Syllabus

IN THE MATTER OF

HORLICKS CORPORATION

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

Docket 5701. Complaint, Oct. 3, 1949—Decision, Sept. 19, 1950

Where a corporation engaged in the manufacture of malted-milk products, including instant cocoa and malted milk for sale at soda fountains, malted-milk tablets and packages of malted milk for sale to consumers through drug, confectionery and grocery stores, and in the interstate sale thereof to different purchasers, some of whom were competitively engaged in the resale thereof at wholesale or retail or both, and including a large corporate wholesaler which sold drugs, fountain supplies, including malted milk, and many other items to retail drug stores throughout the United States—

Contracted to sell and sold its said products on the condition, agreement or understanding that the purchasers thereof should not use or deal in the malted-milk products of its competitors, and, since on or about April 1, 1948, contracted to sell and sold malted milk for soda fountain use to said wholesaler at prices which were fixed on the condition, etc., that it would supply said purchaser with all its requirements of said product, with the result that said purchaser did not deal in malted-milk products of said corporation's competitors;

Effect of which sales and contracts for sale on said condition, agreement or understanding might be to substantially lessen competition or tend to create a monopoly in the lines of commerce in which it and said purchaser were respectively engaged:

Held, That such acts and practices, under the circumstances set forth, constituted a violation of section 3 of the Clayton Act.

In said proceeding in which count 1 of the complaint charged respondent with violation of subsection (a) of section 2 of the Clayton Act, as amended, by reason of having sold, and selling malted milk products to some purchasers at higher prices than to others: the trial examiner found the evidence in the record insufficient to support said charges, and granted respondent's motion to dismiss count 1, in view of a stipulation between counsel supporting the complaint and the respondent, that respondent could produce evidence which would demonstrate that the price differentials alleged in the complaint and shown by the record made only due allowance for differences in the cost of sale and delivery resulting from the differing methods or quantities or both, and that witnesses, if called, would testify that said price differentials made only due allowances for such differences, and that such testimony could not be rebutted in any material respect.

Before *Mr. Frank Hier*, trial examiner.
Mr. Rice E. Schrimsher for the Commission.
Bell, Boyd, Marshall & Lloyd, of Chicago, Ill., for respondent.

COMPLAINT

The Federal Trade Commission having reason to believe that Horlicks Corp. is violating and has violated the provisions of section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C. Title 15, sec. 13), and section 3 of the Clayton Act (U. S. C. Title 15, sec. 14), hereby issues its complaint, stating its charges with respect thereto as follows:

COUNT I

Charging violation of subsection (a) of section 2 of the Clayton Act, as amended, the Commission alleges:

PARAGRAPH 1. Respondent, Horlicks Corp., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located in Racine, Wis.

PAR. 2. Respondent is now and, since June 19, 1936, has been engaged in the manufacture of malted-milk products, including malted-milk powder, in Racine, Wis., and has sold and now sells such products to different purchasers located in the various States of the United States and the District of Columbia for use, consumption, or resale therein. Respondent transports said products, or causes the same to be transported, from Racine, Wis., to said purchasers so located, thereby creating a continuous current of commerce in said products.

PAR. 3. The respondent, in the course and conduct of its business, has been and is in competition with other corporations, individuals, partnerships, and firms engaged in manufacturing, selling, and distributing malted-milk products, including malted-milk powder, in commerce between and among the various States of the United States and the District of Columbia.

Some of respondent's purchasers, and some customers of such purchasers are competitively engaged in the resale of its malted-milk products at wholesale or at retail, or both, in the various territories and places where they respectively carry on their businesses.

PAR. 4. In the course and conduct of its business, as above described, respondent has sold and now sells its malted-milk products to some

purchasers at higher prices than it has sold and now sells such products of like grade and quality to other purchasers.

For example, respondent, since on or about April 1, 1948, has sold and now sells malted-milk powder to certain favored purchasers such as Rexall Drug Co. and McKesson & Robbins, Inc., at lower prices than it has sold or offered to sell malted-milk powder of like grade and quality to other purchasers. The monetary differential between the selling price to such favored purchasers and the selling price to other nonfavored purchasers remains constant. In other words, in the event of an increase or decrease in the selling price per container to nonfavored purchasers, the price charged favored purchasers is increased or decreased by the same amount. The following table illustrates prices charged said favored purchasers and the comparable prices charged other purchasers:

Prices are delivered prices (minimum shipment 100 lbs. freight prepaid) in effect July 1, 1948	Container size				
	5-pound jar	10-pound tin	25-pound tin	100-pound drum	200-pound drum
	Each	*Each*	*Each*	*Each*	*Each*
Price to favored purchasers	$1.15	$2.175	$5.25	$20.30	$39.80
Price to other purchasers	$1.50	$2.90	$6.75	$26.00	$50.00
Price discrimination:					
Per container	$0.35	$0.725	$1.50	$5.70	$10.20
Percent	23.3	25.0	22.2	21.9	20.4

PAR. 5. The effect of such discriminations in price made by respondent, as set forth in paragraph 4 hereof, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and its purchasers are respectively engaged; or to injure, destroy, or prevent competition with respondent or with purchasers of respondent who receive the benefit of such discriminations, or with customers of said purchasers.

PAR. 6. Such discriminations in price by respondent between different purchasers of goods of like grade and quality in interstate commerce in the manner and form aforesaid, are in violation of the provisions of subsection (a) of section 2 of the above-mentioned act of Congress entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, (the Clayton Act), as amended by section 1 of the act of Congress 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. Title 15, Sec. 13, and for other purposes," approved June 19, 1936 (the Robinson-Patman Act).

COUNT II

Charging violation of section 3 of the Clayton Act, the Commission alleges:

PAR. 7. Paragraph 1 to 3, inclusive, of count I hereof are hereby repeated and made a part of this count as fully and with the same force and effect as though here again set forth in full.

PAR. 8. Respondent in the course and conduct of its business, as herein described, has sold and now sells or has made contracts for the sale of its malted-milk products on the condition, agreement or understanding that the purchasers thereof shall not use or deal in the malted-milk products of a competitor or competitors of the respondent.

Respondent, since on or about April 1, 1948, has sold and now sells or has made contracts for the sale of its malted-milk powder, to certain purchasers, including Rexall Drug Co. and McKesson & Robbins, Inc., at prices which were and are fixed on the conditions, agreements, or understanding that respondent supply said purchasers all their requirements of malted-milk powder, with the result that said purchasers have not and do not now deal in malted-milk powder of a competitor or competitors of respondent.

PAR. 9. The effect of said sales, or contracts for sale on said condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in the lines of commerce in which respondent and said purchasers are respectively engaged.

PAR. 10. The aforesaid acts 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).

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), the Federal Trade Commission, on October 3, 1949, issued and subsequently served upon the respondent, Horlicks Corp., its complaint in this proceeding, charging said respondent, in count I thereof, with violation of subsection (a) of section 2 of said act as amended and, in count II thereof, with violation of section 3 of said act. After the issuance of the complaint and the filing of respondent's answer thereto, a trial examiner of the Com-

mission was designated by it to take testimony and receive evidence in support of and in opposition to the allegations of the complaint, and a number of hearings were held and a substantial amount of evidence was introduced and duly recorded and filed. At a hearing held on March 15, 1950, there was read into the record a stipulation as to the facts which had theretofore been agreed upon between counsel in support of the complaint and counsel for the respondent. Said stipulation provides, among other things, that the facts set forth therein are in addition to, and not in lieu of, any and all evidence in the record, and that said stipulation, together with such evidence, shall constitute the whole record herein.

Thereafter this proceeding came on for final consideration by the Commission upon the complaint, answer thereto, testimony and other evidence, stipulation as to the facts, recommended decision of the trial examiner, and memorandum of counsel supporting the complaint (no briefs having been filed and oral argument not having been requested); and the Commission, having duly considered the matter and being now fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent Horlicks Corp. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located in Racine, Wis. Respondent also maintains warehouses in various of the larger cities in the United States.

PAR. 2. Respondent is now, and for many years last past has been, engaged in the production and manufacture of malted-milk products, including Instant Cocoa and malted milk for sale at soda fountains, malted-milk tablets, and packages of malted milk for sale to consumers through drug, confectionery, and grocery stores.

Respondent now sells, and for many years last past has sold, its malted-milk products to different purchasers located in the various States of the United States and in the District of Columbia for use, consumption, or resale therein. Respondent transports said products, or causes the same to be transported, from Racine, Wis., to said purchasers so located, thereby creating a continuous current of commerce in said products.

PAR. 3. In the course and conduct of its business, respondent has been, and is, in competition with other corporations, individuals, partnerships, and firms engaged in manufacturing, selling, and dis-

tributing malted-milk products in commerce between and among the various States of the United States and the District of Columbia.

Some of respondent's purchasers, and some customers of such purchasers, are competitively engaged in the resale of its malted-milk products at wholesale or at retail, or both, in the various territories and places where they respectively carry on their businesses.

PAR. 4. Respondent, in the course and conduct of its business as aforesaid, has contracted to sell, has sold, and now sells its malted-milk products on the condition, agreement, or understanding that the purchasers thereof shall not use or deal in the malted-milk products of a competitor or competitors of the respondent.

Rexall Drug Co. is a large wholesaler which sells drugs, fountain supplies, including malted milk, and many other items to retail drug stores throughout the United States. Respondent, since on or about April 1, 1948, has contracted to sell, has sold, and now sells, malted milk for soda fountain use to Rexall Drug Co. at prices which were, and are, fixed on the condition, agreement, or understanding that respondent supply said purchaser all its requirements of said malted milk, with the result that said purchaser has not dealt, and does not now deal, in said malted milk of a competitor or competitors of respondent.

PAR. 5. The effect of said sales and contracts for sale on said condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in the lines of commerce in which respondent and said purchaser are, respectively, engaged.

PAR. 6. Count I of the complaint herein charges the respondent with violation of subsection (a) of section 2 of the Clayton Act, as amended, by reason of its having sold, and now selling, malted-milk products to some purchasers at higher prices than it has sold, and now sells, such products of like grade and quality to other purchasers. In a stipulation as to the facts which is a part of the record herein, it was stipulated and agreed between counsel supporting the complaint and the respondent that the respondent could produce evidence which would demonstrate that the price differentials alleged in the complaint and shown by the record are differentials which make only due allowance for differences in the cost to the respondent of sale and delivery resulting from the differing methods or quantities, or both, of such sale and delivery, and that witness, if called, would testify that said price differentials make only due allowances for such differences, and that such testimony could not be rebutted in any material respect. The trial examiner consequently found that the evidence in the record is insufficient to support the charges in count I of the

complaint, and granted respondent's motion to dismiss count I of the complaint.

CONCLUSION

The acts and practices of the respondent as herein found constitute a violation of section 3 of the act of Congress entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act).

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, answer of the respondent, testimony and other evidence introduced before a trial examiner of the Commission theretofore duly designated by it, stipulation as to the facts entered into by and between counsel supporting the complaint and the respondent, recommended decision of the trial examiner, and memorandum of counsel supporting the complaint (no briefs having been filed and oral argument not having been requested); and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of the act of Congress entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act):

It is ordered, That the respondent, Horlicks Corp., a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the sale, or making of any contract for the sale, of malted-milk products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

(1) Selling or making any contract for the sale of malted-milk products on the condition, agreement, or understanding that the purchaser thereof shall not use or deal in the malted-milk products, or other goods or merchandise of, a competitor or competitors of the respondent.

(2) Fixing the price charged for malted milk products, or granting a discount from or rebate upon the price therefor, on the condition, agreement, or understanding that the purchaser of such products shall not use or deal in the malted-milk products, or other goods or merchandise, of a competitor or competitors of the respondent.

(3) Enforcing or continuing in operation or effect any condition, agreement, or understanding in or in connection with any existing sale or contract for the sale of malted-milk products, which condition,

agreement, or understanding is to the effect that the purchaser of such products shall not use or deal in the malted-milk products, or other goods or merchandise, of a competitor or competitors of the respondent.

It is further ordered, That the respondent shall, within sixty (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.

Syllabus

IN THE MATTER OF

CONSOLIDATED ROYAL CHEMICAL CORPORATION, TRADING ALSO AS CONSOLIDATED DRUG TRADE PRODUCTS

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

Docket 5302. Complaint, Apr. 3, 1945—Decision, Sept. 21, 1950

Where a corporation engaged in the interstate sale and distribution of a medicinal preparation designated as "New Pe-Ru-Na," and also as "New Pe-Ru-Na Tonic"; in advertisements thereof through radio continuities and by other means—

(*a*) Falsely represented that the use of said preparation would build resistance to colds, prevent them and shorten their duration;

(*b*) Represented that its use would be effective in relieving the symptoms of colds, and would relieve coughs, the facts being that its therapeutic value in relieving the symptoms or discomfort of a cold was limited to its expectorant qualities, which tend, in a slight degree, to increase the exudate from the mucous membranes, thereby making it more liquid and more easily removed by coughing; and

(*c*) Represented that it would assist in building up the strength, energy, and vigor of the user because of its tonic properties; the facts being that it had no tonic properties which would accomplish such results, except to the extent that it might increase the appetite, and might, because of its iron and ammonium citrate content, aid slightly in correcting iron deficiency when taken for a considerable length of time;

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

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 the charge in the complaint that respondent's advertisements concerning its "Pe-Ru-Na" constituted false advertisements for the further reason that they failed to reveal facts material in the light of such representations or material with respect to the consequences which might result from its use under the prescribed or usual conditions, no evidence was introduced, and consequently no findings with respect thereto were made.

Before *Mr. Abner E. Lipscomb*, trial examiner.

Mr. Joseph Callaway for the Commission.

Mr. Elwood H. Seal, of Washington, D. C., *Nash & Donnelly*, of Chicago, Ill., and *Mr. Harlan W. Kelley*, of Milwaukee, Wis., for respondent.