered*, That the respondent, Minneapolis-Honeywell Regulator Co., a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device in connection with the offering for sale, sale, and distribution of automatic temperature controls and other furnace controls in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from—

1. Selling or making any contract for the sale of automatic temperature controls on the condition, agreement, or understanding that the purchaser shall purchase as many limit controls as primary controls.

2. Selling or making any contract for the sale of automatic temperature controls on the condition, agreement, or understanding that the purchaser thereof shall purchase 90 percent as many thermostats as primary controls.

3. Entering into, continuing, or carrying out any agreement or understanding which requires a purchaser to buy any number of limit controls or thermostats with the purchase of respondent's primary controls; provided, however, that nothing herein contained shall pro-

hibit the respondent from selling its automatic temperature controls in sets at a specified price per set.

4. Licensing or otherwise authorizing the use of the furnace control system covered by the Cross Patent on the condition, agreement, or understanding that only automatic stoker switches manufactured or sold by the respondent shall be used in such combination.

5. Licensing or otherwise authorizing the use of the furnace control system covered by the Freeman Patent on the condition, agreement, or understanding that the combination furnace control or any other control used in such system be sold at the price established by the respondent.

6. Using any patent covering a system of furnace controls to require the purchase from respondent of any unpatented control used in said system or requiring the maintenance of prices established by the respondent for any such unpatented control.

II. *It is further ordered*, That the respondent, Minneapolis-Honeywell Regulator Co., a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device in connection with the sale or the making of any contract for the sale of automatic temperature controls or other furnace controls in commerce as "commerce" is defined in that 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), do forthwith cease and desist from—

1. Selling or making any contract for the sale of primary controls on the condition, agreement, or understanding that the purchaser thereof shall not use with such primary controls any limit controls or thermostats other than those acquired from respondent or from some source authorized by respondent.

III. *It is further ordered*, That respondent, Minneapolis-Honeywell Regulator Co., a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device in the sale of automatic temperature controls or other furnace controls in commerce as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality as among oil-burner manufacturers purchasing said automatic temperature controls and other furnace controls—

1. By selling such controls to some oil-burner manufacturers at prices materially different from the prices charged other oil-burner manufacturers who in fact compete in the sale and distribution of such furnace controls, when the differences in price are not justified

by differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such products are sold or delivered.

IV. *It is further ordered*, That the respondent shall, within 60 days after 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.

OPINION OF THE COMMISSION IN THE MATTER OF MINNEAPOLIS-HONEYWELL REGULATOR CO., DOCKET NO. 4920

AYRES, *Commissioner*.

The complaint is directed against practices by respondent in connection with the sale of automatic temperature controls manufactured by it which are used in connection with oil burners of the pressure and rotary types for domestic heating plants. Respondent's sales of such products annually during 1939, 1940, and 1941 represented approximately 60 percent of the total number of such controls sold during those years in the United States.

Count I of the complaint alleges, among other things, that respondent sells controls in sets of three units consisting of a thermostat, a limit control, and a primary control, and that its annual contracts with manufacturers of oil burners or furnaces provide, in part, "that the purchaser will buy at least 90 percent as many room thermostats and 100 percent as many limit controls as primary controls," or contain substantially similar provisions. It also alleges that some of respondent's contracts contain provisions which require its customers to buy respondent's controls exclusively or which limit the extent to which they may buy controls from respondent's competitors.

The evidence disclosed that a number of contracts which respondent entered into with its manufacturer-customers near the end of 1936 for 1937 business required such customers to purchase "at least 95 percent" of their control requirements from respondent. On advice of counsel the contracts were amended on January 28, 1937, by deleting that provision, and respondent's customers were advised that they were not bound by it. That provision never had any substantial effect and has not been repeated. It was abandoned by respondent in recognition of its illegality, and there is no reason to believe that it will be resumed. Accordingly, the order does not include any prohibition with respect to it.

Respondent, in effect, concedes that the provision of its contracts requiring customers to purchase from it as many limit controls as

primary controls was improper. It contends, however, that it should not be prohibited from requiring its customers to purchase from it 90 percent as many thermostats as primary controls. (It should be explained that the purpose of this provision is to require the use of respondent's thermostats exclusively with its primary controls. The provision for 90 percent instead of 100 percent as many thermostats as primary controls is due to the fact that on some installations a second limit control is used to perform the function of the thermostat and also that on replacement sales the old thermostat can sometimes be continued in use.) Respondent asserts that its thermostats and primary controls differ from those of its competitors in certain scientifically important respects and are designed to operate together. It is urged by respondent that it is inefficient and dangerous to use respondent's primary controls in the same installation with thermostats of other makes.

It is stipulated in the record, among other things, that—

"Thermostats and limit controls of the proper type manufactured and sold by a number of competitors of the respondent could be and are satisfactorily and safely used by manufacturers of oil burners, furnace manufacturers and contractors interchangeably for thermostats and limit controls of the same type sold by respondent on installations where respondent's primary controls are used."

This provision of the stipulation is also supported by evidence appearing elsewhere in the record.

In *Thomson Manufacturing Company v. F. T. C.*, 150 F. (2d) 952, the respondent leased its rivet-setting machines and required that rivets used in them be purchased from it. The court said that the evidence indicates that the best results are obtained when the machines and rivets of one manufacturer are used together, and that if improper rivets are used, repairs to the machines and interruptions in the work might ensue. After citing *United States Shoe Machinery Corp. v. U. S.*, 258 U. S. 451, and *International Business Machines Corp. v. U. S.*, 298 U. S. 131, the Court stated:

"The open market not the court should be the forum for the presentation of claims as to the merits of tied articles. The lessees are quite capable of judging for themselves in an atmosphere of competition whether or not rivets of one manufacturer will work in the machines of another. That decision involves considerations of economy and efficiency that will likely vary from lessee to lessee."

In the present case, oil-burner manufacturers should be left free to judge for themselves in an atmosphere of competition whether or not thermostats of one manufacturer will work with the primary controls

of another. Since the use of proper type thermostats and primary controls of different makes in the same installation is safe, we must leave for local regulation the problem of hazardous conditions which may result from the improper mixing of controls.

Respondent's annual contracts with oil-burner manufacturers contain a blank space intended for the insertion of the number of sets of controls which the manufacturers agree to buy from respondent during the life of the contract. In 1937 and 1938 the blank space in some of these contracts carried the words "season's requirements" or "estimated requirements" in lieu of a specific number. It is argued on one hand that such language committed the oil-burner manufacturer to purchase all of its automatic control requirements during the life of the contract from the respondent; and, on the other hand, that it committed the oil-burner manufacturer to purchase from respondent only that number of respondent's controls which the customer might need during the season, and that it did not limit the right of the customer to purchase controls from others. Respondent apparently recognized the questionable nature of this language and discontinued its use. It does not appear necessary, therefore, to include in the order any specific prohibition with respect to this point.

Count I of the complaint also charges misuse of two system patents, the details of which are set-out in the findings. In two decisions in January 1944, involving private litigants, the Supreme Court held that both of the system patents were being improperly used by respondent (*Mercoïd Corp. v. Mid-Continent Investment Company and Minneapolis-Honeywell Regulator Co.*, 320 U. S. 661; and *Mercoïd Corporation v. Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680). Respondent urged without contradiction that promptly after the decisions of the Supreme Court all of its agreements of every kind involving the two patents were terminated and that "all of the practices condemned by the Supreme Court have been eliminated and are not now being carried on in any way by M-H."

The decisions of the Supreme Court were in private litigation. It is difficult to appraise the scope and effect of those decisions in correcting the practices insofar as they may affect parties not involved in those proceedings. The misuse of the patents was redressable in the courts by private litigants, but the unfair practices involved in such misuse also substantially affected the public. Such unfair practices were, therefore, properly included in the complaint. The allegations with respect to them were sustained by the record, and such practices have accordingly been prohibited by the order. Insofar as there is no intention to resume the practices or insofar as they

are restrained by the decisions of the courts, the prohibitions of the order with respect to them constitute no burden or penalty on respondent. To the extent, however, that the practices may be resumed in a form which will not be reached by the decisions of the courts, the prohibitions of our order afford a measure of protection and assurance to the public which could otherwise be obtained only by instituting a new proceeding when warranted by future developments, with its consequent delays and costs.

The charges in count II of the complaint are substantially the same as in count I insofar as they relate to the tying and exclusive dealing provisions of respondent's contracts, except that they allege violation of section 3 of the Clayton Act, rather than section 5 of the Federal Trade Commission Act. Substantially the same considerations which show the violations under count I also show violations under count II and the findings and order have covered both counts.

The majority decision on the foregoing points is substantially in accord with the recommendations of the trial examiner.

Count III of the complaint charges price discrimination in violation of section 2 (a) of the Clayton Act. The trial examiner concluded that the respondent sells its controls to certain oil burner and furnace manufacturers at lower prices than to others, but that such price differentials do not tend to lessen competition or create a monopoly, that certain of the price differentials are justified by cost differences, and that others resulted from prices which were made for the purpose of meeting the lower prices of competitors. He recommended that the charges of count III be dismissed without prejudice. The majority of the Commission is in disagreement with the conclusions of fact and law and with the recommendations of the Trial Examiner with respect to this count.

Respondent's price schedules to oil burner and furnace manufacturers have been based upon annual quantity purchases and have varied to some extent from year to year both in the price differentials and the quantity brackets upon which they were based. The method of pricing during the period covered by the record in this case, however, has remained essentially the same. Because respondent's cost study was based on its price schedule for 1941 and because that is the most recent year covered by the evidence, our consideration has been directed primarily to that schedule.

Respondent's price differentials to manufacturers were based upon annual quantity purchases graduated according to brackets numbered, respectively, 1, 2, 3, 3A, 4, 4A, and 5, each bracket progressively being based on a larger quantity and reflecting a lower price. The Com-

mission has found that the quantity price differentials represented by brackets 1 through 3A make only due allowance for differences in cost within the meaning of the Act, but that the price differentials based on brackets 4, 4A, and 5 have not been justified by cost differences. In reaching this decision, the Commission has recognized certain practical difficulties in the case and has given effect to certain general considerations.

Cost studies of the sort presented in this matter ordinarily do not afford precise accuracy but must necessarily embrace a number of conjectural factors and allocations. There is inherent in them a reasonable margin of allowable error. Where they are made in good faith and in accordance with sound accounting principles, they should be given a very great weight. Respondent had an extensive cost study made by an independent firm of accountants and auditors which disclosed cost justification for the price differentials resulting only from brackets 1 through 3A. It apparently was made with considerable care and great particularity of detail. Although basic questions may properly be raised with respect to the soundness of certain of the procedures and allocations upon which the cost differentials were determined, respondent's effort represents a fair and objective study of the problem which was probably done as well as it could be done under the circumstances. Respondent's burden under the act is very great and it should have a liberal measure of consideration when it becomes apparent that it has made sincere and extensive efforts to discharge that burden. We have accordingly accepted the results of the cost study as fairly reflecting respondent's cost differentials within a reasonable margin of error.

It has been urged that there is necessarily a failure of cost justification where the quantities purchased by two competing customers at applicable price differentials are nearly the same, with one being just below and the other being at or slightly above the minimum quantity for a particular bracket. This argument may be persuasive in a case where such a situation is actually shown and where there is some indication that it is a matter of competitive importance. But there has been no such showing in this case. Any annual quantity system of pricing is vulnerable to this argument and it may be controlling where it has practical aspects. Where it is purely theoretical, however, it does not constitute a satisfactory basis for disallowing the whole effort at cost justification.

The record discloses instances in which respondent granted bracket 1 through 3A prices to certain customers who did not purchase the quantities required under its schedule for such prices. These instances

are designated "off-scale sales." Where annual purchases of a customer are less than the minimum quantity required for the price granted, the cost study shows no justification for the resulting price differential.

Such situations result primarily from respondent's practice of entering into annual contracts with its customers at the beginning of a year based on past experience. If a customer fails to purchase the quantity provided in the contract, and upon which the price is based, the contract price is not increased, and sales to such customer are at off-scale prices. If, on the other hand, the customer purchases more than the contract quantity and qualifies during the year for a lower price under the next bracket, the lower price is given to him in full by means of retroactive discounts or otherwise. Respondent defends this practice as a business necessity, stating that it is impossible to determine at the beginning of the year the unusual factors which may adversely affect the quantity of a customer's purchases, and that it would be prohibitively difficult to require a customer during the year to adjust the price upward.

From a practical standpoint this is no doubt a valid and sufficient reason to respondent. But the respondent has voluntarily chosen its method of selling and pricing. If that method, as it does here, involves practical difficulties which make it hard to comply with the requirements of the law, such difficulties constitute a calculated risk. It is respondent's responsibility, in spite of these practical difficulties, to comply with the law. Otherwise, a seller could set up a schedule of annual quantity prices, justify the differentials, and then sell freely to favored customers at off-scale prices so long as the customers agreed in advance to buy the quantities required for the prices made to them. The law could not be effectively applied on such a basis.

Respondent also gave off-scale prices to certain oil burner manufacturers who sold oil burners without controls to furnace manufacturers who, in turn, bought controls directly from the respondent. The quantity of controls bought from respondent by the furnace manufacturer in such instances was credited to the oil burner manufacturer in addition to the controls purchased by the latter. The aggregate quantity so computed was used to determine the bracket price granted to the oil burner manufacturer on his own purchases, resulting in some instances, in his receiving a lower price than he would otherwise have received under respondent's schedule. Such instances are characterized as "dual" transactions. Prices determined on this basis re-

sult in price differential which are not justified by respondent's cost study.

The price differentials resulting from respondent's price brackets 4, 4A and 5 were not justified by cost differences, but were defended on the basis of meeting in good faith the lower prices of competitors.

Respondent argues in effect that the accounts paying the higher prices are manufacturers who purchase in small volume and that the competition for their business is not as severe as it is for the business of manufacturers who purchase in larger volume. It was urged that all of the manufacturers of automatic controls go after the business of the larger accounts, resulting in the keenest competition for that business throughout the period covered by this case. Respondent argues, therefore, that it had to reduce its prices to customers in the three lowest price brackets in order to keep its share of their business. The record indicates generally that competitors of respondent were offering lower prices to comparable accounts and no instance is shown in which respondent actually undercut competitors' prices.

Respondent's three lowest price brackets do not represent prices made in particular instances to meet competitors' prices, but reflect progressive reductions in a comprehensive price schedule based on increased quantity purchases. It is significant that more than 55 percent of respondent's total volume of controls sold to oil-burner manufacturers were at prices in the three lowest brackets. Such prices were probably established for the purpose of obtaining the business of the larger oil burner and furnace manufacturers, and it is apparent that they were largely effective in accomplishing that result. But they represented no sharp departure from respondent's general pricing policy. All of respondent's prices were established with knowledge of the price levels of its competitors and were undoubtedly influenced by those price levels. As shown in the findings, respondent has developed a large customer demand for, and public acceptance of, its controls, and has been able consistently to sell them at prices higher than those charged by its competitors.

The mere fact that competitors' prices are lower than respondent's discriminatory prices does not constitute a showing that such discriminatory prices were made in good faith to meet the equally low or lower prices of competitors. When price differentials of an established schedule reach a point where they cannot be justified by cost differences, it is unsound and inconsistent to urge that they then become prices which have been made in good faith to meet equally low or lower prices of competitors simply because they may not be lower than competitors' prices. To accept this proposition would mean that any

seller of a commodity which generally sells at a premium price may freely discriminate among its customers so long as it does not undercut the prices of competitors. Such an interpretation would make the act largely unworkable and would, to a substantial extent, defeat its objectives. Respondent has not met the good faith requirement of section 2 (b) of the act, either with respect to its three lowest price brackets or with respect to its "off-scale" prices in the higher price brackets. Its defense on this basis has been rejected by the Commission.

Respondent argues that its discriminatory prices have not resulted in injury to competition within the meaning of the act. This point is covered in the findings in considerable detail.

Respondent urges that the businesses of its competitors in the types of automatic temperature controls involved in this matter have grown, and that its own relative position in the industry decreased from approximately 73 percent in 1937 to about 60 percent in 1941, and that, therefore, the practices with which it is charged have not substantially lessened competition or tended to create a monopoly. But the law does not permit respondent to resort to unfair or discriminatory practices in order to maintain its competitive position in the industry. If its use of such practices substantially interferes with or impedes the progress or growth of competitors, there has been a substantial injury to or lessening of competition within the meaning of the law. That respondent's discriminatory practices and prices have had such an effect on competition is fully established by the record.

The competitive effects of respondent's discriminatory prices on other manufacturers of controls are persuasively indicated by its own arguments that its discriminatory prices were made for the purpose of meeting competition. These arguments show that respondent's discriminatory prices were made to retain the business of certain customers or to secure the business of others and that they were largely successful in doing so. To the extent that business is held by or diverted to respondent from its competitors by its discriminatory prices and unfair practices, competition has been adversely affected within the meaning of the law. That this has been done to a substantial extent is clear from the record.

Annual quantity prices tend to encourage customers to concentrate their purchases with a single source of supply rather than to distribute their business among competitors. When an oil-burner manufacturer sees that his total control requirements, if concentrated with respondent, will entitle him to bracket 4 price, for example, but if divided among other sources of supply he may receive only a bracket 2 or a

bracket 3 price, the competitive tendency of the discriminatory bracket 4 price is apparent. The very nature of quantity price differentials is to divert business to the seller granting such differentials, and, insofar as they cannot be justified by cost differences or otherwise defended, any substantial injury to competition due to them falls within the ban of the act.

Respondent also argues that there has been no adverse effect on competition among its customers as a result of its discriminatory prices. It contends that the prices of oil burners vary as much as \$60 per burner among the various manufacturers, and that frequently the highest prices are charged by oil-burner manufacturers who paid respondent's lowest prices for controls.

The record shows that automatic controls are the most important single item of cost of any of the components involved in the manufacture of oil burners, estimates in the record indicating that they may represent as much as 40 percent of the material cost of manufacturing an oil burner. In addition to controls, oil-burner manufacturers purchase motors, pumps, fans, transformers, etc. Respondent asserts that on each such item the burner manufacturer gets a discount if he buys in volume and does not get it if he does not buy in volume. It is argued, therefore, that the differences in the prices of controls alone and their proper place in the competitive picture cannot be traced with certainty through the oil burner manufacturer to determine their effect on competition among such manufacturers.

Accept, for the purposes of the argument, respondent's statement that oil burner manufacturers who buy in volume receive discounts on motors, pumps, fans and transformers as well as controls. The cost of producing oil burners by large quantity manufacturers would thereby be made substantially less than the cost of producing oil burners by smaller manufacturers who buy in smaller quantities. The larger manufacturers would receive aggregate cost advantages of substantial competitive importance. Such advantages may be reflected in the competition of selling oil burners, either in lower prices, more extensive advertising, better service to customers, more effective selling methods, or improved quality, or in a combination of these potent competitive factors. Each seller who may have contributed to the aggregate price or cost advantages obtained by the favored burner manufacturers is, in part, responsible for the aggregate competitive result. The fact that the whole competitive effect cannot be traced to respondent alone does not relieve respondent of its share of responsibility—a share which appears to have been real and substantial.

It is also argued that other controls are available to oil burner manufacturers at lower prices, and, therefore, that respondent's discriminatory prices do not injure competition among them. The record discloses that there is a substantial demand for respondent's controls and that in order to be competitive, manufacturers of furnaces and oil burners must be able to supply them. Dealers frequently request manufacturers to supply respondent's controls with the burners purchased by such dealers. In such situations the manufacturers must buy respondent's controls at respondent's prices, but must still compete with other manufacturers for the dealer's business. Where competitive manufacturers receive discriminatory prices from the respondent, competition between the manufacturers for the dealer's business may be very substantially affected.

References have been made in this opinion to the discriminations and competitive effects resulting from lower prices being granted to some buyers than to others. Such references could just as well have been to the discriminations and competitive effects resulting from higher prices being charged some buyers than others. There should be no confusion concerning the purpose of the Commission's order on this phase of the case. It is not the intent of the order, nor is its effect to prevent or restrain respondent from reducing prices to the trade or to consumers. This Commission has no authority or desire to intrude in the field of price control either by enhancement, curtailment or stabilization, and its effort here is not directed to that end. There is no showing that respondent has endeavored to reduce prices to the trade or to consumers, and there is nothing in our order which would prevent its doing so. The order directs respondent to cease and desist from discriminating in prices, and it may eliminate the discriminations by reducing its high prices as well as by increasing its low prices. But the law requires that the discriminations be eliminated. We think that this requirement is sound and that it yields results of great benefit to the trade and to consumers, but regardless of our choice of economic philosophies, it is our obligation to enforce the law.

Here we have discussed some of the general considerations which guided the Commission in reaching its decision. The findings as to the facts cover the several points involved with considerable particularity and they are fully supported by the record. On the findings and the supporting evidence, the Commission has reached its conclusions and issued its order to cease and desist.

OPINION OF COMMISSIONER LOWELL B. MASON DISSENTING IN PART AND
CONCURRING IN PART

It is only fair to assume that the answer to a question of business procedure, whether it is the decision of a court or the official ruling of a Government agency, should be recognized as some kind of a guide for businessmen. At least, following a court's ruling should never be used against a citizen as the basis for a cease and desist order.

If Government is going to switch the rules on a businessman in the middle of a play, we should at least give him a chance to start running the other way before slapping penalties on him. Yet that is what I believe the order in this case seeks to do here, as the following facts disclose.

In 1942 this respondent was operating under a patent system which in a private litigation had been approved by the Federal Circuit Court of Appeals (Seventh Circuit). The next year the Federal Trade Commission charged this method of operation was illegal.

In 1944 the Supreme Court reversed the Circuit Court of Appeals and decided that the respondent's course of action was improper.

Of course, when the rules of commerce are switched on a businessman by a superior court reversing a lower court, if he persists in following the inferior court, then that is something else.

But in this case, when the Supreme Court reversed the Circuit Court of Appeals, the respondent immediately reformed its practices to comply with the latest judicial ruling. What more could anyone do?

The Commission seeks to justify an order to cease and desist on the grounds that the Supreme Court decision entered in a private suit, only protects the plaintiff in that case and not other competitors. I see no foundation for us to assume that the respondent will violate the decree of the Supreme Court either against the litigants named or by repeating the acts complained of against any other person.

It is difficult, in view of the Jeddo-Highland decision recently entered by the Commission (Docket 4468), to reject the Commission's reasoning in the Jeddo case when deciding this case, unless there is evidence in the record which makes us doubt this respondent's good faith or even its good judgment.

The case at bar goes much further than the *Jeddo* case, the dismissal of which was based on the economic impracticality of Jeddo attempting a repetition of the unlawful acts charged. Here the Circuit Court of Appeals approved the acts in question, but when the Court of Last Resort reversed the rule of conduct that should govern, the respondent was immediately obedient to its terms. It is quixotic to imagine the

respondent laying itself open to further legal burdens by resuming the practices abandoned four years past. I see no profit in shooting a tiger stuffed and mounted so long ago.

So much for that part of the controversy dealing with section 5 of the Federal Trade Commission Act.

As for the portion dealing with section 3 of the Clayton Act, I am in accord with the majority opinion, findings, and order.

As to that portion of the controversy dealing with section 2 of the Clayton Act, I desire to direct my dissent to the findings of fact, order, and opinion relating to the price differentials resulting from respondent's price brackets 4, 4A, and 5. These were not justified by cost differences but were defended on the basis of meeting the lower prices of competitors.

Here there seems to be but little variance between the majority and myself as to the facts of the case, my dissent being based on the conclusions derived therefrom. In order to clarify these, let me catalog those things about which I believe there to be no controversy.

First, Minneapolis-Honeywell was a combination of two of the oldest heat-control manufacturers in the business. Its antecedents date back to 1885. As pioneers in this business, vigorously pressing its engineering and research work for the creation of new devices and redesigning and improving its existing devices, it early established a dominant position in the heat-control industry. Its price structure was higher than those of its competitors and there was a greater public acceptance for its products. These higher prices were good targets for entrepreneurs entering the field to shoot at. As these newcomers acquired the skill, the know how and good will which had heretofore been largely the sole possession of Minneapolis-Honeywell, the respondent gradually lost its relatively high market position in the heat-control field to its competition.

Between 1937 and 1941, Minneapolis-Honeywell suffered a decline of 20 percent in the total heat control business obtained. This, it seems to me, ought to warn anyone who wanted to stay in business that it should bring its prices in line with its competition.

In this case, the respondent, having lost this ratio of business, made up its corporate mind to hang on to what business it had left and in good faith and what appears to be only ordinary common sense, brought its price down closer to the level of its competitors.

And it is here that I again part with the majority views. It is their contention, as I see it, that the trial examiner was wrong when he "concluded that the price discriminations given by the respondent have

not tended to substantially lessen, injure, prevent or destroy competition between respondent's customers."

I am of the opinion that on this point the findings of the trial examiner are correct. He held:

"It is shown from the evidence that respondent's selling of its automatic temperature controls, of like grade and quality, to certain of its oil-burner manufacturer-customers at lower prices than respondent sells its automatic temperature controls of like grade and quality to others of its oil-burner manufacturer-customers, has not tended to substantially lessen, injure, prevent or destroy competition between respondent's customers, or create a monopoly in the line of commerce in which respondent and its competitors are engaged."

The trial examiner also found:

"Competitors' prices have always and consistently remained under the prices of respondent, and oil-burner manufacturers were always able, if they desired, to purchase controls from respondent's competitors at prices lower than respondent's prices."

The Commission majority contends that in some cases Minneapolis-Honeywell did not lower its price to meet competitors but lowered its price to get the assemblers of heating units who used Minneapolis-Honeywell controls to sell the finished product cheaper to the consumer. What an unhappy bit of evidence to justify a cease-and-desist order against any businessman. The respondent got caught endeavoring to reduce prices to consumers! That old cliché about how wicked industrialists are always reducing prices to consumers in order to put some competitor out of business has too long been overworked. If reducing prices is wrong, I wish more businessmen were guilty of it. The Commission here condemns a respondent for doing what the Commission is supposed to accomplish itself—the protection of the consumer.

The contention that section 2 (b) of the Clayton Act does not concern itself with pricing systems does not mean that the pricing systems of respondent's competitors cannot be considered to prove that at all times the prices of competitors were less than the respondent's. Even though the pricing system of competitors may not be used to justify the defense of the proviso in section 2 (b), there is nothing in the Staley case to prevent its being used to show that the price discrimination has not tended to substantially lessen, injure, prevent or destroy competition.

Referring to the trial examiner's conclusions that "the price discriminations given by the respondent have not tended to substantially lessen, injure, prevent or destroy competition between respondent's

customers," the Commission states: "This conclusion is not supported by a greater weight of the evidence in this record."

My dissent is here directed to the point that a respondent charged with violating the law in a Federal Trade Commission complaint does not have to prove its innocence. The burden of proof has not been removed from the Government's shoulders, nor can the Government brush this duty aside by merely making a general findings of fact that they (oil-burner manufacturers) "had lost business to certain competitors, including Quiet-Heet, who enjoyed lower control prices from respondent, although the exact volume of such lost business could not be calculated." To my mind, this is not sufficient to show injury to competition.

In fact, the greater weight of the testimony, taking into consideration that respondent's competitors had gained instead of lost business during the period under scrutiny, whilst the respondent receded from its dominant position in the market, would indicate that competition had been very much improved in the heat control industry.

On the record I believe it to be impossible for the Commission to make a specific finding that the effect of the discrimination was to substantially lessen competition or tend to create a monopoly or to injure, destroy, or prevent competition. A general finding is insufficient for this purpose.

The prosecuting function in Government is often beset with the cry that "competition is being injured" whenever someone reduces prices.

We must not confuse "injury to competition" with the normal effect resulting from the clash between two businessmen, both endeavoring to obtain the patronage of the consumer by making a better product for less. As I said in my Standard Oil dissent, "We mouth the phrase 'injury to competition' so often that we confuse it with 'injury to a competitor.' When you meet your competitor's lower price so as to keep a customer he sought to take away from you, he feels he has been injured. Of course he has, but that does not mean that competition has been injured. On the contrary, it may have been improved."

If Minneapolis-Honeywell had known that the Federal Trade Commission was going to sue it back in 1943, Minneapolis-Honeywell would still have been faced with two dilemmas. Either it had to cut its price, meet its competition, but get involved in a Government suit—or not cut its price, not meet its competition and today have no suit—nor business, either.

Minneapolis-Honeywell took the former course. Now it finds itself tied up with an order which in no way affects the conduct of its com-

petitors, but which will certainly prevent it from ever approaching a competitor's price if doing so will keep business away from the competitor.

The majority decision in this case, I believe, indicates that such acts have the tendency and capacity to injure competition. Carried to its ultimate end, the order imposed on Minneapolis-Honeywell can very well mean that the Commission itself, by a strict enforcement of this strained interpretation of the law, can remove Minneapolis-Honeywell as a competitive factor in this field of industry.

To this can be added the ironic touch that the testimony in this case indicates the competitors of Minneapolis-Honeywell are following the same practices which the Commission here condemns. Only they have no suits pending against them. If suits are filed and orders entered against them in accord with the instant case, we will have arrived at the millenium when no one will be allowed to take any business away from anyone else, and free competition will be in the museum of quaint and outmoded ideas.

The Standard Oil decision (Docket 4389) and this instant matter are but a series of technical, obscure, and esoteric cease and desist orders, each of which attacks only a small segment of free enterprise, but they are slowly etching away our economic liberties in the name of saving them.

My prognosis is no idle fancy for, while the Congress has given businessmen the right to meet competitors' prices, the decision of this agency takes it away from this particular respondent. That we do it piecemeal can be no comfort to anyone for who can tell where our next order will strike?

In the instant case, the Commission has repeated the error I complained against in my dissent in the Standard Oil case, and I am encouraged to reiterate the objection by quoting the decision of Mr. Justice Briggles recently delivered in *Morton Salt v. Federal Trade Commission*. The general sweeping language of the order to cease and desist exceeds the jurisdiction of the Commission.

"The gist of this order is to require the petitioner to conduct its business generally at its peril, leaving the Commission or any person or litigant claiming injury to harass petitioner by proceeding under the act for a mistake in interpretation or application of the order. In a similar case in disposing of a sweeping and general order of the National Labor Relations Board, the Supreme Court said:

"'But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction

broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged. * * *

“We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found.”

But here the order is even less specific than the statute, for the statute does give a citizen the right to meet the competitors' price, something which the order of this Commission takes away.

I am against it.

Complaint

44 F. T. C.

IN THE MATTER OF
RUTH WHEELER COLLINS, TRADING AS WHEELER
LABORATORY

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

Docket 5233. Complaint, Oct. 11, 1944—Decision, Jan. 15, 1948

Where an individual engaged in the compounding and in the interstate sale and distribution of her drug preparation designated "Climate"—

(a) Represented, directly and by implication, through advertisements in newspapers, circulars, and other advertising literature, and by radio continuities, that said preparation was a cure or remedy for asthma, hay fever, sinus trouble, and rose fever; was a new discovery; and was safe and harmless for use by all persons;

When in fact it had no therapeutic value in the treatment of conditions concerned in excess of facilitating the removal of secretions caused by asthma, and her said claims were otherwise false;

(b) Represented through use of the word "laboratory" as a part of her trade name that she owned, controlled, or operated a laboratory with appropriate equipment and personnel for conducting research, testing, developing, and preparing medicinal preparations;

The facts being that while she compounded said preparation, she did not own, control, or operate a laboratory;

With tendency and capacity to mislead and deceive a substantial portion of the public into the erroneous belief that said representations were true and into the purchase of substantial quantities of her said preparation:

Held, That said acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce.

In said proceeding in which the complaint charged also that respondent's advertisements concerning her preparation "Climate" constituted false advertisements for the further reason that they failed to reveal certain facts as to the potential danger of the preparation involved because of its potassium iodide content, the Commission was of the opinion that in view of the present limited scientific information concerning iodide-containing preparations, no disclosure of such facts should be required in the advertisements for the preparation in question.

Before *Mr. Clyde M. Hadley*, trial examiner.

Mr. William L. Taggart for the Commission.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Ruth Wheeler