Syllabus

IN THE MATTER OF

O'SULLIVAN RUBBER CORPORATION

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (a) OF THE CLAYTON ACT, AS AMENDED

Docket 6045. Complaint, Sept. 9, 1952—Decision, July 29, 1953

Where a corporation engaged in the manufacture, sale and distribution of a line of shoe products, namely, rubber and composition heels and soles and other supplies and materials used in the shoe repair industry, and of shoe findings, namely, machinery, equipment and supplies used in the repair and maintenance of shoes and the operation of shoe repair shops, and in the competitive interstate sale and distribution of said shoe products to shoe manufacturers and in the sale of both said shoe products and shoe findings nationally to wholesalers of shoe repair materials, or, as known generally, shoe finders, by whom said shoe products and shoe findings were resold to shoe repair men, retail shoe stores and retailers of shoe repair and maintenance materials;

In selling its said shoe products and shoe findings pursuant to its cumulative volume discount plan whereby it granted discounts, rebates or allowances from its net selling prices on shoe products (list prices less regular trade discount of 28 percent), and from its list prices on shoe findings based upon the customer's annual cumulative total purchases of both in accordance with different schedules as variously effective, modified or revised in which discounts, rebates or allowances (1) ranged from 1 percent to 5 percent in eight graduated steps beginning with such purchases which aggregated $3,000 but were less than $5,000, and concluding with those of $35,000 and over; (2) as later added to, ranged additionally, for shoe products, from 5½ percent to 9 percent in eight graduated steps, which began with such cumulative annual purchases aggregating from $35,000 to $45,000, and concluded with those of $105,000 and over, with qualifying purchasers automatically receiving a 5 percent discount on their purchases of shoe findings; and (3) as finally effective, ranged from 1 percent to 10 percent for shoe products and one-half thereof for shoe findings as determined by such cumulative annual purchases beginning with $3,000 and ending with those of $50,000 or over, remained at 5 percent for shoe findings after combined annual purchases reached $50,000, and ranged, on cumulative annual purchases of shoe products, figured separately, from 10 percent to 17½ percent in 14 graduated steps for such purchases of shoe products and shoe findings ranging from $40,000 to $400,000 and over; and thereby in effect directly or indirectly reduced prices charged favored customers to a substantially lower amount than those charged other customers—

Discriminated in price between different purchasers of its said shoe products of like grade and quality by selling the same to some of its shoe finder customers at higher prices than to other of its said customers, including, among those thus favored, many who were engaged, in their various trading areas, in the resale of said products in competition with other shoe finders who purchased such products from it, and who were not thus favored:

Held, That such acts and practices, under the circumstances set forth, were in violation of the provisions of subsec. (a) of Sec. 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Before *Mr. William L. Pack*, hearing examiner.

Mr. James I. Rooney and *Mr. James S. Kelaher* for the Commission.

Pheiffer & Weaver, of Washington, D. C., for respondent.

CONSENT SETTLEMENT [1]

Pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by an Act of Congress approved June 19, 1936 (Robinson-Patman Act), the Federal Trade Commission, on the 9th day of September, 1952, issued and subsequently served its complaint on the respondent named in the caption herein, charging it with violation of subsection (a) of Section 2 of the Clayton Act, as amended.

The respondent, desiring that this proceeding be disposed of by the consent settlement procedure provided in Rule V of the Commission's Rules of Practice, solely for the purposes of this proceeding, any review thereof, and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth, and in lieu of answer to said complaint heretofore filed and which, upon acceptance by the Commission of this settlement, is to be withdrawn from the record, hereby:

1. Admits all the jurisdictional allegations set forth in the complaint.

2. Consents that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion and order to cease and desist. It is understood that the respondent, in consenting to the Commission's entry of said findings as to the facts, conclusion, and order to cease and desist, specifically refrains from admitting or denying that it has engaged in any of the acts or practices stated therein to be in violation of law or that such acts and practices, if engaged in, would be in violation of law.

3. Agrees that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in paragraph (f) of Rule V of the Commission's Rules of Practice.

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[1] The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on July 29, 1953, and ordered entered of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

Commissioner Howrey not participating and Commissioner Mason dissenting.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful, the conclusion based thereon, and the order to cease and desist, all of which respondent consents may be entered in final disposition of this proceeding, are as follows:

COMMISSION'S FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent O'Sullivan Rubber Corporation is a Virginia corporation with its principal office and place of business located at Winchester, Virginia. Said respondent also does business under the trade name and style "O'Sullivan Rubber Corporation, Laing, Harrar and Chamberlain Division," with principal place of business located at 135 Hudson Street, New York, New York.

PAR. 2. Respondent is now and has been for many years last past principally engaged in the manufacture, sale and distribution of a line of rubber and composition heels and soles and other supplies and materials used in the shoe repair industry, and hereinafter referred to as shoe products. Said respondent, through its Laing, Harrar and Chamberlain Division, is also engaged in the wholesale distribution of machinery, equipment and supplies used in the repair and maintenance of shoes and the operation of shoe repair shops, and hereinafter referred to as shoe findings.

Said respondent sells said shoe products to shoe manufacturers and sells both shoe products and shoe findings nationally to wholesalers of shoe repair materials, known generally as shoe finders. Said shoe finders resell respondent's shoe products and shoe findings to shoe repairmen, retail shoe stores, and to retailers of shoe repair and maintenance materials.

PAR. 3. Respondent causes said shoe products, when sold, to be transported from the place of manufacture at Winchester, Virginia, and causes said shoe findings, when sold, to be transported from the point of origin in New York, New York, to purchasers thereof located in various other States of the United States and in the District of Columbia. There is and has been at all times herein mentioned a continuous current of trade and commerce in said products across State lines between respondent's factory and the purchasers thereof. Said products are sold and distributed for use, consumption, and resale within the various States of the United States and the District of Columbia.

PAR. 4. In the course and conduct of its business as aforesaid, respondent is now and during the times herein mentioned has been in substantial competition with other corporations and firms engaged in the business of manufacturing or selling shoe products and shoe

findings in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 5. Respondent, in the course and conduct of its business, as hereinbefore set forth, has been since July 1, 1949, and now is, discriminating in price between different purchasers of its shoe products and shoe findings of like grade and quality by selling said products to some of its shoe finder customers at higher prices than to other of its shoe finder customers.

PAR. 6. The discriminations in price referred to in paragraph 5 hereof have been and now are effected pursuant to respondent's cumulative volume discount plan whereby it grants discounts, rebates or allowances from its list prices on shoe findings and from its net selling prices on shoe products (list prices less regular trade discount of 28 percent) based upon the customer's cumulative total of purchases of shoe products and shoe findings during one year. Said cumulative volume discount plan has the net effect, either directly or indirectly, of reducing prices charged favored customers to a substantially lower amount than respondent charges other of its customers for products of like grade and quality.

Effective July 1, 1949, and continuing thereafter to April 1950, respondent, pursuant to its cumulative volume discount plan, granted discounts, rebates or allowances based upon the customer's cumulative total of purchases of shoe products and shoe findings combined, in accordance with the following schedule:

Cumulative annual purchases:	*Percent*
Less than $3,000	None
$3,000 but less than $5,000	1
$5,000 but less than $7,500	2
$7,500 but less than $10,000	2½
$10,000 but less than $15,000	3
$15,000 but less than $20,000	3½
$20,000 but less than $25,000	4
$25,000 but less than $35,000	4½
$35,000 and over	5

Effective in April 1950, respondent modified the foregoing plan by adding thereto extra discounts, rebates or allowances for larger volume purchases in accordance with the following schedule:

Cumulative annual purchases of shoe products:	*Percent*
$35,000 but less than $45,000	5½
$45,000 but less than $55,000	6
$55,000 but less than $65,000	6½
$65,000 but less than $75,000	7
$75,000 but less than $85,000	7½
$85,000 but less than $95,000	8
$95,000 but less than $105,000	8½
$105,000 and over	9

Purchasers qualifying for the foregoing extra discounts, rebates or allowances on shoe products were automatically granted a discount, rebate, or allowance of 5 percent on their purchases of shoe findings.

Effective July 1, 1951, respondent again revised its cumulative volume discount plan and since said date has granted discounts, rebates, or allowances in accordance with the following schedule:

Cumulative annual purchases on shoe products and shoe findings up to $50,000. On shoe findings the discount, rebate, or allowance is half that of the shoe products rate as determined by the combined volume:

	Shoe products, percent
Less than $3,000	None
$ 3,000 but less than $ 5,000	1
$ 5,000 but less than $ 7,500	2
$ 7,500 but less than $10,000	2½
$10,000 but less than $12,500	3
$12,500 but less than $15,000	3½
$15,000 but less than $20,000	4
$20,000 but less than $25,000	5
$25,000 but less than $30,000	6
$30,000 but less than $35,000	7
$35,000 but less than $40,000	8
$40,000 but less than $45,000	9
$45,000 but less than $50,000	9½
$50,000	10

After combined cumulative annual purchases of shoe products and shoe findings reach $50,000, the discount, rebate, or allowance on shoe findings remains at 5 percent and discounts, rebates or allowances are granted on the cumulative annual purchases of shoe products figured separately, in accordance with the following schedule:

	Percent
$ 40,000 but less than $ 45,000	10
$ 45,000 but less than $ 55,000	10¼
$ 50,000 but less than $ 55,000	10½
$ 55.000 but less than $ 60,000	10¾
$ 60,000 but less than $ 65,000	11
$ 65,000 but less than $ 70,000	11¼
$ 70,000 but less than $ 75,000	11½
$ 75,000 but less than $ 80,000	11¾
$ 80,000 but less than $ 90,000	12
$ 90,000 but less than $100,000	12¼
$100,000 but less than $200,000	12½
$200,000 but less than $300,000	15
$300,000 but less than $400,000	17
$400,000 and over	17½

Many of the favored customers receiving the benefits of the aforesaid discriminations in price are competitively engaged in the resale of said products with other shoe findings who purchase shoe products and shoe findings from respondent and who are not favored, within

the various trading areas in which said favored customers are engaged in business.

PAR. 7. The effect of such discriminations in price stated herein may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and its customers are respectively engaged; or to injure, destroy or prevent competition with respondent or with customers thereof who receive the benefits of such discriminations.

COMMISSION'S CONCLUSION

The foregoing acts and practices of said respondent as set forth herein are in violation of the provisions of subsection (a) 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).

ORDER TO CEASE AND DESIST

It is ordered, That respondent O'Sullivan Rubber Corporation, a corporation, its officers, agents, representatives and employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of rubber and composition heels and soles and other supplies and materials used in the shoe repair industry and other products known commercially as findings, in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating in price, directly or indirectly, between different purchasers of said products:

(1) By selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products;

(2) By selling, in competition with others, such products of like grade and quality to any purchaser at prices lower than to any other purchasers: Provided, however, that the foregoing shall not be construed to preclude respondent from defending absolutely any alleged violation of this provision of the Order by showing that none of the products sold at lower prices were resold by the purchaser at the same level of distribution as were the products sold by respondent at higher prices.

For the purpose of comparison, the term "price" as used in this order takes into account discounts, rebates or allowances, volume or otherwise, and other terms and conditions of sale.

It is further ordered, That respondent shall, within sixty (60) days after the service upon it of this order, file with the Commission a re-

port in writing setting forth in detail the manner and form in which it has complied with this order.

O'SULLIVAN RUBBER CORPORATION,
(Sgd) By H. DOUGLAS WEAVER,
(Title) *Secretary.*
(Sgd) H. DOUGLAS WEAVER,
Counsel for Respondent.
PHEIFFER & WEAVER.

Date: March 4, 1953.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record this 29th day of July 1953.

Commissioner Howrey not participating and Commissioner Mason dissenting.

IN THE MATTER OF

INFRA INSULATION, INC., ET AL.

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6072. Complaint, Dec. 12, 1952—Decision, July 29, 1953

Where a corporation and its two officers, engaged in the manufacture and interstate sale of their "Infra Insulation" reflective aluminum insulation, through statements in a 56-page brochure, newspaper advertisements, pamphlets and otherwise, directly or by implication—

(1) Represented that their "Infra" insulation was 97 percent efficient; that the flow of heat through "Infra" was only 3 percent as compared with 90 percent for mass insulations, and that of all heat reaching "Infra" only 3 percent was emitted as compared with 90 percent in the case of mass; and represented thereby that the relative insulating effects of reflective, as compared with mass insulations, was indicated by the magnitude of the surface radiation coefficients of the respective materials;

When in fact the use of aforesaid numbers and expressions was fundamentally incorrect and the implication created thereby, that "Infra" insulation was many times more effective than mass insulation in retarding the flow of heat, was not correct;

(2) Represented conductance values for the several types of their own insulation as considerably lower than the actual values, and the conductivity values for mass insulation as substantially higher than the actual;

(3) Represented falsely that the thermal conductivity of mass insulations varied to a marked degree because of thickness orientation and internal convection, and temperature differences; when in fact the effect of temperature differences was more marked with reflective insulations than with mass insulations;

(4) Represented falsely that "Infra" insulation was noncondensation forming and prevented all moisture and vapor flow in a construction, and that mass insulation was always or usually subject to condensation and accordingly to large accumulations of moisture;

(5) Represented falsely that significantly less ventilation was needed in installations of "Infra" insulation than with those of mass insulation;

(6) Represented that dust streaks on plaster resulted from dampness present in mass insulation; when in fact dust streaks are seldom so caused when mass insulation is properly installed;

(7) Advocated a heat flow test involving radiant heat lamps for comparing the value of different types of house insulation, when such test was not in general an applicable or accurate method for making such comparison: and

(8) Represented falsely that mineral wool insulation created a health hazard both during its installation and in place afterward:

Held, That such acts and practices were all to the prejudice and injury of the public and respondents' competitors and constituted unfair and deceptive acts and practices and unfair methods of competition in commerce.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Jesse D. Kash for the Commission.