

Syllabus

IN THE MATTER OF

AUTOMATIC CANTEEN CO. OF AMERICA

COMPLAINT, FINDINGS, ORDER AND OPINION IN REGARD TO THE ALLEGED VIOLATION OF SEC. 3 AND SEC. 2 (f) OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT APPROVED JUNE 19, 1936

Docket 4933. Complaint, March 19, 1943—Decision, June 6, 1950

Competition among the manufacturers and jobbers of candy, gum, nuts and other confectionery products is and has been such that any differential or discrimination in the price of such products of like grade and quality may result in a substantial diversion of business to those manufacturers and jobbers who grant such differential or discrimination and substantially reduce the sales of those who do not grant them.

Where a corporation engaged in (1) purchasing nationally known candy and confectionery products of standard weight and quality from many manufacturers in various States, and in reselling them to some 83 "canteen distributors" (including two which were owned or controlled by the chairman of its board and his brother and accounted for over one-third of all retail sales reported by said distributors), for resale to the public by means of automatic vending machines leased from it and located in offices, factories and other commercial establishments in 112 separate territories in 33 States and in the District of Columbia; and in (2) acquiring, owning, operating and leasing such machines—substantially all of which were in the possession of its distributors through the operation of its lease agreements with them—and developing, as a part of its primary function of selling confectionery products, the automatic retailing of such items through leased vending machines;

In leasing both the standard machines and the selective machines, which it developed and which permitted the customer to select different kinds of candy, gum or nuts, and which, as with the standard it caused to be manufactured for it by others—

- (a) Entered into exclusive dealing contracts with its said distributors which required said distributors (1) to purchase from it their requirements of confectionery and other merchandise for sale in its machines, (2) not to use or sell any merchandise thus purchased in any machine other than those leased by it, (3) not to offer or sell in such machines any merchandise not purchased from it, and (4) not to make, possess or operate any such machine not leased from it;
- (b) Prohibited its distributors, under said exclusive dealing contracts, following their termination through lapse of time or for breach of any of the aforesaid conditions, from owning, licensing, leasing, or dealing in any automatic vending machine and from selling any merchandise by means of any such machine within the territory specified for a period of five years;
- (c) Reserved to it the right to terminate without notice the lease and all interest of the distributor thereunder in the event that he failed or refused to observe and fulfill certain terms, covenants and guarantees, or defaulted

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in the performance of any of the other agreements, etc., or if his interest should be transferred or pass to another except as permitted in the agreement;

- (d) Included provisions whereby the distributor guaranteed to meet certain requirements with respect to the number and type of machines maintained on active sales locations during the period of operation, and the sales volume to be maintained, failing which it was entitled to terminate the lease and all of the title of the distributor under the agreement;
- (e) Among other miscellaneous requirements related to those above set out, included provisions binding the distributor to follow certain specified standard practice, to make reports on the conditions of its business, and to buy all repair parts from it; but reserved to itself the right to make arrangements for the use of the machines and sale of merchandise in the distributor's territory where chain organizations, interstate concessionaires and public utility transportation systems were involved; and prohibited the distributor for disposing of his business without its consent; and

While modifying from time to time its aforesaid basic agreements, due primarily to wartime conditions, so as to give various distributors permission to make certain purchases from local jobbers or from certain manufacturers and processors upon payment to it of a fee as rental for use of its machines, based upon the amount of such purchases—

- (f) Reserved the right to terminate such permission in whole or in part, and with or without cause; and
- (g) As an aid in carrying out its said exclusive dealing contracts, organized a company as its wholly owned subsidiary, with identical officers and located in the same office, and directed some of its distributors to purchase from said company all merchandise desired of certain suppliers, and directed certain suppliers to sell to its distributors only through said company;

With the result that—

(1) There was a substantial lessening of competition (1) between its suppliers of confectionery products and their competitors, (2) between it and its competitors, and (3) between its distributors and their competitors, thereby tending to create a monopoly in it and its distributors in the resale of the products concerned, and several of its suppliers who received limited orders from it and many of their competitors were prohibited from supply its distributors with their requirements;

(2) Competition was substantially lessened between its suppliers of vending machines and their competitors who were able to sell only to other purchasers, tending thereby to create a monopoly in its suppliers; other manufacturers refrained from attempting to sell their machines to its distributors; and the distributors refrained from using or dealing in such machines of any one other than it, due to the litigation, trouble and loss encountered in cases where such transactions had been attempted; and

(3) Effect of its said exclusive dealing contracts had been and might be to substantially lessen competition or tend to create a monopoly in both lines of commerce in which it was engaged, namely, the sale and purchase of such packaged merchandise suitable for use in automatic vending machines, and

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the development, acquisition, ownership, leasing, licensing, or selling of such machines; and,

Where said corporation, which, since its incorporation in 1931 and particularly since 1936, had enjoyed a rapid growth in business and attained a dominant position in the sale and distribution of confectionery products through automatic vending machines, due primarily to the aforesaid exclusive dealing contracts and to the receipt of lower prices or preferential discounts which accounted for almost all of its gross confectionery profits, on said standard price items (variations in which are brought about only by means of discounts, free deals, or other promotional aids made available by manufacturers and suppliers)—

Through such methods as informing prospective suppliers of the prices and terms of sale which would be acceptable to it, without consideration or inquiry as to whether the supplier could justify such a price on a cost basis or whether it was being offered to other customers of the supplier; refusing to buy unless the price to it was reduced below prices to others; and claiming that certain alleged savings would accrue to the supplier in selling to it, or that certain elements of cost could be eliminated which would justify a lower price—

- (b) Knowingly induced and knowingly received, and knowingly sought to induce and receive, differentials in price from its suppliers which consistently ranged from approximately 1.2 to 33 percent lower than the prices paid by its competitors for products of like grade and quality, which it did not attempt to justify as making only due allowance for differences in cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such products were sold or delivered to it, and which constituted discriminations in price between purchasers of commodities of like grade and quality who had been and were competitively engaged with each other, in the sale and distribution of such commodities or whose ultimate purchasers or customers had been and were so engaged;

With the result that—

(1) Manufacturers and processors who were unable to sell their products at the lower prices demanded by it, to vending machine operators, jobbers and retailers who competed with it or its distributors in the same trade area suffered a loss of business;

(2) Its distributors, by reason of the special services which said discriminatory prices and additional income enabled it to render them, could and did offer larger commissions in the intense competition for locations than other vending machine operators were able to meet, or which they were forced to meet at a decrease in sales and profits, and such competing operators in many instances were forced to remove their machines from various locations as a result of the higher commissions paid by its distributors;

(3) Candy jobbers and wholesalers were adversely affected by competitive sales of its products in their local territories, jobbers were unable to sell products concerned to its distributors who received the ultimate benefit of its lower prices through the medium of additional services and aids which

enabled them to replace other retail outlets, and such jobbers and wholesalers lost business also due to the fact that it and its distributors were able to procure more and better vending machine locations which substantially reduced the business of competing operators who ordinarily purchased their merchandise from jobbers;

(4) Manufacturers engaged in selling such machines to retailers other than vending machine operators, who competed with it and its distributors, and who suffered a loss of sales or detraction of trade in the neighborhood where said distributors were able to place their machines, were either forced to reduce their sale of such machines to such retailers or required to increase their services and expenses in competing with it or its distributors; and

(5) Effect of such price discriminations had been and might be substantially to lessen competition and tend to create a monopoly in the manufacture, sale and purchase of confectionery products or other packaged goods suitable for use in coin-operated vending machines, and in the manufacture, development, acquisition, ownership, operation, leasing, licensing or selling of such machines suitable for said products, and, as hereinbefore indicated, to injure, destroy or prevent competition (1) between manufacturers and processors of the aforesaid products who granted such lower prices and those who did not grant such discriminatory prices, (2) between respondent and vending machine operators who did not receive the benefit of the lower prices received by it, (3) between it and candy jobbers and wholesalers who did not receive the benefit of such discriminatory prices, (4) between it and other retailers of such products who did not receive the benefit of the lower prices granted it, and (5) between those manufacturers of automatic vending machines who supplied it and its distributors and those who did not:

Held, (a) That the acts and practices of said corporation, of entering into exclusive dealing contracts with its various distributors as above set out constituted a violation of section 3 of the Clayton Act; and

(b) That said acts and practices of said corporation is knowingly inducing and receiving discriminations in the prices of products suitable for sale in vending machines, purchased by it from manufacturers and processors, which had the effect above set out, constituted a violation of section 2 (f) of the Clayton Act as amended by the Robinson-Patman Act.

As respects the establishment of a factual basis for a cease and desist order, the medium through which the Commission enforces laws administered by it: competent proof of one or more violations, in ordinary circumstances, is sufficient to establish a factual basis for such an order, and neither harassment of litigants nor waste of Government funds in needless reiteration through cumulative evidence should be countenanced; and the Commission was of the opinion in the instant proceeding, in which fourteen sellers were named as typical of a group from which respondent had induced or received discriminations in price, that the records of not more than five

of such sellers would have supplied ample evidence of such discriminations or price differentials.

In said proceeding in which counsel, after the record had been closed for the taking of testimony, entered into a stipulation—which the Commission accepted and approved—by the terms of which it was agreed that if the Commission, when it reached a decision on the merits, should decide to issue an order to cease and desist and should issue an order which was no more broad in scope and no more stringent in its provisions than the proposed order made a part of said stipulation, then the Commission might proceed, without further intervening procedure, to make its findings as to the facts and its conclusion based thereon from the testimony and exhibits theretofore introduced and admitted, and enter its order requiring respondent to cease and desist from the acts, practices and methods complained of (after making its decision upon certain pending appeals from the ruling of the trial examiner and after the trial examiner had closed the record and filed his recommended decision):

The Commission, after due consideration, eliminated certain prohibitions contained in the order agreed to, and an additional prohibition recommended by the trial examiner either because the evidence failed to provide a basis for findings of fact in support thereof or because such prohibitions were not required by reason of the nature of the complaint or were without sound basis under the provisions of the statute under which the proceeding was initiated; and in adopting the order entered, with inhibitions which did no more than prohibit those acts, practices and methods of respondent which were found to violate section 3 of the Clayton Act and section 2 (f) of said act as amended by the Robinson-Patman Act, and were confined to those acts, practices and methods alleged in the complaint, adopted an order which was not as stringent in its terms or as broad in scope as the order to which respondent agreed, but served to more properly dispose of the issues raised by the pleadings and to more nearly meet the requirements of the statute.

Before *Mr. Charles B. Bayly*, trial examiner.

Mr. Austin H. Forkner for the Commission.

Sanders, Gravelle, Whitlock & Howrey, of Washington, D. C., and *Friedlund, Levin & Friedlund*, of Chicago, Ill., for respondent.

Mr. William A. Quinlan, of Washington, D. C., for National Candy Wholesalers Association Inc., amicus curiae.

Mr. David Carliner, of Washington, D. C., for Automatic Merchandise Co., Davidson Bros., Keystone Vending Co., National Distributors, George E. Leach, Inc., Pack Shops Co., Southern Venders, Sterling Vending Co., W. W. Tibbals, Vendex Inc., and Vendomat Corp. of America, amici curiae.

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COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, since June 19, 1936, has violated and is now violating the provisions of section 3 and of subsection (f) of section 2 of the Clayton Act (U. S. C. title 15, sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint against the said respondent, stating its charges as follows:

COUNT I

PARAGRAPH 1. Respondent, Automatic Canteen Co. of America, is a corporation organized and existing by virtue of the laws of the State of Delaware, with its principal office and place of business located at 222 West North Bank Street, Chicago, Ill.

PAR. 2. Respondent is now and for many years last past has been engaged in the business of leasing and licensing automatic vending machines used in the dispensing of candy bars, chewing gum and nuts, hereinafter referred to as confection and nut products. Respondent is likewise engaged in the sale and distribution to lessees or licensees of said automatic vending machine of the confection and nut products vended in said machines, which products respondent purchases from various manufacturers and sells to said lessees in a manner and under terms and conditions hereinafter described. In connection with the leasing and licensing of automatic vending machines, and in connection with the sale and distribution of confection and nut products to the lessees thereof, respondent has caused, and still causes, said vending machines when leased or licensed and the said confection and nut products when sold to be transported from its principal place of business located in the State of Illinois to the lessees, licensees, and vendees thereof located in various points in the several States of the United States other than the State of Illinois, and in the District of Columbia, and said respondent now is and has been for more than 5 years last past constantly engaged in commerce in said vending machines and said confection and nut products between and among the various States of the United States, the Territories thereof, and the District of Columbia.

PAR. 3. In the course and conduct of its said business in commerce, as aforesaid, said respondent is, and has been for many years last past, in competition with individuals, partnerships and corporations engaged in the manufacture, leasing, licensing, and vending of auto-

matic vending machines and with other individuals, partnerships, and corporations who have been and are engaged in the manufacture, sale and distribution of confection and nut products, most, if not all, of which latter competitors manufacture and/or sell and distribute confection and nut products suitable for use in respondent's vending machines. Respondent would have been, and would now be, in more active and substantial competition with both said competing vending machine manufacturers, lessors and vendors and with said competing manufacturers and/or sellers and distributors of confection and nut products suitable for use in vending machines but for the restrictive conditions of respondent's contracts of license, lease and sale as hereinafter more particularly set forth.

Respondent does not manufacture its own automatic vending machines but has said machines manufactured for it by other companies in accordance with specifications furnished by respondent. Respondent was organized in 1931, has enjoyed rapid growth and is now and has been for more than 5 years last past one of the largest concerns engaged in the business aforesaid. Respondent now has outstanding in numerous locations in 31 States of the United States, and under lease agreements hereinafter described, executed by and between respondent and some 140 lessees, numerous vending machines as follows: 88,856 selective candy machines, 27,735 standard gum machines, 37,487 selective nut machines, 50,976 selective gum machines, and an unknown but large number of standard candy machines and standard nut machines. That by reason of the rapid growth of respondent's business, as aforesaid, and by reason of the numerous machines outstanding under lease as aforesaid, respondent is a dominant factor in the business of leasing and licensing vending machines; however, such business of respondent is incidental to its business of selling and distributing confections and nut products to the lessees of said vending machines. The candy vending machines of respondent vend in excess of 200,000,000 candy bars annually. The nut vending machines of respondent vend in excess of 5,000,000 pounds of nuts annually. Respondent annually purchases from one supplier alone for resale to its gum machine lessees approximately 1,850,000 boxes (100 sticks to a box) of chewing gum. Respondent has leased and now leases its vending machines to its said lessees for specified nominal rentals; the rental charge on the selective candy machines varies from 25 to 37 cents per machine per period and the year is divided into 13 periods. The lease terms of some types of respondent's gum machines are as low as 4 cents per period. Respondent derives little or no profit from the leasing of its vending machines, its principal source of profit being derived from

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the sale of confection and nut products to the lessees of its machines at terms provided for in said lease or at terms as later modified during the period of the lease by mutual agreement. The leases entered into by respondent and its various lessees covering said vending machines run for a fixed term of 18 years without any right to terminate given to the lessees thereunder and provide that the lessees may use such machines only in a certain designated territory allotted by respondent as an exclusive franchise for the period of the lease. The approximate life and usefulness of respondent's vending machines, due to wear, deterioration and obsolescence, is approximately 8 years or less than one-half of the term of the leases covering said vending machines of respondent. Pursuant to arrangements made by respondent or its said lessees, respondent's vending machines are located in industrial plants, service stations, garages and terminals, approximately 95 percent of such vending machines being in industrial plants. The lessees are required by respondent to pay to the owners of the locations a commission of 10 percent on all sales made through said machines and in addition the lessees are sometimes required to pay an additional monetary consideration to the owners of choice locations. Respondent maintains certain supervision over its lessees by provisions in the lease agreement that said lessees shall follow standard practices of respondent with respect to methods employed in obtaining machine locations, in maintaining, reconditioning and servicing the machines, and in accounting and bookkeeping procedure, but said lease agreements expressly provide that the lessees are independent contractors and are in no sense the agents or representatives of the respondent.

PAR. 4. The respondent, in the course and conduct of its business hereinbefore described in paragraphs 1, 2, and 3, has leased and licensed, and is now leasing and licensing, its automatic vending machines for use in the several States and Territories of the United States and in the District of Columbia on the condition, agreement or understanding that the lessees or licensees thereof will not use the said automatic vending machines to vend any confections, nut products or merchandise other than those purchased from respondent; and on the further condition, agreement or understanding that the lessees or licensees thereof, during the period of said leases, will not acquire, hold, use, operate, lease or otherwise deal with any automatic vending machines other than those of respondent; and on the further condition, agreement or understanding that if the lessees or licensees thereof fail to comply with the aforesaid conditions during a period of fifteen days after written notice from respondent, all rights of said lessees or licensees shall terminate, including the right to the

use and possession of such automatic vending machines which may be thereafter immediately repossessed by respondent and removed by respondent from their respective sales locations or from the premises of said lessees or licensees; and on the further condition, agreement or understanding that the lessees or licensees thereof, upon the termination of said leases by lapse of time or by respondent, upon the breach of any of the conditions aforesaid, shall not own, lease or deal in any automatic vending machines of any kind or character, or sell any merchandise of any kind or character by means of any automatic vending machines within the franchise territory of such lessees or licensees for a period of 5 years after said termination of said leases.

PAR. 5. The effect of said leases or licenses on the said conditions, agreements or understandings set forth in paragraph 4 hereof may be to substantially lessen competition or tend to create a monopoly in either or both of two lines of commerce, to wit: (1) the leasing, licensing or selling of automatic vending machines between and among the several States of the United States and in the District of Columbia, (2) the sale of confections and nut products suitable for use in automatic vending machines between and among the various States of the United States and in the District of Columbia.

PAR. 6. The aforesaid acts, practices and methods of respondent constitute a violation of the provisions of section 3 of the hereinabove-mentioned 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).

COUNT II

PARAGRAPHS 1 to 3, inclusive. As paragraphs 1 to 3, inclusive, of count II of this complaint, the Commission hereby incorporates paragraphs 1 to 3, inclusive, of count I hereof to precisely the same extent as if each and all of them were set forth in full and repeated verbatim in this count.

PAR. 4. Respondent in the course and conduct of its business more particularly described in paragraphs 1, 2, and 3 hereof, as a result of the restrictive covenants contained in its automatic vending machine leases, more particularly described in count I hereof, is one of the largest distributors of confection and nut products to automatic vending machine operators in the United States, and in consequence is an important outlet to manufacturers of such confection and nut products who wish extensive distribution of said products throughout the United States.

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Respondent in the course and conduct of its business, now and since June 1936 has been in substantial competition with other corporations, individuals, partnerships, and firms similarly engaged in the business of buying, selling, and distributing confection and nut products, except insofar as such competition has been affected by the practices which are the subject of this count. Respondent in its business of leasing automatic vending machines, of securing additional locations for the lessees of said machines, of increasing the number of its said machines outstanding under lease, and of supplying the lessees thereof with confection and nut products for use therein, is in active competition with jobbers of candy who supply the retail candy trade and also with the retail customers of such jobbers.

PAR. 5. Respondent and its competitors buy confection and nut products from a large number of manufacturers, jobbers and distributors located in the various States of the United States (hereinafter called sellers), representative of whom are the following:

The Curtiss Candy Co., Chicago, Ill.
Walter H. Johnson Candy Co., Chicago, Ill.
Williamson Candy Co., Chicago, Ill.
Bunte Bros., Chicago, Ill.
D. L. Clark Co., Pittsburgh, Pa.
Luden's, Inc., Reading Pa.
Nelster Candy Co., Cambridge, Wis.
Switzer's Candy Co., St. Louis, Mo.
Sperry Candy Co., Milwaukee, Wis.
Queen Anne Candy Co., Hammond, Ind.
Trudeau Candies, Inc., St. Paul, Minn.
Wayne Candies, Inc., Fort Wayne, Ind.
Chase Candy Co., St. Joseph, Mo.
William Wrigley, Jr., Co., Chicago, Ill.

Each of said sellers sell and distribute confection or nut products in commerce between and among the various States of the United States and the District of Columbia causing said confection or nut products to be shipped and transported from their respective places of business in the various States of the United States to respondent at its principal place of business in Chicago, Ill., where respondent takes possession of all of its said purchases, to competitors of respondent, and to said competitors' customers located in the various States of the United States and in the District of Columbia. That the sellers located in Chicago, Ill., make deliveries to respondent with the knowledge that a substantial portion of respondent's purchases is intended for the use of the lessees of the respondent's automatic vending machines

located in the various States of the United States other than the State of Illinois.

Respondent and respondent's competitors resell and distribute said confection and nut products in commerce between and among the various States of the United States and the District of Columbia, causing said confection and nut products to be shipped and transported from their respective places of business in the various States of the United States to their respective customers located in the various States of the United States and the District of Columbia.

PAR. 6. In the course and conduct of their respective businesses as above described said sellers have been and are now being induced by respondent to discriminate in price between different purchasers buying said confection and nut products of like grade and quality in commerce for use, consumption, and resale within the United States by charging said competitors of respondent higher prices than those charged respondent. Said discriminations in prices which favor respondent are not uniform on each confection and nut product sold or from each seller. Respondent pays such sellers from approximately 10 to approximately 25 percent less for said confections and nut products of like grade and quality than respondent's competitors pay said sellers, depending upon the confection and nut product and the seller, or either of them.

PAR. 7. The effect of said discriminations in prices as set forth in paragraph 6 hereof may be substantially to lessen competition between respondent and competing jobbers likewise engaged in the sale of candy either to vending machine companies or to retailers engaged in the sale and distribution of confection and nut products; to tend to create a monopoly in respondent in the lines of commerce in which respondent and its competitors are engaged; and to injure, destroy, or prevent competition with respondent in the resale of such confection and nut products of like grade and quality purchased from said sellers; and to injure, destroy, or prevent competition with the sellers granting said discriminations in prices to respondent.

PAR. 8. Respondent receives information as to the regular prices paid by its competitors to said sellers for said confection and nut products, refuses to purchase said confection and nut products from said sellers unless it is granted prices lower than paid by its competitors, and accepts and receives such lower prices on said confection and nut products and thereby and while engaged in commerce and in the course of such commerce as alleged in paragraph 5 hereof, is now and has been since June 19, 1936, knowingly inducing and receiving the discriminations in price alleged in paragraph 6 hereof.

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PAR. 9. The foregoing alleged acts of said respondent are in violation of section 2 (f) of said act of Congress approved June 19, 1936, entitled, "An act to amend section 2 of the act entitled 'An act to supplement existing laws against unlawful restraints and monopolies and for other purposes,'" approved October 15, 1914, as amended (U. S. C. title 15, sec. 13) and for other purposes.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an act of Congress entitled, "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by an act of Congress approved June 19, 1936 (the Robinson-Patman Act), and by virtue of the authority vested in the Federal Trade Commission by said act, the Federal Trade Commission on March 19, 1943, issued and subsequently served its complaint in this proceeding upon the respondent, Automatic Canteen Co. of America, a corporation, charging it with violation of section 3 and of subsection (f) of section 2 of said act. 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. On February 18, 1939, after the record was closed for the taking of testimony, a stipulation was entered into by and between counsel supporting the complaint and respondent and its counsel. By terms of this stipulation it was agreed, among other things, that if the Commission, when it reached a decision on the merits in this matter, should decide to issue an order to cease and desist and should issue such an order no more broad in scope and no more stringent in its provisions than the proposed order attached to, and made a part of, said stipulation, the Commission might proceed upon the record without further intervening procedure to make its findings as to the facts and its conclusion based thereon from the testimony and exhibits theretofore introduced and admitted, and enter its order requiring the respondent to cease and desist from the acts, practices, and methods complained of after it had made its decision upon pending appeals from rulings of the trial examiner and after the trial examiner had closed the record and filed his recommended decision. The Commission accepted and approved this stipulation on March 2, 1949. On May 5, 1949, it rendered its decision upon the aforesaid

appeals from rulings of the trial examiner. The trial examiner closed the record on July 15, 1949, and filed his recommended decision on August 16, 1949.

Thereafter, this proceeding regularly came on for final hearing before the Commission upon the complaint, the answer thereto, testimony and other evidence, the accepted and approved stipulation, and the recommended decision of the trial examiner and exceptions thereto (no briefs having been filed and oral argument not having been requested, according to the terms of the stipulation); 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, Automatic Canteen Co. of America, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 222 West North Bank Street, Chicago, Ill.

PAR. 2. (a) The respondent is now, and since June 19, 1936, has been engaged in the business of purchasing candy, gum, nuts, and other confectionery products from the producers thereof and in the resale of these products directly through automatic vending machines and to various persons, firms, or corporations known as "canteen distributors." These canteen distributors in turn resell the same merchandise to the public by means of automatic vending machines leased from the respondent and located in offices, factories, and other commercial establishments. The respondent has also been engaged in the development, acquisition, ownership, operation, and leasing of automatic coin-operated vending machines which are designed to, and do, dispense candy, gum, nuts, and other confectionery products to purchasers for consumption at the point of purchase.

(b) The respondent, for nearly 20 years last past, has been engaged in purchasing nationally known candy and confectionery products of standard weight and quality from many manufacturers and producers located in various States and reselling them principally as a wholesaler, to lessees of its automatic vending machines. In carrying out this function, it is, and has been, principally engaged as a wholesaler of candy, gum, nuts, and other confectionery products. The automatic vending machines operated by its customers were leased by it to various persons, firms, and corporations called "canteen distributors," who operate and have operated these machines as in-

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dependent contractors in territories specifically described and set out by the respondent, throughout the several States of the United States. The respondent owns a substantial number of such leased machines located in many States and used within each of the territorial limits specifically defined and circumscribed by it. The lessees of respondent's automatic vending machines, hereinafter referred to as "distributors," have been, and are, its sole customers for the products it purchases and sells as a wholesaler. The number of such distributors has varied from time to time, but as of January 11, 1946, there were 83 such distributors operating automatic vending machines in 112 separate territories located in 33 States and in the District of Columbia. Prior to April 12, 1942, respondent operated a retail division of its own, through which it sold merchandise through automatic vending machines in northern Illinois, including the metropolitan area of Chicago.

PAR. 3. (a) As a part of respondent's primary function in merchandising candy, gum, nuts, and other confectionery products, it has spent considerable time and effort in developing the possibility of automatically retailing these and other items through leased vending machines. Upon its incorporation in 1931, respondent acquired from Chicago Automatic Canteen Co. and the Canteen Co. a small number of standard candy canteens designed to deliver candy bars through a single mechanism. Different sizes and shapes of bars could be placed in this type of canteen, but the customer had no choice in purchasing merchandise placed therein and was compelled to accept the kind of candy bar delivered in response to the deposit of his coin. Respondent continued to purchase this type of automatic vending machine for about 3 years, at the end of which time it owned approximately 40,000.

(b) In 1935 respondent developed a selective candy canteen, which gradually replaced the standard canteens in the hands of its distributors. This selective candy canteen consisted of a machine having five columns installed in a cabinet, which permitted the customer to select five kinds of candy bars. By means of display windows in each column, the customer was enabled to observe samples of these bars. On January 11, 1946, there had been manufactured for respondent a total of 91,217 selective candy canteens, of which the respondent then owned approximately 87,750. Substantially all canteens or automatic vending machines for all types of products are in the possession of respondent's distributors through the operation of a lease agreement between respondent and these distributors.

(c) Beginning in the year 1932 respondent introduced the standard gum canteen operated on the same principle as the standard candy canteen. In 1938 respondent arranged for the manufacture of a selective gum canteen which it had previously designed. This canteen permitted the selection of five kinds or flavors of gum. On January 11, 1946, respondent had purchased a total of approximately 54,941 selective gum canteens, of which it then owned approximately 52,000.

(d) In 1935 respondent added a coin or automatic vending machine for the dispensing of peanuts and other types of nuts. This machine consisted primarily of a glass bowl mounted on a vending device. Respondent has purchased approximately 42,249 such machines, and on January 11, 1946, owned approximately 36,500. In 1938 it introduced a selective nut canteen, which gradually replaced the glass-bowl type and offered the customer a choice of two varieties of nuts. On January 11, 1946, it had purchased approximately 45,243 such machines of which it then owned approximately 43,000.

(e) Respondent does not own or control any manufacturing facilities and has never manufactured any of its vending machines. It purchases them under contract from manufacturers. The number of machines manufactured for respondent prior to January 11, 1946, the original replacement value fixed by it in its contracts with distributors, and the number estimated to be owned as of January 11, 1946, are summarized in the following table:

Number of machines (canteens) manufactured	Replacement value	Number owned by respondent
40,000 standard candy.....	\$13.50	None
91,217 selective candy.....	45.00-50.00	87,750
30,013 standard gum.....	5.00	10,900
54,941 selective gum.....	10.00	52,000
42,249 standard nut (2 pound).....	5.00	36,500
45,243 selective nut.....	10.00	43,000
803,663 total canteens.....	¹ 14.75	230,150

¹ Average.

PAR. 4. (a) Respondent maintains, and at all times mentioned herein has maintained, a course of trade in commerce among and between the various States of the United States and in the District of Columbia.

1. In the course and conduct of its business in the purchase and resale of candy, gum, nuts, and other confectionery products since June 19, 1936, respondent has caused said products to be shipped from its principal place of business in the State of Illinois or from the various places of business of its suppliers to its warehouses or to

its distributors at their respective points of location in various other States of the United States and in the District of Columbia.

2. In carrying on its business in the leasing and licensing of automatic vending machines, respondent has caused said machines, when leased, to be shipped and transported from its principal place of business in the State of Illinois or from the places of manufacture of such machines located in several other States of the United States to the points of location of its respective distributors or to its places of business located in other States of the United States and in the District of Columbia.

PAR. 5. Respondent's largest distributor as of January 11, 1946, consisted of a partnership known as the "Canteen Co.," which was principally owned by Nathaniel Leverone, chairman of the board of directors of the respondent company, and his brother, L. E. Leverone, its president. This partnership operated as a canteen distributor in 17 territories, and its volume of business for the 5 fiscal years prior to January 11, 1946, accounted for 24.7 percent of the total retail sales reported by all canteen distributors during that period. This distributor operated automatic vending machines in 17 cities located in nine States and in the District of Columbia. Another large distributor operated under the name "Canteen Service Co." This was a corporation organized on September 29, 1945, and succeeded a partnership of the same name in which the Leverone brothers were the only partners. The majority of the stock of this corporation was owned by these brothers. It operated principally in Cook County, Ill., and embraced the greater metropolitan area of Chicago and some other parts of the county. For the fiscal year ending September 29, 1945, its retail sales amounted to 10.06 percent of all retail sales reported by respondent's canteen distributors. Both the Canteen Service Co. and the Canteen Co. occupied offices at the same location as the respondent and shared, on a proportionate basis, in the expenses of rental, accounting, clerical, and other services rendered.

Par. 6. (a) Through the use of contracts between respondent and its distributors or lessees, respondent leased automatic vending machines to said distributors for varied specified periods of time and required them to purchase all merchandise sold in said machines solely from it. These lease agreements, among other things, provided that said distributors or lessees would not buy, use, or deal with the products supplied by any other seller or supplier, or any competitor of the respondent. Said agreements further provided that the distributors or lessees of the vending machines leased from respondent would not acquire, manufacture, own, hold, locate, use, operate, lease, or other-

wise deal with any automatic vending machine not sold, licensed, or leased by respondent or otherwise acquired from it.

(b) The provision of the aforesaid contract dealing with the purchase of merchandise by the distributor is as follows:

The distributor, further in consideration of the leasing of the aforesaid canteens, does hereby covenant and agree that it will order and purchase from the company all candy, confections, gum, peanuts and other merchandise (of the kind or type which may from time to time be carried by the company as hereinafter specified) which the distributor may require throughout the period of this agreement, for resale by means of the canteens leased hereunder, at the price and upon the terms hereinafter in this article specified.

(c) The provision of the contract with respect to the sale of merchandise required:

That the distributor shall not use or sell, or cause or permit to be used or sold, any merchandise purchased by the distributor from the company hereunder in any automatic vending machine other than the Canteens leased by the distributor hereunder; that the distributor shall not sell or offer to sell any merchandise purchased hereunder except by means of the canteens leased hereunder; and that the distributor shall not use or sell or attempt to use or offer to sell in or by means of any canteen leased hereunder any merchandise other than that purchased by the distributor from the company hereunder.

(d) The provision dealing with the leasing of automatic vending machines required:

That the distributor shall not during the period of this agreement acquire, manufacture, own, hold, locate, use, operate, lease or otherwise deal with any automatic vending machine other than the canteens leased to the distributor hereunder.

(e) By the terms of said license agreement, respondent's distributors or lessees, upon the termination thereof either by lapse of time or upon the breach of any of the conditions specified in paragraphs (b), (c), and (d) above and others, were prohibited from owning, licensing, leasing, or dealing in any automatic vending machine of any kind or character and from selling any merchandise of any kind or character by means of any automatic vending machine within the territory specified by such agreement with the distributor or lessee for a period of 5 years. The provisions of the lease agreement covering these conditions are as follows:

1. The distributor expressly covenants and agrees that the distributor shall not, at any time during the period of 5 years from and after the date of the termination of this agreement (whether by lapse of time or otherwise), directly or indirectly, or under any circumstances or conditions whatsoever, own, sell, lease, operate, or otherwise deal in any automatic vending machine of any kind or character, or sell or offer to sell any merchandise of any kind or character by

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means of any type of automatic vending machine, within the territory hereinbefore described.

2. The distributor further agrees that from and after the date of the termination of this agreement (whether by lapse of time or otherwise) the distributor shall not, directly or indirectly, employ or use the word "canteen" or the phrase "automatic canteen" in or in connection with any business to be conducted by the distributor in any other manner.

(f) Each of the contracts contained a paragraph providing for its termination as follows:

It is expressly agreed that if the distributor shall (a) fail or refuse during a period of three consecutive months to keep, observe, and fulfill the terms, covenants, and guarantees contained in paragraphs 1, 2, or 3 of article IV hereof; or (b) the distributor shall make default in the performance of any of the other agreements, conditions, covenants or terms herein contained and such default shall continue for a period of 15 days after written notice thereof from the company to the distributor; or (c) if the distributor shall at any time be adjudicated insolvent or a bankrupt; or (d) if the distributor shall at any time make a general assignment for the benefit of creditors or take the benefit of any insolvency act; or (e) if a receiver or trustee of the interest of the distributor hereunder shall be appointed by a court of competent jurisdiction; or (f) if this agreement or the interest of the distributor hereunder shall be transferred or pass to or devolve upon any other person, firm, or corporation, except in the manner hereinbefore permitted; then and in each such event, the company shall have the right, without further notice, to terminate and end this lease and agreement, as well as all of the right, title, and interest of the distributor hereunder.

(g) By other provisions in said contracts or agreements the distributor guaranteed, throughout the period of operation thereunder, that he would at all times maintain on active sales locations a portion of all automatic vending machines leased, of each type specified in the agreement as theretofore delivered to him, a number equivalent to at least 90 percent of all automatic vending machines of the same type owned by respondent and leased by it to all of its distributors under the terms of similar agreements. This agreement further provided that the distributor would maintain a sales volume through respondent's automatic vending machines and a ratio of automatic vending machines on sales locations in proportion to the population of his territory related to the average sales volume and ratio of sales location of all canteen distributors. In the event of default in performance by a distributor of this or of any of the other covenants or undertakings of said distributor, the respondent was entitled to terminate the lease and all of the title and interest of the distributor under the agreement.

(h) This lease and sale agreement which respondent had with its distributors contains a number of miscellaneous provisions and requirements which were directly related to each of the provisions set

forth in paragraphs (b) to (g), inclusive. Some of these provided that the distributor follow certain standard practice as set out by the respondent and required reports on the conduct of the distributor's business. The distributor was required to purchase all his repair parts from the respondent, but the respondent reserved the right to sell, rent, locate, and make arrangements for the location, operation, and use of vending machines and merchandise to be sold therefrom in the distributor's territory where such machines or the sale of such merchandise involved chain organizations, interstate concessionaires, and public utility transportation systems. The distributor was prohibited from disposing of his business without the consent of the respondent.

(i) The basic agreements above referred to were modified from time to time primarily due to wartime conditions. Beginning in 1942 the respondent gave various distributors permission to make certain direct purchases from local jobbers or from certain manufacturers and processors upon payment to it of a fee, as rental for use of its automatic vending machines, based upon the amount of such purchases. In every instance respondent reserved the right to terminate such permission in whole or in part, with or without cause. Beginning on or about December 20, 1942, respondent granted permission to its distributors to purchase merchandise direct from national manufacturers or suppliers and jobbers and to resell the same by means of automatic vending machines, leased by the respondent to said distributors on condition that before reselling any type of candy bar or other vending machine packaged goods, a sample of such merchandise would be submitted to the respondent, together with a statement of the price to be paid and the quantity, if the purchase was from other than a jobber, and further, that on or before the tenth day of each month the distributor would furnish the respondent a statement in writing of all candy bars and other packaged goods purchased and received during the next preceding period, together with the name and address of each supplier and the price paid. The distributor, on or before the tenth of each month, was required to pay to the respondent 10 cents for each 100 candy bars or other similarly packaged goods purchased by such distributor during the next preceding period. On April 11, 1942, this payment was increased to 25 cents for each 100 bars. Permission was also given these distributors to purchase peanuts and other nuts, as well as chewing gum, but similar conditions were imposed with respect to such purchases.

PAR. 7. As an aid in carrying out the full force and effect of the provisions of its exclusive-dealing contracts described in paragraph

6, the respondent organized the Swan Candy Co. as its wholly owned subsidiary with identical officers and located at the same office as respondent. Some of the respondent's distributors were advised, instructed, or directed to purchase of and pay the Swan Candy Co. for all merchandise desired of certain suppliers, while certain suppliers of respondent were advised, instructed, or directed to sell to respondent's distributors only through the Swan Candy Co.

PAR. 8 (a) The effect of the respondent's exclusive-dealing contracts containing the conditions and agreements described herein has been, is, and may be to substantially lessen competition or tend to create a monopoly in both lines of commerce in which the respondent is engaged, namely, the sale and purchase of candy, gum, nuts, confectionery products, and other similar packaged merchandise suitable for use in automatic vending machines and the development, acquisition, ownership, operation, leasing, licensing, or selling of automatic vending machines.

(b) These exclusive-dealing contracts have resulted in a substantial lessening of competition between respondent's suppliers of candy, nuts, confectionery products, and other packaged merchandise and their competitors, who have been, and are, unable to sell similar products to respondent. This lessening of competition tends to create a monopoly in the manufacturers and processors who sell such merchandise to the respondent. Competition has also been substantially lessened between respondent and its competitors and between respondent's distributors and their competitors. Such lessening of competition tends to create a monopoly in the respondent and its distributors in the resale of the aforesaid products. Several of respondent's own suppliers who received limited orders and many competitors of its suppliers who have been unable to sell respondent were, and have been ready, willing, and able to supply respondent's distributors such products as they have required, and now require, for sale through automatic vending machines, but have been prohibited from doing so because of the restrictions, conditions, and limitations set forth in paragraphs 6 and 7 above.

(c) Competition has also been substantially lessened between vending-machine manufacturers and others who are, and have been, able to sell such machines to respondent, and their competitors, who have been able to sell only to other vending-machine purchasers, which tends to create a monopoly in the vending-machine manufacturers and suppliers who sell such machines or parts to the respondent. From time to time one or more manufacturers of automatic vending machines have been, and are now, ready, willing, and able to supply

respondent or its distributors with such machines and would have supplied them had it not been for the restrictions, conditions, and limitations set out in paragraphs 6 and 7. These vending-machine manufacturers have generally refrained from attempting to sell their machines to respondent's distributors. Where such sales have been attempted, expensive litigation, trouble, and loss have resulted to each vending-machine manufacturer or the respondent's distributor to whom said manufacturer was attempting to make a sale. For this reason, respondent's distributors have generally refrained from using or dealing in automatic vending machines of any person, firm, or corporation other than respondent and have generally complied with the terms of the contracts existing between them and the respondent with respect to such purchases.

PAR. 9. (a) In the course and conduct of its business since June 19, 1936, the respondent has knowingly induced, and knowingly received, lower prices from the suppliers from whom it purchased candy, gum, nuts, food, and other confectionery products than the prices paid by respondent's competitors from the same manufacturers and suppliers for products of like grade and quality. The prices paid by respondent to various sellers and suppliers of such products have consistently ranged from slightly less than 1.2 percent to slightly more than 33 percent lower than the prices paid by respondent's competitors for products of like grade and quality. These sellers generally pack candy bars and other confectionery products designed to retail at 5 cents per bar in boxes or cartons containing 100, 60, and 24 such bars. Their standard or usual prices for such boxes or cartons when sold to most of respondent's competitors between 1936 and 1942 were \$2.50, \$1.50, and 64 cents, respectively, while thereafter such prices increased generally to \$2.65, \$1.60, and 68 cents, respectively. Respondent, purchasing candy bars and other confectionery products of like grade and quality from the same sellers, principally in boxes or cartons of 100 bars, between 1936 and 1942, paid prices ranging from \$1.95 to \$2.25 per box and thereafter paid prices ranging from \$2 to \$2.62 per box. Respondent has been, and is now, receiving such price differentials from approximately 80 of its 115 suppliers.

(b) The aforesaid prices and price differentials vary from seller to seller and from product to product of the same seller. Typical and illustrative of these differentials and the different prices paid are the following: The Euclid Candy Co. of Illinois, Inc., during 1938 sold its "Jumbo," "Love Nest," and "Melt Away" candy bars to respondent in 100-count boxes at \$2 per box, while selling them to respondent's

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competitors at \$2.50 per box. In 1939 this company sold its "Jumbo" bars to respondent at \$2 per box, its "Cowboy" and "Big Game" bars at \$1.95, while selling these identical products to other customers at \$2.50. In 1940 it sold its "Rusty" and "Cowboy" bars in 100-count packages to respondent at \$1.95, while selling them to other customers at \$2.50. In 1941 it sold its "Cowboy," "Dolly Dimple," "Four Star," "Victory," and "Jumbo" bars to respondent in 100-count packages at \$1.95, while selling them to respondent's competitors at \$2.50. In 1942 this company sold its "Jumbo," "Dolly Dimple," "Cowboy," and "Four Star" bars in 100-count to respondent at \$2 per box, while selling these same bars in the same count to respondent's competitors at \$2.65. In 1943 this firm sold its "Dolly Dimple," "Jumbo," and "Four Star" bars in 100-count boxes to respondent at \$2.15 and to respondent's competitors at \$2.65. In 1945 and 1946 this firm sold its "Love Nest" bars to respondent at \$2.62 in 100-count packages, while selling them to respondent's competitors at \$2.65. All sales by this firm to respondent were made f. o. b. Chicago, while sales to other customers were made on a delivered basis. During 1938, 1939, and 1940, the George Ziegler Co. sold its "Big Swing" and "Giant" candy bars in 100 count to the respondent at \$2.05, while selling them to respondent's competitors at \$2.10. In 1942 this company sold its "Mounties" bars in 100-count packages to respondent at \$2.10, while sales to its competitors were made at \$2.45. In 1947 the F. W. Washburn Candy Corporation sold its peanut bars in 100-count boxes to respondent at \$2.80 per box, while selling said bars to respondent's competitors at \$2.85 in 100-count packages. This same company during 1939, 1940, and 1941 sold its coconut bars to respondent in 100-count boxes at \$1.85, while it sold the identical product in the same count to respondent's competitors at \$2.10. Luden's, Inc., in 1939 sold its "Fifth Avenue" bar in 100-count packages to respondent at \$2.20 per box, while selling the same product to some of its competitors at \$2.25 per box and to other such competitors at \$2.50 per box.

(c) Respondent made no attempt to show that any of the price differentials received from these or other suppliers make only due allowance for differences in cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such products were to the respondent sold or delivered.

(d) The price differences herein described constitute discriminations in price between purchasers of commodities of like grade and quality who have been and are, either competitively engaged with each

other in the sale and distribution of such commodities or whose ultimate purchasers or customers have been, and are, so engaged.

(e) The respondent's gross profits on candy, nuts, gum, and other confectionery products were composed almost entirely of preferential discounts which it exacted from its suppliers. For example, the William Wrigley, Jr., Co., sold the respondent \$8,823,728.83 worth of gum from 1937 to 1945, inclusive, at 38 cents per hundred sticks. Respondent sold this gum to its distributors at 56 cents per hundred, which resulted in a markup of approximately 46 percent above the purchase price and permitted the respondent a gross profit of approximately \$4,091,386.58. Other customers competing with respondent or its distributors paid the Wrigley Co. 55 cents per hundred sticks, or approximately \$12,771,240 for the same quality of gum of the same grade and quality, which amounts to \$3,947,471.57, or approximately 44 percent, more than the respondent paid for the same gum. Of the \$4,091,386.58 gross profit resulting from the sale of Wrigley's gum alone in the years 1937 to 1945, inclusive, \$3,947,471.57, or approximately 96 percent, consisted of the difference between what others paid and the lower or preferential price which was granted to the respondent by the Wrigley Co. during those years.

PAR. 10. (a) The respondent or its distributors have been, and are, actively engaged in competition in commerce with vending-machine manufacturers or operators, jobbers, and retailers in performing the function of purchasing and reselling candy, gum, nuts, and other confectionery products; in developing, owning, designing, and improving coin-operated vending machines; in developing and finding suitable locations for such machines; and in the operation thereof. In the same trade areas in which there have been, and are, located automatic vending machines owned by respondent and operated by its distributors in factories, theaters, office buildings, oil stations, etc., there have been, and are, also located other automatic vending machines operated by other customers of respondent's suppliers, as well as factory canteens, candy and gum counters, confectionery wagons, restaurants, grocery stores, and other retail outlets distributing merchandise of like grade and quality in competition with the respondent or its distributors. Manufacturers of candy, gum, nuts, and other confectionery products compete in the sale of these products to these various retail outlets and in selling to wholesalers and jobbers who resell these products to other retail outlets. In the same trade area and in the same localities in which there have been, and are located automatic vending machines of respondent, there have been, and are, also located wholesalers and jobbers who have purchased, and now purchase, the

same merchandise for resale to vending-machine operators competing with the respondent or its distributors. Said wholesalers and jobbers have sold, and now sell, the same products to other retail outlets who compete with respondent or its distributors. These wholesalers and jobbers also compete between and among themselves in the resale of these products to retail outlets, including competing vending-machine operators.

(b) Manufacturers of coin-operated automatic vending machines have been, and are now, actively competing with each other and with the respondent in the development, design, perfection, repair, and placement of these machines in suitable locations and in otherwise assisting their vending-machine customers to procure supplies and operate vending machines in order to compete with respondent or its distributors.

PAR. 11. (a) The effect of the price discriminations hereinbefore set forth has been, and may be, substantially to lessen competition and tend to create a monopoly in the manufacture, sale, and purchase of candy, gum, nuts, confectionery products, or other packaged goods suitable for use in coin-operated vending machines, and in the manufacture, development, acquisition, ownership, operation, leasing, licensing, or selling of automatic vending machines suitable for vending said products; and to injure, destroy, or prevent competition between manufacturers and processors of the aforesaid products who grant respondent lower prices and those manufacturers and processors who do not grant such discriminatory prices, between respondent and vending-machine operators who do not receive the benefit of the lower prices received by respondent, between respondent and candy jobbers and wholesalers who do not receive the benefit of such discriminatory prices, between respondent and other retailers of candy, gum, nuts, and other confectionery products who do not receive the benefit of the lower prices granted respondent, and between those manufacturers of automatic vending machines who supply respondent and its distributors and those who do not supply them with such machines.

(b) Competition among the manufacturers and jobbers of candy, gum, nuts, and other confectionery products is, and has been, such that any differential or discrimination in the price of these products of like grade and quality may result in a substantial diversion of business to those manufacturers and jobbers who grant such differential or discrimination and substantially reduce the sales of those manufacturers and jobbers who do not grant them. Thus, the effect of any discrimination in price may be to injure, destroy, or prevent competition between those manufacturers and processors of candy, gum, nuts,

and other confectionery products who grant respondent lower prices and those manufacturers and processors who do not grant discriminatory prices, and between respondent and wholesalers or jobbers of such products who do not receive the benefit of discriminatory prices.

(c) Manufacturers and processors who have been, and are, unable to sell their products at the lower prices demanded by respondent have suffered a loss of business as a result of decreased sales and profits. Their sales of candy, gum, nuts, and other confectionery products have been reduced where such sales are made to vending-machine operators, jobbers, and retailers who compete with respondent or its distributors in the sale of such products in the same trade areas. Vending-machine operators who are, and have been, unable to obtain the low prices granted respondent have suffered reduced profits and the loss of vending-machine locations in many instances, resulting in decreased sales by them. The lower prices granted respondent have enabled it and its distributors to earn greater profits, provide more adequate facilities, give better services, and pay a higher rate of commission for preferred locations. From the increase in income resulting from the lower prices received on merchandise purchased, respondent has been able to create departments for accounting, new business, sales, operations, and engineering, and a traffic or product division, all primarily used for the benefit, aid, and assistance of its distributors. Competition between respondent's distributors and other vending-machine operators for locations in which to place automatic vending machines has been, and is, very intense and has been, and is now, generally determined by the highest rental bid or the type of service rendered. The principal basis of competition by vending-machine operators is obtaining locations in which to place their machines. By means of the additional income which has accrued to the respondent because of the lower prices granted it, through which respondent rendered special services to its distributors, said distributors were enabled to offer larger commissions to obtain locations for their machines, which other vending-machine operators were unable to meet or which they were forced to meet at a definite decrease in sales and profits. The average commission granted for locations of automatic vending machines has been 10 percent. However, higher commissions were granted in some cases by respondent's distributors for the purpose of obtaining competitive locations. In many of such instances competing vending-machine operators were forced to remove their machines from various locations as a result of the higher commissions paid by respondent's distributors. Candy jobbers and wholesalers

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have been, and are, adversely affected by competitive sales of respondent's products in their local territories. Jobbers have been, and are now, unable to sell candy, gum, nuts, and other confectionery products to respondent's distributors who receive the ultimate benefit of respondent's lower prices through the medium of additional services and aids, which have enabled these distributors to replace other retail outlets. Because of the price advantage received by respondent, it and its distributors have been, and are now, able to procure more and better vending-machine locations, which substantially reduces the business of competing vending-machine operators who ordinarily purchase their merchandise from jobbers, again resulting in a loss of business to candy jobbers and wholesalers.

(d) Retailers other than vending-machine operators competing with respondent and its distributors have suffered a loss of sales or detraction of trade in the neighborhood where said distributors were able to place their vending machines. Because of the decreased sales on the part of vending-machine operators competing with the respondent and its distributors, manufacturers engaged in selling or leasing these machines to such operators have been either forced to reduce their sales of such machines or have been required to increase their services and expenses in competing with the respondent or its distributors.

PAR. 12. (a) Respondent, since its incorporation in 1931, and particularly since 1936, has enjoyed a rapid growth in business and attained a dominant position in the sale and distribution of candy, gum, nuts, and other confectionery products through and by means of automatic vending machines. Such expansion has been primarily due to the exclusive-dealing contracts heretofore described and the reception of lower prices as set out herein. The following illustrates respondent's growth in merchandise sales, canteen rentals, and net income for the years 1936 to 1945, inclusive:

Fiscal year ending on or about Sept. 30	Merchandise sales	Rentals and other oper- ating in- come	Net income		Dividends paid on common stock
			Before Fed- eral income taxes	For year	
1936.....	\$1,937,117	\$127,273	\$235,635	\$202,223	\$9,884
1937.....	3,573,098	255,151	421,152	354,152	385,405
1938.....	3,697,104	306,126	382,048	318,048	269,584
1939.....	4,565,704	413,693	514,294	424,378	159,096
1940.....	6,139,442	469,187	874,185	717,185	273,959
1941.....	9,065,727	650,625	1,290,273	840,273	376,155
1942.....	14,706,508	887,936	2,167,396	829,896	313,252
1943.....	14,738,776	1,037,730	1,741,395	641,395	317,133
1944.....	14,253,547	1,073,940	1,686,520	602,020	320,338
1945.....	12,899,106	879,970	1,458,219	548,219	321,067

(b) Respondent's sales of candy bars and other packaged goods increased from 53,135,000 for the year ending September 30, 1936, to 335,438,000 for the year ending September 30, 1942. The number of 1-cent sticks of gum sold by respondent for these respective periods amounted to 33,409,000 and 355,332,000, while its sales of nuts for the same periods amounted to 808,000 pounds and 6,760,000 pounds, respectively.

PAR. 13. (a) In the course and conduct of its business since June 19, 1936, respondent has, through its officers and representatives, knowingly induced and knowingly received, and has knowingly sought to induce and receive, the differentials in price set forth in paragraph 9 above. Officials of respondent knew that many of the prices paid by its competitors were higher than those which it sought to induce and did receive. This knowledge was based primarily on the common information that items purchased by respondent consisting of the 1- and 5-cent variety goods purchased were standard price items. Sales by most suppliers were based on that standard and considered to be common trade information. Variations from the standard price were brought about only by means of discounts, free deals, or other promotional aids made available by manufacturers and suppliers. That officials of respondent had knowledge that it was inducing and receiving lower prices than those granted to its other customers is shown by the following:

1. The C. S. Allen Corp., one of respondent's suppliers, on February 13, 1939, addressed a letter to respondent in which it stated:

To show our good will, we are prepared to take a small loss and quote you \$1.95 C delivered in Chicago, if that will be of any assistance to you.

2. The president of Town Talk, Inc., on March 10, 1943, addressed a letter to respondent which reads in part:

At all times we have made sales to your company at substantially lower prices than we made to other companies and also at substantially lower prices than our ceiling price.

3. By letter of April 13, 1943; the George Ziegler Candy Co. sent the respondent a month-to-month summary of the prices at which it had sold its candy bars to its jobber and other customers for a period of 3 years. Said prices are all above those which respondent paid for the identical bars of candy purchased from this supplier.

4. On February 20, 1937, W. F. Schrafft & Sons Corp. addressed a letter to the respondent which reads in part:

The superior quality of the materials used in the manufacture of our products, our rigid adherence to established standards, combined with the unusual precautions we take to insure uniform quality, will not permit of our meeting the

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lower prices quoted by other bar manufacturers, as indicated by your letter, * * *

* * * we have always refrained from taking any business on which a legitimate profit cannot be secured. On that basis the price we have made is the very lowest which we are able to offer.

(b) Respondent used various methods to induce its suppliers to grant discriminatory prices. One of these was to inform prospective suppliers of the prices and terms of sale which would be acceptable to the respondent without consideration or inquiry as to whether such supplier could justify such a price on a cost basis or whether it was being offered to other customers of the supplier. At other times the respondent refused to buy unless the price to it was reduced below prices at which the particular supplier sold the same merchandise to others. In other instances respondent sought to explain to the prospective supplier that certain alleged savings would accrue to the supplier in selling to respondent or that certain elements of the supplier's cost could be eliminated, which would, in respondent's opinion, justify a lower price. In carrying out this form of inducement, respondent would advise a supplier or prospective supplier of the price which it considered "standard price." In letters written to the Curtiss Candy Co. on November 15, 1939, and to W. F. Schrafft & Sons Corp. on February 15, 1937, respondent summarized alleged savings to these companies as follows:

Alleged savings	Curtiss Co.	Schrafft Corp.
	<i>Percent</i>	<i>Percent</i>
(1) Freight savings of	6	5 to 7
(2) Sales cost savings of	7	7
(3) 24-count cartons savings of	5	5
(4) Return and allowances savings of	1	1 to 2
(5) Free deals and samples savings of	8	2 to X
(6) Shipping containers savings of		1 to 2
Total deductions	27	21 to 25

Respondent advised these companies that such alleged savings could be made because of the method by which respondent made purchases and because certain services could be eliminated in selling to it.

CONCLUSION

The acts and practices of the respondent as herein found of entering into contracts with its various distributors for the leasing of vending machines and the purchase of candy, gum, nuts, or other confectionery products to be sold through these same machines on the

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condition and with the agreement and understanding that such distributors should not lease, operate, or in any way use vending machines obtained from any other source than the respondent and that such distributors should not purchase for resale through said vending machines leased from the respondent any candy, gum, nuts, or other confectionery products except such products as were sold to the distributor by the respondent, constitute a violation of section 3 of the act of Congress approved October 14, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" (the Clayton Act).

The acts and practices of the respondent in knowingly inducing and receiving discriminations in the prices of candy, gum, nuts, and other confectionery items of the 1- and 5-cent variety and other products suitable for sale in vending machines, purchased by it from various manufacturers and processors, which have the effect herein found, constitute a violation of the provisions of section 2 (f) of an act of Congress entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" (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, the answer of 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, a stipulation entered into between counsel in support of the complaint and the respondent and its counsel, and approved and accepted by the Commission, and recommended decision of the trial examiner and exceptions thereto (no briefs having been filed and oral argument not having been requested according to the terms of the stipulation); and the Commission having made its findings as to the facts and its conclusion that respondent has violated the provisions of section 3 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), and subsection (f) of section 2 of said act, as amended by an act of Congress approved June 19, 1936 (the Robinson-Patman Act):

1. *It is ordered*, That the respondent, Automatic Canteen Co. of America, a corporation, its officers, agents, representatives, and em-

Order

46 F. T. C.

ployees, directly or through any corporate or other device, in connection with the leasing, licensing, operation, or sale of any automatic vending machine or parts thereof, or in connection with the offering for sale, sale, or distribution of candy, gum, nuts, or any other confectionery product purchased for resale by or through the use of automatic vending machines, in commerce as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

A. Entering into, enforcing, continuing in operation or effect, or carrying out any contract, agreement, or understanding for the lease or sale of automatic vending machines or parts therefor, or for the sale of candy, gum, nuts, or other confectionery products for use or resale in such machines on the condition, agreement, or understanding that any lessee, licensee, operator, or purchaser thereof

1. Shall not acquire, manufacture, own, hold, locate, use, operate, lease, or otherwise deal with any automatic vending machine which is not licensed, leased, purchased, or otherwise acquired from respondent or from some source authorized by it.

2. Shall not offer to sell, sell, or cause or permit to be sold any candy, gum, nuts, or other confectionery products purchased from respondent other than by means of automatic vending machines leased or purchased from it.

3. Shall not buy for resale, deal with, use, or permit to be used, in automatic vending machines leased or purchased from respondent, the confectionery products of any seller or supplier other than respondent.

4. Shall order and purchase exclusively from respondent all confectionery products offered for resale by means of automatic vending machines leased or purchased from respondent.

Provided, however, That nothing contained in the preceding paragraphs numbered 1 through 4 shall be construed as prohibiting respondent from entering into any contract, agreement, or understanding with any lessee, licensee, purchaser, or distributor of its automatic vending machines which provides for payment to the respondent of such compensation as it may desire for the use of its automatic vending machines, for services rendered, for protection of quality and salability of products sold through its said vending machines, or provides for protection of respondent's franchise territories and distribution, of its good will and trade name, of its rental and additional income, of the development and retention of its business in its distributors' territory, and of the public, when none of such provisions are in conflict with the prohibitions set forth herein.

II. *It is further ordered*, That respondent, Automatic Canteen Co. of America, a corporation, its officers, agents, representatives, and employees, in connection with the offering to purchase or purchase of any candy, gum, nuts, or other confectionery products of any nature in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

A. Knowingly inducing or knowingly receiving or accepting any discrimination in the price of such products, by directly or indirectly inducing, receiving, or accepting a net price from any seller known by respondent or its representatives to be below the net price at which said products of like grade and quality are being sold by such seller to other customers, where the seller is competing with any other seller for respondent's business, or where respondent is competing with other customers of the seller: *Provided, however*, That the foregoing shall not be construed to preclude the respondent from defending any alleged violation of this order by showing that a lower net price received or accepted from any seller makes only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are by such seller sold or delivered to respondent.

For the purpose of determining "net price" under the terms of this order, there shall be taken into account discounts, rebates, allowances, deductions, or other terms and conditions of sale by which net prices are affected.

III. *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 BY COMMISSIONER MASON, CONCURRED IN BY COMMISSIONERS
AYRES, CARSON, AND MEAD

This matter regularly came on before the Commission for final consideration on its merits. The complaint herein was issued on March 19, 1943. It charged respondent, Automatic Canteen Co. of America, a corporation, with violation of section 3 of the Clayton Act through the use of certain exclusive-dealing contracts employed in leasing automatic vending machines in commerce, which machines were designed for the retail sales of candy, gum, nuts, and other confectionery products, and through the use of such contracts in connection with the sale and distribution of such products in commerce. It also charged respondent with violation of subsection (f) of section 2

of said act as amended by the Robinson-Patman Act through knowingly inducing and receiving price discriminations in connection with the purchase of candy, gum, nuts, and other confectionery products in commerce. Respondent, in its answer, filed May 11, 1943, denied the material allegations of the complaint. Through a series of delays, caused primarily by wartime conditions, a trial examiner was not appointed until May 26, 1946, at which time the first hearing was ordered to begin on June 26, 1946. Thereafter, a number of hearings were held at various points throughout the United States, and the last witness was examined on July 3, 1947. During these hearings, more than 7,000 pages of testimony and 6,000 exhibits were introduced into the record as evidence.

The complaint listed 14 candy manufacturers as representative of those sellers from whom respondent was alleged to have knowingly induced and received discrimination in price. Records or summaries of records of the prices at which more than 75 such manufacturers sold their candy, gum, nuts, and other confectionery products covering a period of 10 years were obtained by subpoena and introduced into evidence. The Commission is concerned with enforcement of the laws administered by it through the medium of orders to cease and desist. Competent proof of one or more violations would, in ordinary circumstances, be sufficient to establish a factual basis for such an order. The record in this case does not disclose the reason for such a plethora of cumulative evidence as was adduced by Government counsel in the instant matter. Neither harassment of litigants nor the waste of Government funds in needless reiteration through cumulative evidence should be countenanced, nor does it seem that it was necessary to name 14 sellers as typical of a group from which respondents had induced or received discriminations in price, and certainly the records of not more than 5 of such sellers would have supplied ample evidence of such discriminations or price differentials.

On August 4, 1947, after counsel in support of the complaint had rested his case, respondent filed a motion to dismiss, which the Commission denied on January 6, 1948. On March 18, 1948, respondent filed a motion before the trial examiner for reconsideration and reversal of 272 previous rulings on the admissibility of evidence, upon which the trial examiner made his rulings on July 5, 1948. Thereafter, on August 9, 1948, respondent appealed from these rulings. Counsel in support of the complaint filed answer to each of the aforesaid motions and appeals, and on July 8, 1948, filed his own motion for reconsideration and reversal of certain rulings of the trial examiner, which rulings were appealed to the Commission after the trial ex-

aminer had rendered his decision with respect thereto. While these appeals were under consideration by the Commission, pending decision and after the record had been closed for the taking of testimony, counsel supporting the complaint and respondent and its counsel on February 18, 1949, entered into a stipulation, by the terms of which it was agreed that if the Commission, when it reached a decision on the merits in this proceeding, should decide to issue an order to cease and desist and should issue such an order no more broad in scope and no more stringent in its provisions than the proposed order attached to, and made a part of, said stipulation, the Commission might proceed upon the record, without further intervening procedure, to make its findings as to the facts and its conclusion based thereon from the testimony and exhibits theretofore introduced and admitted, and enter its order requiring respondent to cease and desist from the acts, practices, and methods complained of after making its decision upon the pending appeals from the rulings of the trial examiner and after the trial examiner had closed the record and filed his recommended decision. The Commission accepted and approved this stipulation on March 2, 1949, and on May 5, 1949, rendered its decision upon the aforesaid appeals from rulings of the trial examiner. The trial examiner closed the record on July 15, 1949, and filed his recommended decision on August 10, 1949.

For a number of years respondent has been engaged in the business of purchasing candy, gum, nuts, and other confectionery products from approximately 115 producers thereof and selling them as a wholesaler or jobber to various persons, firms, and corporations which lease its automatic vending machines and which are known as "canteen distributors." These distributors resold these products to the public by means of such machines. Respondent has also been engaged in the development, acquisition, ownership, operation, and leasing of automatic vending machines. It has occupied a dominant position with respect to these two activities. On January 11, 1946, it owned 230,150 candy, nut, and gum vending machines, most of which were leased to its 83 distributors located in 112 separate territories in 33 States and in the District of Columbia. Sales through such machines increased from \$1,937,117 for the year ending September 30, 1936, to \$14,253,547 for the year ending September 30, 1944.

The contracts under which respondent's automatic vending machines were leased to its distributors provided that said distributors or lessees, during the life of such agreement, would order and purchase all merchandise sold in said machines solely from respondent; would not use or sell, or cause or permit to be sold, any merchandise pur-

chased from respondent in any automatic vending machine not leased to the distributor by the respondent; would not use or sell, or attempt to use or offer to sell, in or by means of any automatic vending machine leased from respondent, any merchandise not purchased from respondent; and would not acquire, manufacture, own, hold, lease, locate, use, operate, or otherwise deal with any automatic vending machine other than such machines as were leased by respondent. These contracts further provided that for a period of 5 years from the termination thereof, whether by lapse of time or upon breach of certain conditions, distributors or lessees of respondent's vending machines should not, directly or indirectly, or under any circumstances or conditions whatsoever, own, sell, lease, operate, or otherwise deal in any automatic vending machine of any kind or character, or sell or offer to sell any merchandise of any kind or character by means of any type of automatic vending machine, within the territory described in such contract.

These exclusive-dealing contracts have affected a substantial volume of business in both the leasing, sale, and distribution of vending machines and the sale and distribution of candy, gum, nuts, and other confectionery products. It is apparent that they entirely foreclosed the sale and leasing of vending machines to respondent's distributors by anyone but respondent and that other sellers and suppliers of candy, gum, nuts, and other confectionery products have been completely and effectively foreclosed from selling these products to respondent's distributors. Further, respondent's distributors or the lessees of its vending machines have been wholly foreclosed from doing business with any competitor of respondent while these contracts have been in effect and for 5 years thereafter. In *International Salt Co. v. U. S.* (332 U. S. 392), the court stated that "it is unreasonable, per se, to foreclose competitors from any substantial market" and held a similar contract to be in violation of section 3 of the Clayton Act, even in the absence of evidence that the effect of such a contract may be to substantially lessen competition or tend to create a monopoly in any line of commerce. The record in this proceeding contains an abundance of evidence which proves, beyond any reasonable doubt, that the effect of respondent's exclusive-dealing contracts has been, and may be, to substantially lessen competition or tend to create a monopoly in both lines of commerce in which respondent is engaged, and the Commission has so found. Such proof more than meets the standard laid down in the case of *Standard Oil Co. v. U. S.* (337 U. S. 293), in which the court concluded "that the qualifying

clause of section 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected."

Respondent has induced and received discriminations in price from approximately 80 of its suppliers of candy, gum, nuts, and other confectionery products. It has consistently paid these suppliers and sellers from slightly less than 1.2 percent to slightly more than 33 percent less than its competitors paid the same sellers for products of like grade and quality. These price differentials or discriminations varied from seller to seller and from product to product of the same seller. Officers, agents, and representatives of respondent were thoroughly aware that such price discriminations were being induced and received. They knew the prices at which their suppliers were selling candy, gum, nuts, and other confectionery products of like grade and quality to other customers, and employed various means to induce lower prices on purchases by respondent. The evidence of record clearly establishes that respondent at times informed prospective suppliers of the prices and terms of sale which would be acceptable to it without consideration or inquiry as to whether such suppliers could justify such a price on a cost basis or whether it was being offered to other customers of the supplier. At other times the respondent refused to buy unless the price to it was reduced below the prices at which its supplier sold the same merchandise to others. In other instances, respondent sought to, and did, persuade its suppliers and sellers that they could effect certain savings in freight, sales, cartons, return and allowances, free deals and samples, and shipping container costs in selling to respondent, and thus could afford to sell to respondent at a net price of 21 to 27 percent below the price at which products of like grade and quality were being sold to respondent's competitors.

The evidence of record reveals that any discrimination in the price of candy, gum, nuts, and other confectionery products will divert business from any manufacturer or jobber of such products who does not grant such price discriminations to a manufacturer or jobber who does grant them. Such a condition is demonstrated beyond any doubt by respondent's refusal to buy in most instances except where it could induce and receive a discrimination in price.

The Commission has found from the evidence of record that the effect of price discriminations induced and received by respondent has been, and may be, substantially to lessen competition and tend to create a monopoly in the manufacture, sale, and purchase of candy, gum, nuts, confectionery products, or other packaged goods suitable for use in coin-operated vending machines, and in the manufacture,

development, acquisition, ownership, operation, leasing, licensing, or selling of automatic vending machines suitable for vending such products; and to injure, destroy, or prevent competition between manufacturers and processors of the aforesaid products who granted respondent lower prices and those manufacturers and producers who did not grant such discriminatory prices, between respondent and vending machine operators who did not receive the benefit of the lower prices received by respondent, between respondent and candy jobbers and wholesalers who did not receive the benefit of such discriminatory prices, between respondent and other retailers of candy, gum, nuts, and other confectionery products who did not receive the benefit of the lower prices granted respondent, and between those manufacturers of automatic vending machines who supplied respondent and its distributors and those who did not supply them with such machines.

Respondent made no attempt to show that the price differentials and discriminations induced and received by it made only due allowance for differences in the cost of manufacture, sale, or delivery resulting in the differing methods or quantities in which candy, gum, nuts, or other confectionery products were sold or delivered to it. The statute places squarely on respondent the burden of showing that price differentials are thus justified. In *F. T. C. v. Morton Salt Co.* (334 U. S. 37) [44 F. T. C. 1499], the court said:

First, the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits, requires that respondent undertake this proof under the proviso of section 2 (a). Secondly, section 2 (b) of the act specifically imposes the burden of showing justification upon one who is shown to have discriminated in prices.

Certainly, the same burden rests upon one who is shown to have knowingly induced or received a discrimination in price in violation of subsection (f).

Respondent made no attempt to rebut the prima facie case herein established by showing that the discriminatory prices which it induced and received were granted in good faith to meet equally low prices at which merchandise of like grade and quality was being sold to its competitors. Here, again, section 2 (b) of the Clayton Act as amended places the burden of making such a showing upon the person charged with a violation. In *F. T. C. v. Staley Manufacturing Co. et al.* (324 U. S. 746) [40 F. T. C. 906], the court stated:

Section 2 (b) does not require the seller to justify price discriminations by showing that in fact they met a competitive price. But it does place on the seller the burden of showing that the price was made in good faith to meet a competitor's. The good faith of the discrimination must be shown in the face of

the fact that the seller is aware that his discrimination is unlawful, unless good faith is shown, and in circumstances which are peculiarly favorable to price discrimination abuses. We agree with the Commission that the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.

In this proceeding the burden of such a showing rests upon respondent, and it is unlikely that such proof could be successfully adduced since the evidence clearly shows that officers, representatives, and employees of respondent knew that the discriminatory prices induced and received by respondent were below those prices at which merchandise of like grade and quality was being sold to its competitors by the same seller.

The inhibitions contained in the order to cease and desist issued herewith do no more than prohibit those acts, practices, and methods of respondent which are found to violate section 3 of the Clayton Act and section 2 (f) of said act as amended by the Robinson-Patman Act, and are confined to those acts, practices, and methods alleged in the complaint. Other prohibitions contained in the order to which respondent agreed and urged by counsel in support of the complaint and an additional prohibition recommended by the trial examiner have been eliminated after due consideration by the Commission, either because the evidence of record fails to provide a basis for findings of fact in support thereof or because such prohibitions are not required by reason of the nature of the complaint or are without sound basis under the provisions of the statute under which this proceeding was initiated. Thus, the order adopted by the Commission is not as stringent in its terms or as broad in scope as the order to which respondent agreed but serves to more properly dispose of the issues raised by the pleadings and to more nearly meet the requirements of the statute.

IN THE MATTER OF
MILTON W. FOLDS, JESSIE D. FOLDS, AND JESSIE MAY
FOLDS DOING BUSINESS AS KLEEREX CO.

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

Docket 5332. Complaint, June 11, 1945—Decision, June 6, 1950

Where three partners engaged in the interstate sale and distribution of a medicinal preparation for pimples designated "Kleerex," the ingredients of which were recognized variously as being mildly astringent, antiseptic, antipruritic, and analgesic in nature, and which, as directed, was to be applied nightly, before retiring, with a brush, after washing the face with soap and water, to be followed by a second coating after the face was dry, and to remain on the skin overnight; in advertising in newspapers and by circulars, leaflets, pamphlets and other advertising literature—

Represented that their said Kleerex constituted an effective treatment for pimples and would cause them to dry up and disappear overnight; the facts being that whatever the value thereof might be in masking the unattractive appearance of pimples, in relieving accompanying discomfort, in aiding to reduce the number of organisms on the surface of the skin, or in tending to dry skin surfaces, the preparation would not penetrate through the layers of the skin to the core of the pimple, and thus affect the seat of the infective process and cause pimples to disappear overnight, or at all; and said product was not a competent or effective treatment for said condition;

With effect of misleading and deceiving a substantial portion of the purchasing public into the belief that said representations were true and thereby into the purchase of substantial quantities of their said preparation, and with capacity and tendency so to do:

Held, That such 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.

As respects stipulated testimony of certain users of said preparation to the effect that it had relieved accompanying itching and pain and that the pimples had subsequently disappeared, such stipulation cannot be accepted as evidence that Kleerex is an effective treatment for pimples, since it is common knowledge, fully supported by the record, that these vary considerably in size, virulence and duration, and that by following simple standards of cleanliness they will, except in unusual situations, disappear within a reasonable time, and there is nothing whatever in said stipulated testimony of the lay witnesses that the disappearance of their pimples was due directly or indirectly to the use of said preparation.

In said proceeding the Commission was further of the opinion—based on the record, including the testimony of the only medical witness in the original proceeding and in a supplemental proceeding (stricken in part by the trial examiner, but restored by the Commission), certain corroborative stipulated