

IN THE MATTER OF
F. & V. MANUFACTURING CO., INC.

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

Docket 5579. Complaint, Aug. 17, 1948—Decision, Mar. 14, 1950

In a proceeding in which the complaint alleged a violation of Sec. 2 (a) of the Clayton Act as amended by the Robinson-Patman Act, and in which the case was submitted for disposition on the complaint, the respondent's answer, and a stipulation of facts which covered all of the material allegations of the complaint, and included all of the elements necessary to constitute a showing of unlawful price discriminations in violation of said section, but dealt only with price differences ranging from 10 percent to 20 percent of respondent's regular retail prices, the effect of which, as there set forth, might "be substantially to lessen competition in the sale and distribution" of the products involved "in the respective lines of commerce in which respondent and its customers are engaged * * *" etc., and was silent as to what effect, if any, price differences amounting to less than 10 percent might have, the Commission's findings—and, as a consequence, the order to cease and desist—in the absence of any facts to support an inference of the likelihood of competitive injury as a result of smaller price differences, were necessarily limited to differences amounting to 10 percent or more of said retail prices, since the only alternative, namely, to prohibit all price differentials, subject to the proviso that the order shall not be construed to prevent smaller differences which do not tend to lessen, injure or destroy competition, was barred under the decision in *Morton Salt Co. v. F. T. C.*, 334 U. S. 37, 54, as shifting to the courts in possible subsequent proceedings, as there stated, the responsibility which Congress primarily intrusted to the Commission.

Where a corporation engaged in the manufacture of jewelry products consisting of expansion bands and other attachments for ladies', men's and children's watches, and in the competitive interstate sale and distribution thereof to retail jewelers, many of whom were competitively engaged with one another and with the customers of its competitors within their several trade areas—

- (a) Put into operation its so-called "10% Business Volume Rebate" plan, under which each of its retail customers who purchased from it as much as \$1,500 worth of jewelry products, calculated at retail prices, during a calendar year, and without any requirements as to the amount purchased at any one time, and with no contention of statutory cost justification, received from it a 10% cash rebate, paid when said amount was reached, and an additional 10% rebate on all purchases in excess of said amount made during the balance of the year;

With the result that the relatively few customers—generally, the major retail jewelry dealers—who qualified for such volume purchase rebate, were thereby

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enabled to obtain greater profits from the resale of said products and to either undersell their competitors or furnish superior facilities and services to their consumer purchasers, or both, with the capacity of diverting trade to them from the smaller retailers; and

- (b) Likewise extended to chain retail jewelry stores, which resold the products purchased from it to the consuming public through their various branches or outlets, in active competition with other retail customers not thus favored, so-called "jobber's discounts" varying from 12% to 20% below its regular list prices, without regard to the quantity purchased,

Effect of which discriminations in price to competing customers, might be substantially to lessen competition in the sale and distribution of jewelry products, and to injure and destroy or prevent such competition with it and with its customers who received the benefits of said discriminatory prices:

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

Mr. William C. Kern and *Mr. William H. Smith* for the Commission.
Mr. Israel E. Pechter, of New York City, for respondent.

COMPLAINT

The Federal Trade Commission having reason to believe that F. & V. Manufacturing Co., Inc., hereinafter designated and referred to as respondent, since June 19, 1936, has violated and is now violating the provisions of section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C. Title 15, sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent F. & V. Manufacturing Co., Inc., is a corporation organized and existing under the laws of the State of Rhode Island with its factory, principal office and place of business located at 373 Taunton Avenue, East Providence, R. I.

PAR. 2. Respondent is now and has been for more than 3 years last past engaged in the business of manufacturing jewelry products consisting of expansion bands and other attachments for ladies', men's and children's watches, which it distributes and sells to retail jewelers located throughout the various States of the United States other than the State of Rhode Island and in the District of Columbia, and causing said jewelry products, when sold, to be transported from the place of manufacture within said State of Rhode Island to the purchasers thereof located in States other than the State of Rhode Island and in the District of Columbia. There is and has been at all times herein mentioned a continuous current of trade and commerce in said jewelry products across State lines between respondent's factory and the purchasers of said products. Said jewelry products are distributed and

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sold for use, consumption and resale within the various States of the United States and the District of Columbia. Respondent enjoys a substantial volume of business and has more than doubled its sales volume since 1945.

PAR. 3. The respondent, in the course and conduct of its business, as herein described, has been for more than 3 years last past and still is in substantial competition with other corporations and with individuals, partnerships, and firms who are likewise engaged in the business of manufacturing, selling and distributing jewelry products in commerce between and among the various States of the United States and the District of Columbia.

Many of respondent's customers are competitively engaged with each other and with the customers of respondent's competitors within the trade areas in which respondent's said customers respectively offer for sale and sell the jewelry products purchased from the respondent.

PAR. 4. Respondent, in the course and conduct of its business, as hereinbefore set forth, has been for several years last past and is now discriminating in prices at which it has sold and still sells watch attachments of like grade and quality between the different purchasers of said products and commodities by giving and allowing certain of said purchasers a lower price than given or allowed other purchasers competitively engaged in said line of commerce, and by giving and allowing certain of said purchasers, adjustments, rebates, or discounts in the form of either a cash rebate based on annual volume purchases or of a discount from regular retail dealer prices, which rebates or discounts are not given and allowed to others of respondent's said purchaser-customers. Respondent's said purchaser-customers in whose favor such price discriminations are made are generally the larger retail dealers who are thus enabled to obtain greater profits and thereby enabled either to undersell their competitors or furnish superior facilities and services to their consumer-purchasers, or both, with consequent capacity for diversion of trade from the smaller retailer to the more favored or larger retail dealer in such products.

PAR. 5. The respondent has discriminated and still is discriminating in price by the use of a so-called "10% Business Volume Rebate" which it inaugurated and made effective as of January 1, 1947, whereby it has sold jewelry products, including expansion bands and watch attachments, of like grade and quality, to some of its customers at lower prices than to other of its customers who are in competition with said favored customers in the resale of said jewelry products within the United States. Under such "10% Business Volume Rebate" a retail customer purchasing \$1,500 or more of respondent's jewelry products

calculated at retail list prices during the calendar year receives from respondent a 10% cash rebate paid by check as soon as the amount of \$1,500 is reached and a similar 10% rebate is paid to such customer by separate check from respondent on all purchases in excess of \$1,500 made during the balance of the said calendar year. Respondent invokes no requirements from its customers in order to qualify for such annual volume rebate as to the amount of respondent's jewelry products required to be purchased at any one time. Respondent had approximately 2,500 active purchaser-customer accounts representing retail jewelry dealers during the year 1947 of whom only approximately 150 qualified for the 10% annual volume rebate aforesaid during said calendar year, the remainder of said purchaser-customers being unable to qualify for said rebate. Whether a customer qualified to earn such a discount or not, respondent's methods in soliciting and receiving orders from all customers are the same. Respondent's salesmen customarily call on the customers at their respective and geographical places of business throughout the country and solicit and receive orders, such orders being transmitted to respondent's principal office where said orders are invoiced and where the merchandise is shipped to the purchasers at their respective places of business.

PAR. 6. In addition to the discriminations effected by the aforementioned "10% Business Volume Rebate" respondent has been for several years last past and still is discriminating in price by granting and allowing to some of its customers so-called jobber's discounts although such customers are in truth and in fact merely chain retail jewelry stores which resell respondent's products directly to the consuming public through the various branches or outlets of their said chain stores. Notwithstanding the retail characteristics of said retail chain stores, respondent has given and allowed, and still gives and allows, a so-called jobber's discount to said chain stores varying from 12% to 20% below the regular retail customers' list price on various watch attachments, said discount being allowed by respondent without regard to quantity purchases. Respondent's purchaser-customers receiving such favored discounts are engaged in active competition in the resale of respondent's products at retail with other retail customers of respondent who do not receive any such favored discount as above described.

PAR. 7. The effect of the discriminations in price, as hereinabove set forth, may be substantially to lessen competition in the sale and distribution of jewelry products in the respective lines of commerce in which respondent and its customers are engaged, and has been

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and may be to injure, destroy, or prevent competition in the sale and distribution of said products with the respondent and with its customers who receive the benefits of such discriminatory prices.

PAR. 8. The discriminations in price as hereinabove alleged by the respondent between different purchasers of jewelry products of like grade and quality in interstate commerce in the manner and form aforesaid are in violation of the provisions of subsection (a) of section 2 of the Clayton Act described in the preamble hereof.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to 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 (the Robinson-Patman Act) (15 U. S. C., Sec. 13), the Federal Trade Commission on August 17, 1948, issued and subsequently served upon the respondent, F. & V. Manufacturing Co., Inc., its complaint in this proceeding, charging said respondent with having violated the provisions of subsection (a) of section 2 of the said Clayton Act, as amended. The respondent's answer to said complaint was filed on October 13, 1948. Subsequently, a stipulation was entered into by and between the respondent and the Chief Trial Counsel of the Commission, in which it was stipulated and agreed that, subject to the approval of the Commission, the statement of facts contained therein may be taken as the facts in this proceeding in lieu of evidence in support of and in opposition to the charges stated in the complaint, and that the Commission may proceed upon said statement of facts to make its report, stating its findings as to the facts, including inferences which it may draw from the facts admitted, and its conclusion based thereon, and enter an order disposing of the proceeding without further hearing as to the facts or other intervening procedure, the filing of briefs and the presentation of oral argument having been expressly waived. Thereafter, this proceeding regularly came on for final hearing before the Commission upon the complaint, the respondent's answer and the stipulation as to the facts, said stipulation having been approved, accepted and filed, 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. The respondent, F. & V. Manufacturing Co., Inc., is a corporation organized and existing under the laws of the State of

Rhode Island, with its factory, principal office, and place of business located at 373 Taunton Avenue, East Providence, R. I.

PAR. 2. The aforesaid respondent is now and for many years last past has been engaged in the business of manufacturing jewelry products, consisting of expansion bands and other attachments for ladies', men's and children's watches, which it sells and distributes to retail jewelers for use, consumption and resale within the various States of the United States and in the District of Columbia. The respondent causes said jewelry products, when sold, to be transported from their place of manufacture within the State of Rhode Island to the purchasers thereof at their various points of location in States other than the State of Rhode Island and in the District of Columbia. There is now and at all times herein mentioned there has been a continuous current of trade in commerce, as "commerce" is defined in the said Clayton Act, in the respondent's jewelry products among and between the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of its business, as aforesaid, the respondent is now and since June 19, 1936, it has been in substantial competition with other corporations and with various individuals, firms, and partnerships also engaged in the business of manufacturing, selling and distributing jewelry products in commerce among and between the various States of the United States and in the District of Columbia. The respondent enjoys a substantial volume of business, and since the year 1945 it has more than doubled its sales volume. Many of the respondent's customers are competitively engaged with each other and with the customers of the respondent's competitors within the several trade areas in which the respondent's said customers respectively offer for sale and sell the jewelry products purchased by them from the respondent.

PAR. 4. Effective as of January 1, 1947, the respondent inaugurated and put into operation its so-called "10% Business Volume Rebate" plan. Under this plan each of the respondent's retail customers who purchased from the respondent as much as \$1,500 worth of jewelry products, calculated at retail list prices, during a calendar year, received from the respondent a 10% cash rebate, which was paid by check as soon as the purchases of such customer amounted to \$1,500. Such a customer was also given an additional rebate, which was paid later by separate check, amounting to 10% on all purchases in excess of \$1,500 made during the balance of the same calendar year. In connection with the operation of said plan, the respondent invoked from its customers no requirements whatever as to the amount of

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jewelry products which must have been purchased at any one time in order to qualify for such annual rebates.

During the year 1947, the respondent had approximately 2,500 active purchaser-customer accounts representing retail jewelry dealers. Of these 2,500, only approximately 150 dealers qualified for the 10% annual volume purchase rebate during the calendar year, the remainder of said dealers, some of whom were in active competition with some of those who received the rebate, being unable to so qualify. Regardless of whether a customer qualified to earn such a rebate or not, the respondent's methods in soliciting and receiving orders from all of its customers were the same. The respondent's salesmen customarily called on the customers at their respective places of business throughout the country, solicited and received orders, and transmitted such orders to the respondent's principal office, where the merchandise ordered was invoiced and shipped to the purchasers at their respective places of business.

The respondent's purchaser-customers who were able to and did qualify for such volume purchase rebates were generally the major retail jewelry dealers. Such dealers were thus enabled to obtain greater profits from the resale of said jewelry products and to either undersell their competitors or furnish superior facilities and services to their consumer purchasers, or both, which had the capacity of diverting trade from the smaller retailers to the larger and more favored retail dealers in such products.

PAR. 5. The respondent, since June 19, 1936, has likewise extended to certain of its purchaser-customers so-called jobber's discounts, varying from 12% to 20% below the respondent's regular list prices to retailers, depending upon the item of jewelry involved, although such purchaser-customers were in fact mere chain retail jewelry stores which resold the products purchased from the respondent to the consuming public through the various branches or outlets of their chain stores. These so-called jobber discounts were allowed to said retail chain stores by the respondent without regard to the quantity of products purchased. As was true in the case of the volume purchase rebates described in paragraph 4, the respondent's purchaser-customers who have received the favored "jobber discounts" have been in active competition in the resale of products purchased from the respondent at retail with other retail customers of the respondent who have not received any such favored discounts.

PAR. 6. The acts and practices of the respondent in paying and granting the rebates and discounts as aforesaid have resulted in discriminations in price from 10% to 20% in sales of jewelry prod-

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ucts of like grade and quality to competing customers of the respondent, and the effect of such discriminations may be substantially to lessen competition in the sale and distribution of jewelry products in the respective lines of commerce in which the respondent and its customers are engaged. The further effect of such discriminations has been and may be to injure, destroy, or prevent competition in the sale and distribution of such products with the respondent and with its customers who receive the benefits of said discriminatory prices.

The respondent made no contention that any of the price differences made only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which the products involved were to such favored customers sold or delivered.

CONCLUSION

The aforesaid acts and practices of the respondent as herein found constituted violations of subsection (a) 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, approved June 19, 1936.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the respondent's answer thereto, and a stipulation as to the facts entered into by and between counsel for the respondent and the Chief Trial Counsel of the Commission, which stipulation provides, among other things, that without further evidence or other intervening procedure the Commission may proceed upon the complaint, answer and stipulation to make its report, stating its findings as to the facts, including inferences which it may draw from the facts admitted in the stipulation, and its conclusion based thereon, and enter its order disposing of this proceeding (the filing of briefs and presentation of oral arguments having been expressly waived); and the Commission having made its findings as to the facts and its conclusion that the respondent has violated subsection (a) 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, approved June 19, 1936:

It is ordered, That the respondent, F & V. Manufacturing Co., Inc., a corporation, and its officers, representatives, agents, and employees,

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directly or through any corporate or other device, in or in connection with the sale or distribution in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, of jewelry products, do forthwith cease and desist from:

Directly or indirectly discriminating in the price of jewelry products by charging, accepting, or receiving from different purchasers of such products of like grade and quality net prices which differ as much as, or more than, 10% of the highest of such net prices; *Provided, however*, That the foregoing shall not be construed to prevent the respondent from defending any alleged violation of this order by showing that different prices make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which the products were sold or delivered.

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 COMMISSIONER LOWELL B. MASON

CONCURRED IN BY COMMISSIONERS AYERS, CARSON AND MEAD

The respondent in this proceeding is engaged in the manufacture and sale of jewelry products. It is charged with having violated section 2 (a) of the Clayton Act, as amended, by the use of (1) an annual volume purchase rebate plan, under which it grants rebates of 10% of its retail sales prices to purchasers of \$1,500 or more of its products annually, and (2) a "jobber's discount" plan, under which it grants discounts of from 12% to 20% of its regular retail prices to chain store purchasers of its products, regardless of the quantities of such products purchased. The case was submitted for disposition on the complaint, the respondent's answer, and a stipulation of facts entered into by and between counsel which covers all of the material allegations of the complaint.

On the basis of the stipulation, there can be no question about the respondent's violation of the law. In addition to setting forth the rebate and discount plans above-mentioned, under which price differences are made in sales of products of like grade and quality to competing customers in amounts varying from 19% to 20% of regular retail prices, the stipulation further provides that "The effect of the discriminations in price, as hereinabove set forth, may be substantially to lessen competition in the sale and distribution of jewelry products in the respective lines of commerce in which respondent and its cus-

tomers are engaged * * *," etc. Thus, all of the elements necessary to constitute a showing of unlawful price discriminations in violation of section 2 (a) of the Clayton Act, as amended, are specifically covered. Moreover, the respondent made no contention that any of its price differences make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which the products involved are to its favored customers sold or delivered. Therefore, this case does not involve the question of the respondent's ability to justify the price differences by reason of corresponding differences in costs.

It is to be noted, however, that the stipulation is very specific as to the price differences which may substantially injure competition. By its express terms, the differences having that effect are those "hereinabove set forth," and the differences thus encompassed are those ranging from 10% to 20% of the respondent's regular retail prices. What effect, if any, price differences amounting to less than 10% of the retail prices may have on competition is not stated. It is clear, therefore, in the absence of any facts to support an inference of the likelihood of competitive injury as a result of smaller price differences, that the Commission's findings must necessarily be limited to differences amounting to 10% or more of the respondent's retail prices.

The Commission's findings as to the facts being so limited, its order to cease and desist must be limited accordingly. The only alternative would be for the order to prohibit all price differentials, with a proviso that it shall not be construed to prevent differences of less than 10% of retail prices which do not tend to lessen, injure or destroy competition. This, however, the Commission may not do in view of the decision of the Supreme Court in the *Morton Salt Company* case (334 U. S. 37 (54)). The Court, in that case, had before it an order carrying just such a proviso. In rejecting it, the Court said:

The effective administration of the Act, insofar as the act entrusts administration to the Commission, would be greatly impaired if, without compelling reasons not here present, the Commission's cease and desist orders did no more than shift to the courts in subsequent contempt proceedings for their violation the very fact questions of injury to competition, etc., which the act requires the Commission to determine as the basis for its order. * * *

Whether on this record the Commission was compelled to exempt certain differentials of less than five cents we do not decide. But once the Commission exempted the differentials in question from its order, we are constrained to hold that as to those differentials it could not then shift to the courts a responsibility in enforcement proceedings of trying issues of possible injury to competition, issues which Congress has primarily entrusted to the Commission.

Thus, the Commission's order to cease and desist in this proceeding prohibits only those price differences which, on the basis of the record, are found to have a reasonable possibility of substantially lessening competition, namely, differences of 10%, or more, of the respondent's highest retail prices.

Syllabus

IN THE MATTER OF
STEELCO STAINLESS STEEL, INC., AND CLYDE C. CARRCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 5530. Complaint, Mar. 9, 1948—Decision, Mar. 15, 1950*

While various mineral elements and vitamins are required by the body as a whole, and essential to the strength and functioning thereof, statements and representations which attributed to various mineral elements and vitamins specific or unique functions in connection with specified tissues or organs, and asserted that the method of cooking was responsible for their loss or destruction, or conservation, as the case might be, were false in their breadth, express and implied, and misleading and deceptive in their lack of qualification.

As respects the vitamins, foods or other preparations containing vitamin A do not increase resistance to disease, and vitamin A is not effective in preventing or relieving anemia, pellagra, gallstones or eye trouble generally, vitamin B is not effective in preventing or relieving nervous diseases generally or paralysis, vitamin C does not increase one's strength and endurance and will not prevent or relieve muscular diseases or loss of weight, and vitamin D is not effective in the treatment or prevention of bone disorders generally. And as respects vitamin E, there is no scientific evidence that it plays any role in reproduction in human beings.

With regard to the effect of cooking on minerals and vitamins, the former are not appreciably damaged or destroyed by the heat used in any method. In the case of the latter, vitamin C and some elements of vitamin D are destroyed by prolonged high temperatures; other vitamins are not. As respects losses in cooking, minerals and vitamins B₁ and C leach out in boiling water depending upon the solubility of the compounds in which they occur in food, and if the water is not consumed in gravies, sauces or otherwise, there is loss of said food elements, depending on the amount in the food before cooking, which in turn depends upon the nature of the food, the soil in which grown, the manner of harvesting and storage, and the exposure to light and air between maturity and preparation, matters which, for all practical purposes, govern the food elements derived from the consumption of cooked foods as much as the manner of their cooking. And except for persons already deficient in such food elements or on the border line, or those on restricted diets, the maximum loss from any method of cooking in general use would be insignificant from a nutritional standpoint and would not affect the health of a person in normal health or on a normal diet.

Where a corporation and its president, who was its majority stockholder, engaged in the competitive interstate sale and distribution of cooking utensils; in selling their said products through salesmen who were their agents or employees and not independent contractors or dealers, and whom they furnished with sales manuals, instruction books, advertising matter, charts.