

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.

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 respondents, and oral argument of counsel.

The original complaint in this proceeding was issued on September 27, 1948, charging the respondents, The Procter & Gamble Distributing Company, a corporation, and The Procter & Gamble 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 respondents 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 respondents 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 respondents, 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 respondents, pursuant to which the hearing examiner issued his order dismissing the charges contained in subparagraph 2 of paragraph Five of Count 1 of the amended and supplemental complaint dealing with quantity discounts, 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.

Respondents, The Procter & Gamble Distributing Company and The Procter & Gamble Company, are corporations organized and existing under the laws of the State of Ohio with their office and principal place of business located in the Gwynne Building, Cincinnati, Ohio.

The Procter & Gamble Distributing Company is a wholly owned subsidiary of The Procter & Gamble Company and is now, and for several years last past has been, engaged in the sale and distribution of soap and soap products, supplied by The Procter & Gamble Company, in interstate commerce to retail grocers, jobbers and other purchasers. A substantial portion of the business of respondent, The Procter & Gamble Distributing Company, 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.

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, The Procter & Gamble Distributing Company, 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 costs; and (4) To induce the trade to maintain an adequate reservoir of stock.

Many single and two-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, The Procter & Gamble Distributing Company, 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 respondents' 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, The Procter & Gamble Distributing Company, 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 said respondent's soap and soap products ranging from 5 percent to 10 percent or roughly 25¢ to 50¢ per case.

At the time of these price declines, respondent, The Procter & Gamble Distributing Company, 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 said 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 said respondent. Following such price declines, said respondent determined the number of unopened cases held in the warehouse space of its various customers for distribution to three or more retail stores and made an allowance or rebate on such cases to such customers equal to the price reduction. Said 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 paid, said 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 or two stores who bought and took delivery solely for the needs of those stores. An exception to this is the carload purchaser operating one or two stores to whom stock protection was granted on cases over and above his normal operating inventory. 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, The Procter & Gamble Distributing Company, 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, said 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 three or more retail stores. Some of said 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, The Procter & Gamble Distributing Company, 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 three or more stores while not extending the same protection to the operators of single or two stores.

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

"As attorney supporting the complaint I now announce to the Court that I raise no question as to the price protection given to the warehouse stocks of chains, voluntaries, or cooperatives or others kept in a warehouse in a separate building not in any way physically connected with any retail store while denying for stock protection to certain other customers who operate retail stores but who maintain no separate warehouses.

"I also announce that I shall 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 three or more stores while refusing this protection to other competing customers who operate one or two stores. This would include among other things, warehouse stock of three or more jointly-owned stores which stock is stored in a building occupied by one of the retail stores." (Tr. 2991-92.)

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 three or more stores while refusing this protection to other retail customers who operate only one or two stores. 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.

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It is uncontradicted in this record that when respondent, The Procter & Gamble Distributing Company, 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 three 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 or upon the normal operating stock of the warehousing store.

There is no evidence in this record that any injury to competition was sustained by the single store or two-store operator by reason of the practice of granting warehouse stock protection by respondent, The Procter & Gamble Distributing Company. No price protection was granted by said 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 three or more stores. It is uncontradicted in this record that the normal operating stocks, including shelf stock, in unit stores of chains of three or more stores upon which no price protection was granted by said respondent were greater in size than that in single stores or in units of two-store operations. Units of chains of three or more stores have as a part of their normal working stock more unopened cases than do single stores or two-store units.

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 three 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 three 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 and two stores who were not accorded price protection compete with customers who operate three 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 or two-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 three or more stores which is likewise unprotected.

6. On the basis of the present record, the inventory loss to a single or two-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 in operation for only a short period of time and usually involves only one product. During the past several years this plan has been used by the respondent, The Procter & Gamble Distributing Company, on only six occasions.

In the operation of this plan in 1948, the respondent, The Procter & Gamble Distributing Company, issued a promotional allowance or rebate to chains of three or more stores and to jobbers amounting to approximately 50¢ a case on one product, Dreft, based upon the number of cases moved into the retail store from the warehouse during the periods from March 23, 1948, to April 30, 1948; and from November 8, 1948, to December 15, 1948. 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 customers operating less than three stores received no allowance or rebate for stock on hand but were charged the lower

price on all Dreft ordered or shipped during the sale period. No allowance or rebate was granted to chains of three or more stores on cases opened or unopened in their various units. It was the practice of the respondent, The Procter & Gamble Distributing Company, 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 the promotional merchandise, during the period, to all customers operating less than three stores.

There is no evidence that an opportunity to participate in the Count and Recount Plan was not offered to all chains of three or more stores or that operators of less than three 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, The Procter & Gamble Distributing Company, 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, The Procter & Gamble Distributing Company, did become effective on three occasions, following a Count and Recount promotion, there is no evidence that any customer of said 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 allowances 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 a Count and Recount campaign.

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 respondents 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 customers of respondent, The Procter & Gamble Distributing Company, because it is not reasonably possible for those who purchase smaller quantities of said 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 said 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, The Procter & Gamble Distributing Company, 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 customer. In the granting of such allowances said respondent used two forms of contract—both designated Cooperative Merchandising Agreements, one of which is an annual contract and the other is generally referred to as the trip contract. The trip contract is 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 annual contract, respondent, The Procter & Gamble Distributing Company, agreed to pay to the customer an allowance per case ranging from 10¢ to 20¢ a case, depending upon the product, on the condition that the customer render sales promotions and advertising services by conducting a minimum of nine feature sales annually on each product, to be spaced as evenly as possible throughout the year, with no more than four features on any brand (3 features on Lava and Kirk's Coca HWC) which shall be counted toward contract performance in any one of the successive four-month periods of the contract. As a part of the feature sales the customer was required to place newspaper advertising in the main body of his advertisements in the newspapers used in his regular consumer advertising, and that each sale be supported by the usual other auxiliaries of special sales promotion. 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, in lieu of newspaper advertising, handbills, radio or television. In this event, the customer was paid 9¢ per case on all products.

In the trip contract, which was offered by salesmen to customers at the time the order was taken, respondent, The Procter & Gamble Distributing Company, 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 of the brands purchased. The trip contract provided for an option in that if the customer advertised any of the products purchased in newspapers, handbills or by radio or direct mail, he received the allowance of 9¢ per case purchased.

The annual contract required that advertising space used in newspapers should be equal to that which the customer ordinarily used in major feature sales, but in no case less than one column inch, 14 agate lines, per brand with right of customer to use any size space he might elect, provided the total space devoted to advertising any brand during the period of the contract equaled at least the total minimum number of column inches required for full contract performance.

The existence and availability of said contracts and payments were made known by respondent, The Procter & Gamble Distributing Company, to all of its customers and said respondent offered said contracts and the opportunity to receive said payments to all of its customers. Said 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 called for. All direct customers of respondent were offered the choice of executing either the annual contract or the trip contract, 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 said respondent's customers, including small, single-store customers, belonged to cooperative or voluntary associations and where such associations wished to advertise for their members, 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 annual contract were paid to customers by respondent, The Procter & Gamble Distributing Company, 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 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. Said respondent required that handbill advertisements supporting feature sales must be printed and copies furnished to it. 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 attorneys for the respondents, 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 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 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.

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 the use of the annual contract or as a member of an association, cooperative or affiliated group. 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. In addition, respondent pays the allowance only on products advertised under its annual contract. 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 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 newspaper 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, The Procter & Gamble Distributing Company, 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 supplemented complaint in this proceeding be, and the same is hereby, dismissed.

Decision

IN THE MATTER OF
COLGATE-PALMOLIVE-PEET CO.

Docket 5587. 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 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.

Lord, Day & Lord, of New York City, and *Mr. H. Walter Reynolds* and *Mr. B. C. Dunklin*, of Jersey City, N. J. 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.

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