

IN THE MATTER OF
LEVER BROTHERS CO.

Docket 5585. Amended and supplemental complaint, Apr. 26, 1951—Order denying appeal, etc., and opinion, Dec. 16, 1953

Charge: Discriminating in price by selling soap products in commerce to certain customers, usually small businessmen, at higher prices than to other and generally larger competing customers, in violation of subsection 2 (a) of the Clayton Act, as amended; and

Entering into advertising arrangements with certain customers whereby respondent paid or contracted to pay them compensation for services or facilities furnished by them in connection with the sale, etc., of respondent's soap products without making comparable payments or consideration available to their competitors, in violation of subsection 2 (d) of the Clayton Act, as amended.

Before *Mr. Randolph Preston* and *Mr. Earl J. Kolb*, hearing examiners.

Mr. John L. York and *Mr. William H. Smith* for the Commission.
Arnold, Fortas & Porter, of Washington, D. C., and *Mr. Martin J. Pendergast*, of New York City, for respondent.

ORDER DENYING APPEAL FROM INITIAL DECISION OF HEARING
EXAMINER, AND DECISION OF THE COMMISSION

This matter having come on to be heard by the Commission upon the appeal of counsel supporting the complaint from the initial decision of the hearing examiner and upon the briefs and oral argument of counsel in support of and in opposition to said appeal; and

The Commission having duly considered said appeal and the record herein and being of the opinion, for the reasons stated in the written opinion of the Commission which is being issued simultaneously herewith, that the appeal should be denied and that the initial decision of the hearing examiner is appropriate in all respects to dispose of this proceeding:

It is ordered, That the appeal of counsel supporting the complaint from the initial decision of the hearing examiner be, and it hereby is, denied.

It is further ordered, That the initial decision of the hearing examiner, a copy of which is attached, shall, on the 16th day of December, 1953, become the decision of the Commission.

ORDER DISMISSING AMENDED AND SUPPLEMENTAL COMPLAINT

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding came on to be considered by the above-named hearing examiner theretofore duly designated by the Commission, upon the

amended and supplemental complaint, the answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions, and brief thereon submitted by counsel for respondent, and oral argument of counsel.

The original complaint in this proceeding was issued on September 27, 1948, charging the respondent, Lever Brothers Company, a corporation, with having violated the provisions of subsection (a) of Section 2 of the Clayton Act, as amended.

Testimony and other evidence in support of the allegations of the complaint were introduced before Randolph Preston, a duly designated hearing examiner of the Commission, but prior to the introduction of any evidence in opposition to the charges of the complaint the said Hearing Examiner, Randolph Preston, became unavailable to the Commission by reason of his retirement from the Government service, and the Commission by order issued August 24, 1950, designated Earl J. Kolb as hearing examiner in this proceeding to take testimony and receive evidence in the place and stead of Hearing Examiner Randolph Preston.

Thereafter, prior to the introduction of any testimony and other evidence by the respondent in opposition to the charges of the complaint, the Commission on April 26, 1951, issued and subsequently served its amended and supplemental complaint in this proceeding charging the respondent with having violated subsections (a) and (d) of Section 2 of the Clayton Act as amended.

On June 4, 1951, after hearing upon certain motions of the respondent, the hearing examiner issued his order that all testimony and other evidence heretofore taken in this proceeding be stricken from the record as not being applicable to the issues raised by the amended and supplemental complaint.

Thereafter, on November 26, 1951, the Commission approved a stipulation executed by counsel in support of the complaint and counsel for respondent, pursuant to which the hearing examiner issued his order dismissing the charges contained in subparagraphs 2 and 5 of Paragraph Five of Count 1 of the amended and supplemental complaint dealing respectively with quantity discounts and price protection on price increase, and, further ordered, that the testimony and other evidence theretofore taken in support of the original complaint be reinstated and considered as testimony and other evidence taken in support of the amended and supplemental complaint.

Thereafter, testimony and other evidence were introduced before Hearing Examiner Earl J. Kolb in support of and in opposition to the allegations of the amended and supplemental complaint, which testimony and other evidence were duly recorded and filed in the office of the Commission.

Respondent, Lever Brothers Company, a corporation, is engaged in the manufacture and in the sale and distribution of soap and soap products in interstate commerce to retail grocers, jobbers and other purchasers. A substantial portion of respondent's business consists of sales of soap and soap products direct to thousands of retail grocers located in virtually every city and town in the United States. Among such retailer customers there are approximately 2,300 who operate chains of two or more stores and the remainder are single-store operators.

The differences in price and allowances charged in the amended and supplemental complaint to be in violation of Section 2 (a) and 2 (d) of the Clayton Act arise out of the following practices of respondent in connection with sales of soap and soap products to its retailer customers: (1) Price protection of warehouse stocks upon price decline; (2) Count and recount; and (3) Advertising allowances.

I. Price Protection of Warehouse Stocks Upon Price Decline

Allowances to cover price decline in warehouse stocks is a general practice in the grocery industry and has the following purposes: (1) To provide adequate stocks immediately behind point of sale; (2) To avoid necessity of maintaining greater number of warehouses by the manufacturer; (3) To pass on to the customer delivery cost; and (4) To induce the trade to maintain an adequate reservoir of stock.

Many single store retailers throughout the United States belong to cooperative associations or purchase all or part of their requirements of soap and soap products from jobbers. Respondent extends price protection to the warehouse stocks of such associations and jobbers enabling them to offer their members or customers the new lower price immediately upon the announcement of a price decline.

Price declines on respondent's soap and soap products were relatively few and at infrequent intervals and for the most part were made for the purpose of offsetting the higher prices existing during World War II and were due to the lower price of raw materials and the greater availability of such materials. When such price declines occurred, respondent immediately reduced the price on all of its own warehouse stock which reduction applied to goods in transit. During the four-year period immediately preceding the issuance of the amended and supplemental complaint there were six declines in price of respondent's soap and soap products ranging from 6 percent to 10 percent or roughly 25¢ to 50¢ per case.

At the time of these price declines, respondent made adjustments to all of its customers having storage or warehouse stocks held by such customers for further handling, transportation and distribution to

the site of retail sale. In making such adjustments the respondent did not protect any of its customers on stocks in their warehouses or stores which were purchased from jobbers or others and not directly from the respondent. Following such price declines, respondent determined the number of unopened cases held in the warehouse space of its various customers for distribution to two or more retail stores and made an allowance or rebate on such cases to such customers equal to the price reduction. Respondent made no payment on cases, opened or unopened, held in retail store stocks regardless of the size of the retailer or the number of stores owned. In determining the amount of allowance to be made, respondent accepted the count of the customer who carried a running inventory, but as to those who did not, actual count was made by salesmen of respondent. No price protection was extended to operators of one store who bought and took delivery solely for the needs of that store. An exception to this is the carload purchaser operating a single store to whom stock protection was granted on unopened cases in the warehouse or storage space and only on merchandise received as part of a carload shipment. No price protection was extended to a customer operating several stores on soap or soap products delivered to a unit store for resale solely in that store.

Respondent did not require that the warehouse or storage stock should be in a separate building not in any way physically connected with any retail store. Instead, respondent included in its definition of warehouse and storage stocks any stocks located in a warehouse or storage space from which distribution was made at the customer's expense to the site of retail sale in two or more retail stores. Some of respondent's customers, who received price protection on such warehouse or storage stocks, kept such stock in warehouse or storage space physically connected in some way to one of the retail stores from which further distribution was made.

In the administration of its price protection policy respondent carefully determined the eligibility of stocks for payment; carefully determined the number of cases on which payment should be made in accordance with its policy; and limited payments to the amounts so determined. No issue was raised in this proceeding of any arbitrary or improper allowances being made to particular customers separate and apart from the general plan hereinbefore described. There is some evidence of improper classification of customers in several isolated instances through carelessness or improper conduct of salesmen, but these were immediately corrected by the respondent and such isolated instances are not at issue in this proceeding. The charges of the amended and supplemental complaint were instead directed to the general practice of affording warehouse protection to

the operators of two or more stores while not extending the same protection to the operators of single stores.

This issue was further limited by the following stipulation on the record by the attorney in support of the complaint:

"* * * the attorney supporting the complaint stipulates and agrees and will announce for purposes of this record that he raises no question as to the price protection given to the warehouse stocks of chains, voluntaries, cooperatives, or others, kept in a warehouse in a separate building not in any way physically connected with any retail store, while denying floor stock protection to certain other customers who operate retail stores but who maintain no separate warehouses.

"The attorney supporting the complaint will, however, contend that section 2 (a) of the Robinson-Patman Act is being violated by granting floor stock protection to what is claimed to be warehouse stock stored in a building used as a retail store by the same customer who operates two or more stores while refusing this protection to other retail customers who operate only one store. This would include, among other things, warehouse stock of two or more jointly-owned stores which stock is stored in a building occupied by one of the retail stores." (Tr. 3372-73).

By this stipulation the issue was limited to the granting of price protection to what is claimed to be warehouse stock stored in a building used as a retail store by customers who operate two or more stores while refusing this protection to other retail customers who operate only one store. This stipulation was made prior to the introduction of any testimony in opposition to the charges of the amended and supplemental complaint respecting warehouse stock protection and the testimony in defense was based solely upon the issue as so limited.

It is uncontradicted in this record that when respondent granted an allowance on stock stored in a building occupied by one of the stores, such allowance was made only on stock stored in the warehouse section for distribution to two or more stores and no allowance was made on cases opened or unopened on the floor of the store for replenishment of the retail stock.

There is no evidence in this record that any injury to competition was sustained by the single store by reason of the respondent's practice of granting warehouse stock protection. No price protection was granted by the respondent on normal operating stock, which is that stock which the retailer requires to refill his shelves and rebuild display. This includes all stock in the individual-member store other than that stored in the warehouse section for distribution to two or more stores. It is uncontradicted in this record that the normal oper-

ating stocks, including shelf stock, in unit stores of chains of two or more stores upon which no price protection was granted by the respondent were greater in size than that in single stores and that such units have as a part of their normal working stock more unopened cases than do single stores.

On the basis of the present record, it appears that there has been a total failure to sustain the charges of the amended and supplemental complaint relative to price protection on decline in price, for the following reasons:

1. The stipulation entered into by counsel in support of the complaint, prior to the introduction of any evidence in opposition to the charges of the amended and supplemental complaint, in effect abandoned the original theory of the amended and supplemental complaint; admitted the legality of the practice of extending price protection to warehouse or storage stocks and removed as an issue in this proceeding the granting of price protection to warehouse stocks stored in a separate warehouse.

2. By reason of this stipulation it must be considered, for the purpose of this proceeding, that a retail customer maintaining a separate and distinct warehouse for supplying two or more stores performs a warehousing function which entitles him to the allowances made on warehouse stock in the case of price decline.

3. A customer maintaining a separate warehouse stock in one of its units for distribution to two or more stores, including the unit store, performs the same warehousing function as the customer maintaining a separate warehouse.

4. While it was stipulated in the record that single stores who were not accorded price protection compete with customers who operate two or more stores and who receive price protection but do not have physically separate warehouses, there is no evidence in this record that the failure of unprotected customers to receive price protection affects their competitive position, ability or opportunity to compete with protected customers who do not have physically separate warehouses. The evidence on competitive effect relates to competition between unprotected customers and chain stores which have physically separate warehouses.

5. There is no competitive injury to the single-store operator who does not receive price protection because his unprotected stock at the time of any price decline is less than the normal operating stock of the units of chains of two or more stores which is likewise unprotected.

6. On the basis of the present record, the inventory loss to a single-store operator resulting from failure to receive price protection on

price declines occurring at infrequent intervals is at best *de minimis* and cannot affect his competitive position or opportunities.

II. Count and Recount

The practice known as Count and Recount is a promotional plan, common to the grocery industry, which is designed to stimulate the movement of goods which are moving slowly. It is an operation for only a short period of time and usually involves only one product. During the past ten years this plan has been used by the respondent on only two occasions: in Los Angeles on the product Breeze in 1948, and countrywide on the product Swan soap from March 14 to April 15, 1949.

In the operation of this plan in 1949, the respondent issued a promotional allowance or rebate to chains of two or more stores and to jobbers amounting to 50¢ a case on Swan soap large, and 30¢ a case on Swan soap regular, based upon the number of cases moved into the retail store from the warehouse during the period from March 14, 1949, to April 15, 1949. The quantity on hand at the warehouse of such customers was counted at the beginning of the campaign period to which was added the quantity purchased and delivered to the warehouse during the campaign period and from the total the quantity on hand in the warehouse at the end of the period was subtracted. The difference being the amount moved from the warehouse to the individual store, which formed the basis for the promotional allowance or rebate. All independent or single stores received no allowance or rebate for stock on hand but were charged the lower price on all Swan soap ordered or shipped during the sale period. No allowance or rebate was granted to chains of two or more stores on cases opened or unopened in their various units. It was the practice of the respondent to notify all of its direct customers of the institution of a Count and Recount promotion and to have its salesmen make a special effort to sell all single-store operators the promotional merchandise during the period.

There is no evidence that an opportunity to participate in the Count and Recount Plan was not offered to all chains of two or more stores or that single stores did not have an opportunity to purchase at the reduced price during the campaign period, or that any injury to competition was suffered by any customer of the respondent by reason of the operation of said Count and Recount Plan.

The amended and supplemental complaint further charged that by reason of a general reduction in price, which frequently followed the Count and Recount Plan, certain customers received a second rebate

on the same merchandise. While it is true that a general reduction in price by respondent did become effective on April 15, 1949, there is no evidence that any customer of respondent received a promotional allowance on Count and Recount and a price protection allowance on warehouse stock covering the same merchandise. In fact, in the operation of these two plans the promotional allowance is received only on merchandise moved to the individual stores and the price protection allowance only on warehouse stocks, so that no duplication of allowance is possible on the same merchandise. There is no evidence that any injury to competition was suffered by any customer by reason of the fact that a general price reduction followed the Count and Recount campaign on April 15, 1949.

On the basis of the present record, it appears that there has been a total failure to sustain the charges of the amended and supplemental complaint relative to the Count and Recount practice.

III. Advertising Allowances

Count II of the amended and supplemental complaint charged the respondent with violation of Section 2 (d) of the Clayton Act, in that: (1) Payments of allowances for newspaper advertising were not made available to all of respondent's customers because it is not reasonably possible for those who purchase smaller quantities of respondent's products to avail themselves of the higher rate which respondent pays and agrees to pay for newspaper advertising; and (2) that the amounts received by the respondent's customers were disproportionate to the cost of advertising furnished by them in that purchasers of large quantities of soap products received sums which were grossly in excess of the cost of the advertising which they furnished, whereas purchasers of lesser quantities received much lesser amounts in relation to the cost of the advertising they furnished.

Respondent, in the course of its business in commerce, entered into contracts with and made payments to its customers for promotional services and facilities furnished by such customers. In the granting of such allowances the respondent used two forms of contract—(1) Cooperative Merchandising Agreement, which was offered as a contract to be entered into on an annual basis, and (2) Cooperative Merchandising Plan, which was a contract physically incorporated as part of the order blank on each order written for customers who had not executed the annual contract.

In the Cooperative Merchandising Agreement, often referred to as the annual contract, respondent agreed to pay to the customer an allowance per case ranging from 10¢ to 20¢ per case purchased, depend-

ing upon the product, on the condition that the customer render sales promotions and advertising service by conducting nine feature sales annually on each product, three of which to be scheduled during each of the four-month advertising periods. As a part of the feature sales the customer was required to place newspaper advertising which shall be included in the customer's regular consumer advertising and that each sale be supported by a prominent store display of the product advertised. The annual contract also provided for an option whereby the customer instead of advertising in newspapers could conduct the nine sales as required and use handbills, radio or television in lieu of newspaper advertising. In this event the customer was paid 9¢ per case on all products except Gold Dust on which 8¢ per case was paid.

In the Cooperative Merchandising Plan which was offered by salesmen to customers at the time the order was taken the respondent agreed to pay to the customer an allowance of 6¢ per case purchased on the condition that the customer render sales promotional service, consisting of a prominent mass store display, together with a feature sale for one week. The Cooperative Merchandising Plan provided for an option whereby the customer might advertise one or more of respondent's products in newspapers, handbills or by radio or television, and receive the allowances provided for by the Cooperative Merchandising Agreement, or annual contract, covering the number of cases ordered of the product so advertised.

The Cooperative Merchandising Agreement, or annual contract, required that advertising space used in newspapers shall be at least equivalent to that given to competitive products. While one column inch consisting of 14 agate lines is generally considered as being required under the contract, there is testimony that respondent has accepted advertising of less than one column inch as compliance with its contract and that in practice no minimum space was required to be devoted to each brand. The size of newspaper advertisements actually run and actually accepted by respondents as compliance ranged from 2 or 3 agate lines to advertisements considerably in excess of 14 agate lines. There is no required media to be used in newspaper advertising other than that used for regular consumer advertising. According to the testimony, any newspaper carrying consumer advertising distributed in the territory covered by the customer is acceptable. This includes, in addition to metropolitan newspapers, local, neighborhood, and foreign-language papers, and shopping news, either daily, weekly or monthly, the rates of which are comparatively inexpensive.

The existence and availability of said contracts and payments were made known by respondent to all of its customers and respondent offered said contracts and the opportunity to receive said payments

to all of its customers. Respondent through its sales employees endeavored to persuade all customers to avail themselves of the contracts and payments and to furnish the services and facilities provided. All direct customers of respondent were offered the choice of executing either the annual contract or the Cooperative Merchandising Plan and the decision in each case was a matter for the retailer's own judgment and decision based on the retailer's own merchandising policies and choice.

Many of respondent's customers, including small, single-store customers belonged to cooperative or voluntary associations and where such associations wished to advertise for their members in newspapers it was the practice of respondent to enter into its annual contract with such associations and to pay to them the advertising allowance based upon the total purchases of the members of such associations.

The advertising allowances provided for in its Cooperative Merchandising Agreement were paid to customers by respondent at the end of the four-month period, specified in the agreement, after verification of the advertising placed by the customer, either through report of check made by an independent audit bureau or submission of tear sheets, particularly of those publications not covered by the audit bureau. Allowances were paid only upon those products which were actually advertised. In the event the feature sales were not conducted in all the stores as, for example, in the case where the customer failed to provide newspaper advertising serving all of the areas of location of all the specified stores, payment to the customer was proportionately reduced. The same was true in the event the customer failed to conduct the minimum of nine feature sales annually. In that case payment was also proportionately reduced. Respondent required that handbill advertisements supporting feature sales must be printed and copies submitted to respondent. This was required as a practical method of insuring that the advertisement had been prepared and distributed in good faith.

The attorney in support of the complaint did not file proposed findings or briefs with the Hearing Examiner but instead argued the matter orally, which argument, together with that of the attorney for the respondent, has been incorporated in and made a part of the record. In the argument the attorney in support of the complaint stated the following issues which may now be considered as the issues in this proceeding:

(a) That it is not reasonably possible for customers who purchase smaller quantities of respondent's products to avail themselves of the higher rate which respondent pays, and agrees to pay for newspaper advertising because respondent's contract provides that the advertising

placed must be included in the advertiser's regular consumer advertising and, consequently, if a customer does not do newspaper advertising, the rates provided by the annual contract are unavailable to him under any conditions.

(b) That respondent's Cooperative Merchandising Plan contract by providing that payment will be made for advertising placed at the rates provided for by the annual contract carries over to the Cooperative Merchandising Plan the requirement that the advertisement placed must be included in the advertiser's regular consumer advertising.

(c) That among the customers who receive advertising allowances under the annual contract there is a lack of proportionality because such allowances which are paid upon a per case basis have no relationship to the advertising required to be placed, because there is no cutoff point between the per case allowance and the number of advertisements to be placed with the result that allowances are paid for advertising not placed as distinguished from allowances for advertising which is placed.

As to the first contention, this case was not tried on the theory now advanced by the attorney supporting the complaint in his oral argument. The evidence in this record is not sufficient to support this contention; there is no evidence as to what actually constitutes regular consumer advertising as used in the actual contract, no evidence that an isolated advertisement placed by a customer would not be considered as regular consumer advertising or that the respondent has ever refused to grant an advertising allowance because the advertisement appeared as an isolated advertisement in a newspaper.

As to the second contention, it is a strained interpretation of what is otherwise clear language in the Cooperative Merchandising Plan contract and is not supported by any testimony or other evidence in this record. It is perfectly clear that if a customer advertises under the Cooperative Merchandising Plan contract he is paid for such advertisement at the rate provided for by the annual contract—namely, from 10¢ to 20¢ per case, depending on the particular product purchased and advertised.

Aside from counsel's contentions on availability, this question arises when the requirements for participation are such that only certain customers can in fact participate. There is no evidence in this record to support a finding that even the highest rate of payment offered by respondent for feature sales, including newspaper advertising, is not reasonably available to all of respondent's customers. The customer can avail himself of this rate either through use of the annual

contract by advertising one or more products three times each contract period of four months, or on such products which he cares to advertise through the Cooperative Merchandising Plan with only one insertion of the advertisement. The respondent places no restrictions on the newspapers which he may use except that it cover the area where his store or stores are located thus enabling the use of neighborhood papers or weekly or monthly papers at a greatly reduced rate. The respondent has accepted as low as 2 or 3 lines of advertising as compliance with the contract which reduces the advertising expense. In the absence of evidence that respondent has refused or withheld its annual contract from customers for not advertising all of its products or a substantial number thereof it must be assumed that even a customer executing the annual contract could, if he so desired, participate by advertising only one or more products as his financial condition or needs might dictate. No witness has appeared in this proceeding who testified that he wished to participate in the advertising allowance but could not do so because of the expense. Furthermore, any customer, who for any reason does not wish to advertise, can avail himself of promotional allowances at the rates provided by using handbills, radio or television or by conducting feature sales with display only.

As to the third contention that there is a lack of proportionality because allowances are paid on a per case basis with no relationship to the advertising required to be placed, the evidence in this record is such that no finding whatsoever could be made on this point. All the record shows is that various newspapers charge different rates; that customers use different newspapers; that varying amounts of advertising are used by different customers to comply with their contracts with respondent; and that lineage rates are different as between customers even though same newspapers might be used. Furthermore, the allowances paid are for feature sales of which advertising is a part. Consequently, there is no comparative basis in this record which might be used to determine the relationship between the allowances paid and the advertising required to be placed, and the deficiencies of this record are such as to be fatal to any finding on this point.

On the basis of the present record, it appears that there has been a total failure to sustain the allegations of Count II of the amended and supplemental complaint charging that the method used by the respondent in granting allowances for advertising to its various customers is in violation of Section 2 (d) of the Clayton Act.

It is therefore ordered, That the amended and supplemental complaint in this proceeding be, and the same is hereby, dismissed.

OPINION OF THE COMMISSION

By GWYNNE, Commissioner:

The above cases were tried simultaneously. While the evidence pertaining to each is not in all respects identical, nevertheless as to the questions presented on the appeal of counsel supporting the complaint they may be considered together. These questions have to do with alleged violations of Section 2 (d) of the Clayton Act by respondents in their advertising and promotional allowances.

The amended and supplemental complaint in each case alleges in Count Two, Paragraph Three, as follows:

"Among the payments made and contracted to be made by respondent as alleged in Paragraph Two hereof are payments of money for advertising purposes with respect to respondent's soap products. Said payments made, or contracted to be made, are not available to all customers competing in the resale of said soap products on proportionally equal terms by reason of the following facts:

1. Said payments are made and contracted to be made at different rates per case of said soap products purchased by the customer depending upon the form of advertising used by him, and it is not reasonably possible for those who purchase smaller quantities of respondent's products to avail themselves of the higher rate which respondent pays and agrees to pay for newspaper advertising.

2. The amounts received by respondent's customers are disproportionate to the cost of the advertising furnished by them in that purchasers of large quantities of said soap products receive sums which are grossly in excess of the cost of the advertising which they furnish, whereas purchasers of lesser quantities receive much lesser amounts in relation to the cost of the advertising they furnish."

Each of said respondents is a large corporation engaged in the sale of soap and soap products to retailers throughout the country. In addition to their nationwide advertising programs, each respondent engages in "point of sale" advertising in cooperation with its customers. In other words, each respondent offers to enter into contracts with its customers, by the terms of which it agrees to pay certain amounts for services rendered by the customers in promoting the sale of respondent's products. The terms and conditions of the offer are set out in written contracts, copies of which are attached to the briefs of counsel supporting the complaint.

For example, respondent Lever Brothers offers two types of contracts: first, the Cooperative Merchandising Agreement, or second, the Cooperative Merchandising Plan. The Merchandising Agreement is for one year. Under it the customer agrees to conduct a minimum of

nine feature sales of respondent's products, to be promoted by advertising either in a newspaper or by radio or handbill, and in all cases to be supported by a store display of respondent's products. "Advertising space * * * shall be at least equivalent to that given to competitive products and shall be included in the advertiser's regular consumer advertising." Payment for services rendered is based on the number of cases of each product purchased by the customer during the contract period. The amount paid varies with the product and with the type of advertising, ranging from 12½¢ to 20¢ per case for newspaper advertising and from 8¢ to 9¢ for handbill or radio advertising. If less than nine sales are held, payment is made on a proportional basis.

The Cooperative Merchandising Plan is incorporated with the individual orders of those customers who do not choose the annual plan. Under it, the respondents pay 6¢ for each case purchased, in return for a feature sale supported by a store display. These customers also have the option of promoting this sale by advertising one or more of respondent's products through newspapers, radio, or handbills and of receiving payment at the per case figure set out in the annual merchandising agreement.

In all cases payments are to be made on proper showing of the services rendered.

The contracts of the other respondents and their methods of procedure thereunder are substantially the same.

Section 2 (d) of the Clayton Act, as amended, reads as follows:

"That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

The question presented is, are the payments made for newspaper advertising (1) "available" within the meaning of Section 2 (d), and (2) available on proportionally equal terms to all customers competing in the sale of respondent's products?

It is well established that respondent offered to all customers payments for services rendered by newspaper advertising. That is, it made its several promotional plans known to all. Every customer knew, or could have easily learned, what payments were being offered

and what he must do to get any of them. There was no singling out of favorite customers and making private and different deals with them as appeared in the matter of *John D. Stetson Company*, 41 F. T. C. 244. There was no making of special allowances for promotional services to certain customers which were not made known (or even denied) to other customers, "who were able and willing to furnish the same services and facilities" as in *American Art Clay*, 38 F. T. C. 463, *American Crayon Company*, 32 F. T. C. 306, *Lifesavers Corp.*, 34 F. T. C. 472, and other cases.

Counsel supporting the complaints argues that the newspaper advertising allowances are not "available" because they are not suitable or usable to certain of the customers of the respondents. He cites Black's law dictionary as to the meaning of the word "available." He points out groups of customers who he claims could not make practical use of the newspaper program. These groups are:

(1) Those Who Do Not Do Consumer Advertising Within the Meaning of That Term in the Contract.

Counsel construes the quoted sentences of the contracts to mean that the only advertising which respondents would pay for is that which is a part of the regular advertising of the customer in which he calls his wares generally to the attention of the public; as some did not do that type of advertising, therefore they could not avail themselves of respondents' offer and consequently the advertising programs were not usable or suitable.

The meaning of the quoted sentences is not entirely clear. They might be construed as counsel suggests. On the other hand, they might be construed to require advertising of respondents' products in the customer's regular consumer advertising *only in the event he did such advertising*.

There is some evidence that respondents paid for advertising which was restricted to their own products, which has a bearing on how the contracts were actually construed.

On this point, we adopt the finding of the trial examiner, which is as follows:

"As to the first contention, this case was not tried on the theory now advanced by the attorney supporting the complaint in his oral argument. The evidence in this record is not sufficient to support this contention. There is no evidence as to what actually constitutes regular consumer advertising as used in the actual contract, no evidence that an isolated advertisement placed by a customer would not be considered as regular consumer advertising or that the respondent has ever refused to grant an advertising allowance because the advertisement appeared as an isolated advertisement in a newspaper."

(2) Those Who Because of their Smaller Purchases of Respondents' Products do not Receive Enough in Payment to Pay for Newspaper Advertising Even Though Restricted to Respondents' Products.

Several proprietors of small grocery stores testified that the number of cases of respondents' products purchased by them would not be sufficient to pay the cost of newspaper advertising; that in their particular situation any newspaper advertising would not be practical and that therefore the newspaper allowances of respondents were not usable.

While this evidence has a bearing on the "availability" of the newspaper allowances generally, its value is somewhat weakened by other facts in evidence as follows:

(a) The figures as to the advertising rates offered by these particular customers had to do with newspapers whose circulation was considerably more extensive than the particular customers' trading area. The possibility of advertising in local or neighborhood papers confined to his own trade area (for which payments were made by respondents) does not seem to have been sufficiently explored in the testimony.

(b) Respondents' advertising allowances were offered to, and, to some extent at least, used by cooperatives, of which individual retail grocers were members. This would naturally increase the number of small grocers who could avail themselves of respondents' allowances.

(c) The evidence was confined to New York City where the retail grocery situation is not typical of the country generally. Taking the figures for the country as a whole, the evidence is that, of the customers using Lever Brothers annual advertising contract, 30% purchase less than 400 cases a year; 49% less than 1,000 cases; and 55% less than 1,500 cases. About 50% of the chain store customers do not take advantage of Lever Brothers allowances for newspaper advertising.

On this feature of the case, we adopt the finding of the trial examiner, which is as follows:

"* * * There is no evidence in this record to support a finding that even the highest rate of payment offered by respondent for feature sales, including newspaper advertising, is not reasonably available to all of respondent's customers. The customer can avail himself of this rate either through use of the annual contract by advertising one or more products three times each contract period of four months, or on such products which he cares to advertise through the Cooperative Merchandising Plan with only one insertion of the advertisement. The respondent places no restrictions on the newspapers which he may use except that it cover the area where his store or stores are located thus enabling the use of neighborhood papers

or weekly or monthly papers at a greatly reduced rate. The respondent has accepted as low as 2 or 3 lines of advertising as compliance with the contract which reduces the advertising expense. In the absence of evidence that respondent has refused or withheld its annual contract from customers for not advertising all of its products or a substantial number thereof, it must be assumed that even a customer executing the annual contract could, if he so desired, participate by advertising only one or more products as his financial condition or needs might dictate. No witness has appeared in this proceeding who testified that he wished to participate in the advertising allowance but could not do so because of the expense. Furthermore, any customer, who for any reason does not wish to advertise, can avail himself of the promotional allowances at the rates provided by using handbills, radio or television or by conducting feature sales with display only."

Each of the respondents offers alternative promotional allowances for those who do not for any reason use the advertising allowances. These offers are also made to all customers. For example, in the case of Lever Brothers, a retail customer who holds a feature sale supported by handbill or radio advertising is paid 8¢ or 9¢ per case of products purchased. There is also a second option—to wit, for a sale supported only by a store display, 6¢ per case is allowed.

In other words, the newspaper advertising allowance is a part of the comprehensive plan of payment for promotional services offered by respondents to their several hundred thousand customers throughout the country. The conditions under which these customers operate, of course, vary. Although it appears that the use of advertising by means of newspaper, handbills, or store displays is general throughout the country, we will assume that among these many customers will be found some who do not find newspaper advertising practical. There is no proof, however, that either handbills or store displays are not reasonably practical for all.

There is no evidence in these cases that the promotional plans were tailored to fit the needs of favored customers as was condemned in *Elizabeth Arden, Inc., v. Federal Trade Commission*, 156 F. 2d 132, a case arising under Section 2 (c). Nor does the law require that a comprehensive plan must be so tailored that every feature of it will be usable or suitable for every customer. In many cases that would be an impossibility.

Considering the entire record, we believe that the payments offered for advertising allowances were "available" within the meaning of Section 2 (d) of the Clayton Act.

The next question is, do the payments, which are based on the number of cases sold, meet the test of proportionality as required by Section 2 (d) ?

The Congressional history of that legislation as well as statements by the courts and the Commission indicate that such a method of measurement is a proper one. For example, see Senate Report No. 1502 and House of Representatives Report No. 2287, 74th Congress, 2nd Session: *Elizabeth Arden Sales Corp. v. Gus Blass Company*, 150 F. 2d 988; *International Salt Company* and *Eastern Salt Company*, Docket No. 4307.

During the course of the trial, the trial examiner made the following statement:

"Let's get this straightened out. I am permitting you to prove in this case whether or not the allowances are, in fact, given on proportionally equal terms to either customers; in other words, whether there is a discrepancy in the contracts on the allowance made or whether or not the advertising which is required is so high as to exclude any customers, but I do not intend by my ruling to permit you to go into the very testimony which we have in question; in other words, what the man spends as to show his profit. I suppose you could put a man on the stand to show that his advertising costs so much and as a result he couldn't advertise, but that is as far as I am going to let you go."

Section 2 (d) permits payments for services or facilities actually furnished. Certainly, payments for services or facilities not furnished are not authorized. The same would be true of payments grossly in excess of the cost or value of the services rendered. If by his statement, the trial examiner meant that any examination into the relation between the payments made and the cost of rendering the services would not be permitted, then we think the ruling was too restrictive.

In connection with this ruling, the examiner stated he would permit an offer of proof for the record. No proof was offered and the error, if any were thereby waived. There is no evidence from which it can be found that payments to any customers are in excess of their cost or value.

An additional question arises because of the fact that respondents' payments covered different types of services for which a differing scale of payment was fixed—a certain amount per case for newspaper advertising, a lesser amount for handbills, and still less for store displays. The argument is made that, to meet the requirement of proportionality, payment per case should be the same for each type of service rendered.

While a few instances are cited to the contrary, the proof generally is to the effect that advertising by newspaper is more expensive and

more effective than advertising by either handbill or store display. Evidently respondents considered it of more value to them and their payments are made on that basis.

The law does not prohibit a seller from paying for services of various types. In some cases it might be his duty to do so in order to meet the test of availability. Nor does the law require a seller to pay at the same rate, per unit of product sold, for types of services which are of unequal cost or value. The practical result of such a rule would be to restrict the payments to some type of service that every single customer could furnish. It would adopt uniformity as its goal rather than proportionality. Payments must be made in good faith for services or facilities actually rendered and there should be a fair and reasonable relation between the amount of the payment and the type of service rendered. Congressman Utterback, a member of the Judiciary Committee, had this to say in the debate on the Robinson-Patman bill in the House:

"But proportional to what? Proportional naturally to customers' purchases and to their ability and equipment to render or furnish the services or facilities to be paid for."

While Section 2 (d) requires that payments shall be made available on proportionally equal terms to all competing customers, no standards are laid down in the law for accomplishing this result. Indeed no standard could be laid down which would insure exact proportionality with the mathematical accuracy of a slide rule. Although standards are not laid down, nevertheless the intent of Congress in enacting Section 2 (d) is clear. Prior to the enactment of the Robinson-Patman Act, payments for services and facilities rendered (particularly in the advertising field) were often used for the purpose of discriminating among customers. It was that evil that Section 2 (d) was intended to eliminate. Consequently, every plan providing payment for promotional services and facilities should be carefully scrutinized to see that it does conform to the express Congressional intent. It must be honest in its purpose and fair and reasonable in its application.

We agree with the initial decision of the trial examiner that, on the basis of the present record, there has been a failure to sustain the allegations of Count Two of the amended and supplemental complaint charging that the method used by respondents in granting allowances for their various customers is in violation of Section 2 (d) of the Clayton Act.

Decision

IN THE MATTER OF
THE PROCTER & GAMBLE DISTRIBUTING CO. ET AL.

Docket 5586. Amended and supplemental complaint, Apr. 26, 1951—Order denying appeal, etc., and opinion,¹ Dec. 16, 1953

Charge: Discriminating in price by selling soap products in commerce to certain customers, usually small businessmen, at higher prices than to other and generally larger competing customers, in violation of subsection 2 (a) of the Clayton Act, as amended; and

Entering into advertising arrangements with certain customers whereby respondent paid or contracted to pay them compensation for services or facilities furnished by them in connection with the sale, etc., of respondents' soap products without making comparable payments or consideration available to their competitors, in violation of subsection 2 (d) of the Clayton Act, as amended.

Before *Mr. Randolph Preston* and *Mr. Earl J. Kolb*, hearing examiners.

Mr. John L. York and *Mr. William H. Smith* for the Commission.

Dinsmore, Shohl, Sawyer & Dinsmore, of Cincinnati, Ohio, and *Dwight, Royall, Harris, Koegel & Caskey*, of Washington, D. C., for respondents.

ORDER DENYING APPEAL FROM INITIAL DECISION OF HEARING EXAMINER AND DECISION OF THE COMMISSION

This matter having come on to be heard by the Commission upon the appeal of counsel supporting the complaint from the initial decision of the hearing examiner and upon the briefs and oral argument of counsel in support of and in opposition to said appeal; and

The Commission having duly considered said appeal and the record herein and being of the opinion for the reasons stated in the written opinion of the Commission which is being issued simultaneously herewith, that the appeal should be denied and that the initial decision of the hearing examiner is appropriate in all respects to dispose of this proceeding:

It is ordered, That the appeal of counsel supporting the complaint from the initial decision of the hearing examiner be, and it hereby is, denied.

It is further ordered, That the initial decision of the hearing examiner, a copy of which is attached, shall, on the 16th day of December 1953, become the decision of the Commission.

¹ For opinion in this case see page 506 of the Lever Brothers case.