

Decision

IN THE MATTER OF
MOOG INDUSTRIES, INC.ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (A)
OF THE CLAYTON ACT AS AMENDED

Docket 5723. Complaint, Dec. 20, 1949—Decision, Apr. 29, 1955

Order requiring a manufacturer of automotive replacement parts in St. Louis, Mo., to cease discriminating in price between different customers by selling its products of like grade and quality at higher and less favorable prices to numerous small businessmen than to their larger competitors, in violation of sec. 2 (a) of the Clayton Act as amended.

Before *Mr. Earl J. Kolb*, hearing examiner.

Mr. Eldon P. Schrup, *Mr. James E. Corkey* and *Mr. Francis C. Mayer* for the Commission.

Mr. Edwin S. D. Butterfield, of Chicago, Ill., *Halfpenny, Hahn & Cashedy*, of Washington, D. C., and *Rosenblum, Mellitz & Frank*, of St. Louis, Mo., for respondent.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is before the undersigned Hearing Examiner for final consideration on the complaint, answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel.

1. The complaint in this proceeding charges that the respondent Moog Industries, Inc., has discriminated in price between different purchasers of its products in violation of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U. S. C. title 15, section 13).

2. The price differentials which are charged to be in violation of the Clayton Act arise from respondent's pricing practices, involving the granting of an annual retroactive volume rebate to its customers and also in the granting of such retroactive volume rebate to group purchasers on the basis of their aggregate purchases instead of upon the individual purchases of the members.

3. The general system of pricing used by the respondent, as developed by the record, and the variations therefrom in the case of group buyers, is not disputed by the respondent but was instead defended on the basis that the merchandise sold by the respondent to its various customers was not of like grade and quality; that the pricing practices of respondent has not resulted in any injury to

competition; and that respondent's prices, discounts and allowances were made to meet competition. No attempt was made by respondent to justify its price differentials on the basis of differences in cost of manufacture, sale or delivery. Evidence as to primary line injury to competition between respondent and its competitors is not sufficient to warrant any finding, and consideration of this matter must be limited to secondary line injury to competing customers of the respondent.

4. Respondent Moog Industries, Inc., is a Missouri corporation with its principal office and place of business located at 6650 Easton Avenue, St. Louis, Missouri, with selling and distributing subsidiaries known as the St. Louis Spring Suspension Service Company of Texas, Moog Industries, Inc., of Tennessee, Moog Industries, Inc., of Colorado, and St. Louis Spring Suspension Service Company of Nebraska.

5. Since June 1936, the respondent has been engaged in the manufacture and in the sale and distribution in interstate commerce of automotive replacement parts, consisting of coil action parts, leaf springs, coil springs, chassis parts, piston rings and other related items in competition with other concerns who were also engaged in the sale and distribution of similar products in interstate commerce.

6. The market in automotive replacement parts is highly competitive. The amount of business transacted by the respondent in the replacement parts field is substantial. In an advertising circular distributed by respondent to its customers in 1949, it was stated "The company with a small beginning back in 1919, has become one of the country's large industries and recently consolidated its manufacturing divisions: St. Louis Spring Co., Moog Coil Action Parts Co., and Moog Piston Ring Company, into Moog Industries, Inc." The respondent sells its products in every state of the United States and in 1950 maintained 25 branches and warehouses in the principal cities.

7. The respondent, during the times mentioned herein, has sold its replacement parts to jobbers, who were designated by the respondent as distributors, who resold such products to garages, service stations, fleet owners and to other jobbers. The respondent separated its products into three classifications (a) leaf spring line, which consists of leaf springs, coil springs, tie rod ends, shackles and kingbolts; (b) coil action line, which consists of front wheel spring assembly parts exclusive of coil springs; and (c) piston ring line. A portion of the replacement parts in each of these lines was sold in the form of kits or packages containing complete unit installations for various makes of cars. From time to time respondent issued its distributor's price list on each of these lines which listed the basic prices used by the

respondent in the sale and distribution of its various replacement parts. Any discounts, allowances or rebates were off said distributor's price list. Respondent also from time to time issued suggested resale price lists for use by distributors and dealers in the resale of respondent's products. During the year 1949, respondent sold approximately 1,200 coil action accounts, 800 leaf spring and chassis parts accounts, and 400 piston ring accounts. In relation to total sales, the leaf spring line and coil action line have always predominated with the piston ring line accounting for a small proportion of the total overall sales.

8. The net purchase price paid by distributors for respondent's products is the purchase price paid subject to and following all applicable rebates, discounts and allowances. The automotive replacement parts sold and distributed by respondent were all of one grade and quality. Respondent sold such products of like grade and quality to its distributors at varying net prices. Such distributors of respondent were competitively engaged in the resale of respondent's replacement parts in the various territories and places where such distributors carried on their businesses.

9. The annual volume rebates, provided for in respondent's pricing plan, were incorporated in, and made a part of, its distributor franchise agreement. The volume rebate on the coil action line and the piston ring line has been a retroactive volume rebate in substantially the same amount since 1947. Prior to July 1, 1949, respondent allowed a non-retroactive rebate on its leaf spring line, but subsequent thereto had granted a retroactive volume rebate. The retroactive volume rebates as set out in respondent's franchise agreements with its distributors are as follows:

COIL ACTION PARTS

Net purchases during each fiscal year	Retroactive rebate	Net purchases during each fiscal year	Retroactive rebate
	<i>Percent</i>		<i>Percent</i>
Under \$1,000	None	\$15,000-\$17,499	14
\$1,000-\$4,999	5	\$17,500-\$19,999	15
\$5,000-\$7,499	7½	\$20,000-\$22,499	16
\$7,500-\$9,999	9	\$22,500-\$24,999	17
\$10,000-\$12,499	10	\$25,000-\$27,499	18
\$12,500-\$14,999	12	\$27,500 and over	19

PISTON RING LINE

	<i>Percent</i>		<i>Percent</i>
Under \$2,000	None	\$9,000-\$9,999	13
\$2,000-\$2,999	2	\$10,000-\$11,999	14
\$3,000-\$3,999	5	\$12,000-\$14,999	15
\$4,000-\$4,999	7	\$15,000-\$17,999	16
\$5,000-\$5,999	9	\$18,000-\$20,999	17
\$6,000-\$6,999	10	\$21,000-\$24,999	18
\$7,000-\$7,999	11	\$25,000-\$29,999	19
\$8,000-\$8,999	12	\$30,000 and over	20

Decision

51 F. T. C.

LEAF SPRING LINE, INCLUDING COIL SPRINGS AND CHASSIS PARTS

	Percent		Percent
Under \$1,000.....	None	\$11,000-\$14,999.....	11
\$1,000-\$2,999.....	5	\$15,000-\$19,999.....	12
\$3,000-\$4,999.....	7	\$20,000-\$27,499.....	13
\$5,000-\$7,999.....	9	\$27,500-\$34,999.....	14
\$8,000-\$10,999.....	10	\$35,000 and over.....	15

In addition to the above volume rebate, the respondent allowed a 10 percent warehousing and redistributing commission to distributors who resold respondent's products to other jobbers who had been approved by the respondent, provided the combined earnings of the warehousing and redistributing commission and the volume rebate on any line cannot exceed the earnings figured at the maximum rebate for that line. The retroactive volume rebate was paid by respondent on all purchases of the distributor including merchandise resold by the distributor to other jobbers.

10. Under the retroactive rebate plan, purchasers were granted and received rebates on all their individual purchases according to the rebate bracket applicable to their total annual purchases. Any individual purchase price was retroactively determined by the total of all purchases during the year according to the terms of the retroactive rebate plan.

11. The amounts involved in the granting by respondent of the volume rebates were substantial and reflect the importance which was attached to said rebates by the various purchasers. Rebates were granted by respondent and received by some, but not all, the purchasers of the coil action line for the following years in the following amounts:

1947.....	\$163,392.66
1948.....	203,478.53
1949.....	106,255.91

Rebates were also granted by respondent and received by some, but not all, the purchasers of the piston ring line for the following years in the following amounts:

1947.....	\$57,561.89
1948.....	21,011.19
1949.....	22,380.88

Rebates were likewise granted by respondent and received by some, but not all, purchasers on purchases of the leaf spring line in the year 1950 in the amount of \$81,300.

12. During the year 1949, respondent sold its products to jobber members of various group buying organizations, entering into the Moog distributor's franchise agreement. Sales were made during 1949 to members of the following group buying organizations:

<i>Name</i>	<i>Address</i>
Ark-La-Tex Warehouse Distributors, Inc.....	Marshall, Texas
Associated Parts Company.....	Somerville, Mass.
Automotive Jobbers, Inc.....	Cleveland, Ohio
Automotive Parts Distributors, Inc.....	Athens, Ga.
Automotive Southwest, Inc.....	Dallas, Texas
Cotton States, Inc.....	Greenwood, Miss.
Metropolitan Automotive Wholesalers.....	New York, N. Y.
Mid-South Distributors, Inc.....	Memphis, Tenn.
Mid-West Warehouse Distributors.....	Kansas City, Mo.
Ozburn-Crow & Yantis Co.....	Memphis, Tenn.
Six-States Associates.....	Boston, Mass.
Southern California Jobbers, Inc.....	Los Angeles, Calif.
Southwest Automotive Distributors.....	Los Angeles, Calif.
Southwestern Warehouse Distributors.....	Dallas, Texas
Warehouse Distributors, Inc.....	Chattanooga, Tenn.

13. The purchase procedure in a group buying operation provided for the forwarding of purchase orders by the individual jobber member to the seller directly or through the group office. Merchandise so ordered was shipped by the respondent direct to the individual jobber member with billing for same being directed to the group office. Monthly settlements were made between respondent and the group office for the aggregate purchase orders of all the jobber members so received and each jobber member also settles monthly with the group office for his own individual purchases so made. The annual volume rebate allowed by the respondent was based upon the aggregate purchases of the group members and was paid to the group office, which in turn distributed such volume rebate to the jobber members in proportion to the amount of such jobber's individual purchases. The rebates and discounts, as shown by the tabulations in evidence, were granted and allowed by respondent to each individual member of the said buying groups on the basis of the total purchases of all the members irrespective of whether or not the amount of such individual member's purchases met with the requirements of any particular bracket of respondent's volume rebate schedules set forth in the respondent's distributors' franchise agreement. The group buying organization was in reality a bookkeeping device for the collection of rebates, discounts and allowances received from sellers on purchases made by its jobber members. Such jobber members, in fact, purchase their requirements of respondent's products direct from the respondent and at the same

time receive a more favorable price or higher rebate based upon the combined purchases of all of the members.

14. Illustrative of the monetary benefits derived by the individual jobber member of such group buying organizations, as opposed to those individual purchasers buying without the benefits of such group consolidation of purchases is the following tabulation taken from Commission's Exhibits 21-V and 21-W, dealing with the transactions between respondent and the Mid-South Distributors, Inc.:

Automotive jobber "group-buying" method of purchasing

Manufacturer's published discount schedule to trade		1	2	3	4	5	6
Net purchases	Retro-active rebate	Actual net purchases each member jobber	Manufacturer's schedule discount rate applicable	Manufacturer's schedule discount amount due	Manufacturer's "group" discount rate	Manufacturer's "group" discount amount paid	Actual price difference
	Percent		Percent		Percent		
Under \$1,000.....	None	1. \$1,369.08	5	\$68.45	19	\$260.13	\$191.68
\$1,000-\$4,999.....	5	2. 2,408.24	5	120.41	19	457.57	337.16
\$5,000-\$7,499.....	7½	3. 1,530.00	5	76.50	19	290.70	214.20
\$7,500-\$9,999.....	9	4. 585.96	None	-----	19	111.33	111.33
\$10,000-\$12,499.....	10	5. 2,594.97	5	129.75	19	493.05	363.30
\$12,500-\$14,999.....	12	6. 1,483.65	5	74.18	19	281.89	207.71
\$15,000-\$17,499.....	14	7. 3,728.45	7½	186.42	19	708.41	521.99
\$17,500-\$19,999.....	15	8. 6,656.06	5	609.20	19	1,264.65	655.45
\$20,000-\$22,499.....	16	9. 2,759.69	5	137.98	19	524.34	386.36
\$22,500-\$24,999.....	17	10. 3,440.61	5	172.03	19	653.72	481.69
\$25,000-\$27,499.....	18	11. 1,492.70	None	-----	19	283.61	208.97
\$27,500 and over.....	19	12. 750.92	5	74.64	19	142.67	142.67
		13. 3,610.53	5	180.53	19	686.00	505.47
		14. 1,072.02	5	53.00	19	203.68	150.08
Total.....		33,482.83		1,883.69		6,361.75	4,478.06

15. In following the pricing practices hereinabove described, respondent has discriminated in price by means of rebates allowed by it in the sale of its various automotive products and related items as between respondent's competing distributors and also between respondent's distributors and competing group buying jobbers, and the effect of such discriminations may be to substantially lessen, injure, destroy or prevent competition between customers receiving the benefit of said discriminations and the customers who do not receive the benefit of such discriminations.

16. The respondent did not grant exclusive territory to any of its customers and has had more than one distributor in various trade areas who were, in fact, in competition with each other and also in competition with group buying jobbers, who sold respondent's replacement parts to dealers and other purchasers in their respective trade areas. The price discriminations received by some distributors as compared with others, competing with them in the same trade area, as a result of respondent's pricing plan, is shown by a number of tabula-

931

Decision

tions taken from the respondent's books and records which were received in evidence as Commission's Exhibits 61 through 79-G, inclusive. These tabulations show the prices paid and the rebates received by purchasers located in various trade areas throughout the United States during the years 1947 through 1950. Testimony was taken of distributors of the respondent in four trading areas, as shown on the tabulations—New Orleans, Memphis, Denver, and Dallas. The amounts purchased by the distributors in these areas and the discounts and rebates received by them on both the leaf spring line and the coil action line are as follows:

LEAF SPRING, COIL SPRING AND CHASSIS PARTS LINE

Name of purchaser	Net purchases	Amount	Percentages
New Orleans:			
Greiner Auto Parts Co. ¹	\$3,373.71	\$472.32	14.00
Auto Chassis & Spring Co.....	1,687.68	84.38	5.00
Dealers Truckstell Sales, Inc.....	447.30	22.36	5.00
Memphis:			
Mills-Morris Co. ¹	5,301.09	792.84	14.96
Ozburn-Abston & Co. ¹	14,681.31	2,201.12	14.99
J. B. Cook Auto Machine Co.....	1,260.25	189.04	15.00
Dealers Truckstell Sales, Inc.....	922.54	46.13	5.00
McKee-Moog Spring Co.....	26,230.04	3,409.91	13.00
Dallas:			
Automotive Appliance Co. ¹	216.63	26.00	12.00
Motor Supply Co. of Dallas ¹	1,301.62	156.19	12.00
American Gear & Parts Co. ¹	553.76	74.59	13.47
Terry Automotive Supply ¹	955.42	143.31	15.00
Henderson Auto Parts.....	523.18		
Truett-Worrell Spring & Aligning.....	4,090.16	298.15	7.29

¹ Greiner Auto Parts Co. was a member of Cotton States Inc., a group buying organization; Mills-Morris Co., a member of Mid-South Distributors, Inc.; Ozburn-Abston & Co., a member of Ozburn-Crow & Yantis Co.; Automotive Appliance Co. and Motor Supply Co. of Dallas, members of Ark-La-Tex Warehouse Distributors, Inc.; American Gear & Parts Co., a member of Automotive Southwest, Inc.; and Terry Automotive Supply, a member of Southwestern Warehouse Distributors.

COIL ACTION LINE

Name of purchaser	Net purchase after deducting cash discount and excise tax and other credits	Amount of rebate	Percentage
New Orleans:			Percent
Auto Spring & Brake Serv.....	\$5,765.40	\$432.41	7½
Auto Chassis & Spring Co.....	296.30		
Auto Shock Absorber Sales.....	1,241.69	266.69	5
Greiner Auto Parts Co. ¹	749.88	67.48	9
Memphis:			
J. B. Cook Auto & Machine Co.....	1,643.60	164.36	10
McKee-Moog Spring Co.....	5,497.27	412.30	7½
Ozburn-Abston Co. ¹	9,101.10	1,729.21	19
Mills-Morris Co. ¹	1,546.91	247.51	16
Denver:			
Foster Auto Supply Co.....	56.83	210.83	17
Steckel Auto Supply Co.....	2,646.06	132.30	5
R. K. Sweeney Elec. Co.....	3,548.45	177.42	5
Western Spring Service Co. ¹	900.07		

¹ Greiner Auto Parts Co. was a member of Cotton States Inc., a group buying organization; Ozburn-Abston Co., a member of Ozburn-Crow & Yantis Co.; and Mills-Morris Co., a member of Mid-South Distributors, Inc.

² Computed on "Net Sales" before deducting "Cash Discount" and "Excise Tax."

There is nothing in the record to indicate that the above trading areas are unique or different from other trading areas where respondent sells its products at differing prices. It is therefore concluded that competitive conditions shown to exist in these four areas, with respect to purchase and resale of respondent's products are typical and representative of the other areas in the United States and that respondent's distributors reselling respondent's products in the same trading area are in competition with each other in the resale of such products.

18. The inequities arising from the annual volume rebate plan based solely on total yearly purchases and which completely ignores the size and quantity of individual purchases is illustrated by Commission's Exhibit 69 which is set out as follows:

D. 5723—Moog Industries, Inc.

Summary by discount brackets of number of customers and average annual coil action purchases—1947, 1948, and 1949]

Net purchases	Rebate	1947		1948		1949	
		Number of customers	Average annual purchases	Number of customers	Average annual purchases	Number of customers	Average annual purchases
Under \$1,000.....	Percent None						
\$1,000-\$4,999.....	5	369	\$2,238	426	\$2,143	352	\$1,911
\$5,000-\$7,499.....	7½	38	6,235	59	5,895	27	5,499
\$7,500-\$9,999.....	9	22	8,279	26	7,705	4	8,372
\$10,000-\$12,499.....	10	8	11,031	8	8,770	6	10,660
\$12,500-\$14,999.....	12	5	13,676	10	11,945	4	13,667
\$15,000-\$17,499.....	14	2	16,237	2	13,715	5	9,277
\$17,500-\$19,999.....	15	3	18,966	5	15,138	2	18,735
\$20,000-\$22,499.....	16	1	20,940	0		0	
\$22,500-\$24,999.....	17	1	22,734	1	22,987	1	23,444
\$25,000-\$27,499.....	18	0		0		1	26,887
\$27,500 and over.....	19	7	38,488	11	36,065	5	33,471

This exhibit shows that in 1947, 456 purchasers participated in the rebate plan on coil action line sales; in 1948, 557 purchasers participated; and in 1949, 407 purchasers participated in the rebate plan. In none of the years selected did as many as half of the purchasers from respondent receive a rebate on their purchases, and for the most part, only approximately one-third of the purchasers from respondent were favored with the lower prices resulting from the granting of said rebates.

19. The record, based upon the tabulations in evidence in this proceeding, disclosed substantial differences in the net purchase prices paid by competing purchasers of respondent's products for resale. The substantiality of the amount represented by such price differences with relation to the purchasers' net profit margin is conclusively shown

when compared with the competitive effect of the amount represented by the 2 percent cash discount. Distributors of respondent, who testified in this proceeding, stated that they invariably took advantage of the 2 percent cash discount as being essential in the conduct of their respective businesses and that such discount reduced the cost of acquisition of respondent's products. This 2 percent reduction in cost of acquisition is substantial and may account for a substantial portion of the margin of profit. One jobber of respondent, ranking third or fourth in the Dallas, Texas, trade area, testified that the overall net profit for his company ran less than 4 percent. By the very nature of the business operated by the various jobber customers of respondent their profit was necessarily based upon an accumulation of small margins of profit on many items. Some of the witnesses handled 15 to 75 lines, involving an aggregate of thousands of items. Practically all of respondent's jobber customers extend the same cash discount they receive to their customers, however, on a mark-up of acquisition cost, the discount actually given by such customer to its purchaser on resale will be greater than the 2 percent cash discount.

20. In the course of this proceeding it was the contention of the respondent that no injury to competition existed by reason of respondent's pricing practices because its customers generally followed the suggested resale price lists, issued by the respondent, in the resale to their respective customers. In support of this contention, the respondent introduced testimony of a number of distributors that they had not suffered any injury by reason of differing or higher prices paid by them as compared with prices paid by competitors in their respective trade areas. On cross-examination, these witnesses admitted that their reasons for stating that they had not been competitively injured was due to the fact that their competitors all followed the suggested resale price of the respondent and that there was no price competition in their particular trade areas.

21. The fact that price competition may have been eliminated in some areas because of uniformity of resale price does not eliminate the question of injury to competition. Any saving or advantage in price obtained by one competitor as against another increases his margin of profit, permits additional services to be extended to customers, the use of additional salesmen, the carrying of larger and more varied stocks, and the establishment of branch houses for expansion of the business. While price competition among customers was more or less non-existent, except in isolated instances, in the areas where testimony was taken, the possibility of price competition is ever present where lower prices to certain competing customers exists.

22. The contention by the respondents that no injury to competition can be proven or inferred where the discriminatory discount has not been used to reduce the sale price, is without merit as a defense in this proceeding and has been so held by the United States Supreme Court. In *F. T. C. v. Morton Salt Company*, 334 U. S. 37, the Supreme Court held that where purchasers, buying and competing in the resale of the same merchandise, are charged different prices therefor, the conclusion is inescapable that injury to the competitive efforts of the unfavored purchasers is present. In this connection the Court said, "It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence." In the present case the evidence more than meets this test.

23. It was also contended by the respondent that the replacement parts sold by it to competing customers have not been shown to be of like grade and quality, and as a basis for this contention respondent has taken the position that such parts to be of like grade and quality, under Section 2 (a) of the Clayton Act, must pass the test of interchangeability. This would, in effect, be saying that merchandise to be of like grade and quality must be identical. If Congress had intended to so require it would have said so. We do not have here different grades of merchandise designed to sell at different price levels, such as first quality line and a second or inferior quality line. All of respondent's products are of the same grade and quality.

24. Respondent's distributors purchased respondent's replacement parts, not as individual items, but as part of a line designed to supply the needs of garages and others engaged in the repair of motor vehicles. The respondent has grouped its automotive replacement parts for discount purposes into three separate categories which are referred to as respondent's coil action line, leaf spring line and piston ring line. Each one of these lines carries a separate and different retroactive volume rebate. Respondent has made the selection of the parts to go into the various lines, and the rebates granted to purchasers of such lines apply to each and every item in the line. Having grouped its parts for discount purposes, the respondent cannot logically contend that items within the group are not of like grade and quality, or that distributors in the same trade area, who purchase items within the group for resale, are not competitive.

25. The Robinson-Patman Act is an antitrust statute designed to preserve equal competitive opportunity. Respondent's contention of interchangeability places the existence of like grade and quality solely on functional similarity and thereby ignores the effect upon competitive opportunity. When the respondent sells replacement parts, classified into the three lines described above, to its distributors, who resell in competition with each other in their respective trade areas, the functional similarity of the individual items in each class is no longer of consequence because from a competitive standpoint they are all of like grade and quality. It also appears from the record that distributors in order to supply the needs of their garage customers would purchase substantially all of the items in respondent's various lines over a period of time, their purchases of the items being dependent upon the demands of their customers. It must accordingly be concluded that the discriminations in price herein found were, in fact, made in connection with the sale and distribution of merchandise of like grade and quality and that the defense that such products must pass the test of interchangeability is without merit.

26. The respondent in its answer did not assert a defense of meeting competition under Section 2 (b) of the Clayton Act and did not request a finding on this issue in its proposed findings submitted to the Hearing Examiner. However, the attorney for the respondent did announce on the record that he intended to introduce testimony on the defense of meeting competition. While respondent did consider and compare competitors' prices in preparing its price list, the price differentials and the discriminations in price did not occur from the use of the price list or deviations from such price list to individual customers, but instead arose out of the pricing practice involved in the use of a pricing plan consisting principally of a non-retroactive volume rebate. There is no evidence that the respondent either met the price of a competitor or any rebate or discount schedule used by a competitor. In fact, there was no uniformity in the discount schedules of competitors; some used a retroactive volume rebate; some a non-retroactive volume rebate; some a flat percentage discount; and others an incentive rebate based on turnover of merchandise or maintenance of stock.

27. The activity of the respondent in meeting competition was summed up by respondent's executive vice president who said, in referring to the use by respondent of the discount schedule of the Wausau Motor Parts Co., in determining respondent's pricing policy, "We would examine it. We would try to evaluate the effect of Wausau on our market, how close we would have to come to meeting the competi-

Order

51 F. T. C.

tive offer and how far away we should stay because of certain pitfalls which it may lead us into, and upon examination of this we would use our own good judgment and experience to try and work this thing in with all of the others and come out with a contract and a schedule which we feel would earn us the greatest amount of profit and lose us the smallest number of customers and attract the most." This might be adopting a pricing practice or sales system best suitable for the respondent in a competitive market, irrespective of any discriminating effect, but it does not constitute a showing that lower prices to some favored customers, resulting from the pricing practice, were made in good faith to meet an equally low price of a competitor.

28. Section 2 (b) of the Clayton Act does not mean that a seller can use a sales plan which constantly results in his getting more money for like goods from some customers than he does from other customers competing with them. This was definitely decided by the United States Supreme Court in *F. T. C. v. A. E. Staley*, 374 U. S. 746, 753, in which the Court stated that Section 2 (b) "does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor'." The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition. We think the conclusion is inadmissible, in view of the clear Congressional purpose not to sanction by Section 2 (b) the excuse that the person charged with a violation of the law was merely adopting a similarly unlawful practice of another." It must therefore be concluded that respondent's price discriminations were not made in good faith to meet an equally low price of a competitor and that respondent's attempted defense under Section 2 (b) of the Clayton Act is without merit.

CONCLUSION

The aforesaid discriminations in price by the respondent as herein found constitute violations of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

It is ordered, That the respondent Moog Industries, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale for replacement purposes of automotive replacement parts, consisting of coil action parts, leaf spring, coil spring, chassis parts, piston rings and

other related items in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating in the price of such products of like grade and quality:

By selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale and distribution of respondent's products.

OPINION OF THE COMMISSION

By SECREST, Commissioner:

This case is before us on respondent's appeal from the hearing examiner's initial decision.

Respondent, Moog Industries, Inc., is charged with having discriminated in price between different purchasers of its automotive replacement parts in violation of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act.¹ Hearings were held at which testimony and other evidence in support of and in opposition to the complaint were introduced and the hearing examiner, after considering the entire record, made his initial decision in which he found that respondent's pricing practices have resulted in price discriminations between competing customers and that the effect of the discriminations "may be to substantially lessen, injure, destroy or prevent competition between customers receiving the benefit of said discriminations and the customers who do not receive the benefit of such discriminations." The order in the initial decision prohibits respondent from discriminating in price:

"By selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying a higher price in the resale and distribution of respondent's products."

Respondent, in its appeal, takes exception to specific findings and conclusions in the initial decision as well as to certain procedural matters, including rulings of the hearing examiner. Exception is also taken to the substance and form of the hearing examiner's order to cease and desist. We consider first respondent's contention that as a result of certain alleged procedural errors it has not been accorded a fair and impartial hearing.

During the course of the proceeding respondent made two requests for a bill of particulars, the first before it filed its answer and the second at the conclusion of the taking of evidence in support of the com-

¹ 15 U. S. C., sec. 13.

plaint. The Commission denied respondent's first request and the hearing examiner denied the second. Respondent claims that by such denials prejudicial error was committed. In its order denying respondent's original request for a bill of particulars, the Commission expressed the view that the complaint was sufficient to advise respondent of the nature of the charges against it. We are still of that view.

We are also of the view that the hearing examiner's refusal to grant respondent's motion for a bill of particulars was not prejudicial. The function of a bill of particulars is to enable the moving party to prepare for responsive pleadings and then only to the extent that it is required for that purpose; the office of the bill is related to pleading, not to trial. During the presentation of the case in support of the complaint respondent became fully informed as to the scope and details of the charges against it. Continuances are freely granted in Commission proceedings and respondent had full opportunity to study the record before proceeding. There was no possibility of "surprise" to the respondent or inopportunity properly to prepare its case.

During the course of the hearings respondent moved the hearing examiner to issue a rule requiring counsel supporting the complaint to make certain elections from the evidence which would be relied upon to constitute the case against the respondent. As grounds for the motion respondent stated, in substance, that by virtue of the undue proliferation of evidence which had been offered and received over respondent's objection, including voluminous tabulations with respect to sales by respondent to customers in many different communities during many months and years, involving hundreds of different automotive parts and thousands of invoices, there had been placed upon the respondent the almost insurmountable burden of analyses and proof, requiring the breakdown of thousands of invoices and cost allocations, requiring thousands of man hours of time and extensive, exorbitant and needless work, and causing respondent to be faced with the situation wherein it was impossible for it to receive a fair and impartial hearing. The hearing examiner denied respondent's motion and the Commission refused to entertain respondent's appeal from that ruling.

Respondent's motion was made at a hearing held on June 23, 1953. Counsel supporting the complaint rested their case on June 2, 1952. In the interval between those dates, at hearings held in St. Louis, Denver, Dallas, New Orleans, Memphis and New York, respondent introduced considerable evidence in opposition to the complaint. There is no indication that respondent did not know the issues it must meet during the presentation of this evidence. The evidence introduced in support of the complaint was that which counsel supporting

the complaint believed necessary to establish respondent's practice of price discrimination. It does not appear that respondent has advanced any defense to this proceeding which would require it to analyze or break down each of the numerous transactions represented in the tabulations. We think the motion was properly denied by the hearing examiner and are accordingly rejecting respondent's contention that prejudicial procedural errors were committed which prevented it from having a fair and impartial hearing.

Respondent does a substantial business in the manufacture and sale of automotive replacement parts consisting of coil action parts, leaf springs, coil springs, chassis parts, piston rings and related items. Respondent has classified the products itself into three lines, namely, leaf springs line, including coil springs and chassis parts, coil action line and piston ring line. Respondent sells its products in every State of the United States and in 1950 maintained 25 branches and warehouses in the principal cities. In 1949 respondent sold its products to approximately 1,200 coil action accounts, 800 leaf spring accounts, and 400 piston ring accounts.

During the period covered by this proceeding respondent sold its products to customers designated by respondent as distributors at the prices appearing in respondent's distributor net price sheets, less specified discounts, allowances and rebates. Respondent's customers resold these products to garages, service stations, fleet owners and other jobbers. Respondent from time to time issued suggested resale price lists for use by distributors and dealers in the resale of respondent's products. Respondent's base price was the same to all customers. The price differences with which we are concerned arose from the practice of granting discounts or paying rebates to customers, the amount being determined by each customer's total annual net purchases or, in the case of purchasers who purchased through a group buying organization, by the aggregate annual net purchases by all members of a particular group.

The annual volume rebates available to customers were incorporated in and made a part of the franchise agreement which respondent entered into with its distributors and group buying organizations. A different volume rebate schedule was applicable to each of the three lines. For example, on the coil action line the amount of the retroactive volume rebate ranged from 5% on annual net purchases of \$1,000 to 19% on annual net purchases of \$27,500 or more. On the piston ring line the range was from 2% on annual net purchases of \$2,000 to 20% on annual net purchases of \$30,000 or more. On the leaf spring line the retroactive volume rebate schedule adopted as of July 1, 1949,

provided for rebates ranging from 5% on annual net purchases of \$1,000 to 15% on annual net purchases of \$35,000 or more. In addition to the volume rebate, respondent allowed a 10% warehousing and redistributing commission to distributors who resold respondent's products to jobbers who had been approved by respondent, provided the combined earnings of the warehousing and redistributing commission and the volume rebate on any line could not exceed the earnings figured at the maximum volume rebate for that line.

In 1949, respondent had franchise agreements with 15 group buying organizations. The jobber members of these groups forwarded their orders for respondent's merchandise either directly to respondent or through the group office. The merchandise was shipped by respondent direct to the jobber members but the billing for same was to the group office. The annual volume rebate, which was computed on the basis of the aggregate of the purchases by all members of a group, was paid to the group office, which in turn made distribution to the jobber members on the basis of each member's purchases. In other words, under this arrangement members of the group buying organizations were granted discounts or paid rebates based on the total purchases by all members of the group rather than on the total purchases of the individual member, with the result that many such purchasers received a more favorable price or higher rebate than other competing purchasers who did not purchase through group buying organizations.

Substantial differences in the net purchase prices paid by competing purchasers have resulted from the above-described pricing practices. The record contains a number of tabulations prepared from respondent's accounts and records showing details of respondent's sales of two of its three lines to customers in a number of different trading areas. These tabulations reflect differences in net buying prices between customers in the same trading area of varying amounts and percentages, with some differences amounting to as much as 19%. For example, respondent, in 1950, sold its leaf springs line to six customers in Dallas, Texas, all of whom were in competition with each other in the resale of respondent's products. Four of these purchasers purchased through group buying organizations at net prices ranging from 12% to 15% off list price. One customer received no discount or rebate on its purchases and the largest purchaser received a rebate of 7.29% on its total net purchases.

The inequities of respondent's annual volume rebate plan are further demonstrated by the fact that in 1949, for instance, of the approximately 1,200 purchasers of respondent's coil action line, there were only 407 purchasers who received a rebate on their purchases, and

931

Opinion

that 352 of these 407 received a rebate of only 5%, all as illustrated by the following tabulation:

Net purchases	Rebate	Number of customers	Average annual purchases
	Percent		
Under \$1,000.....	None		
\$1,000-\$4,999.....	5	352	\$1,911
\$5,000-\$7,499.....	7½	27	5,499
\$7,500-\$9,999.....	9	4	8,372
\$10,000-\$12,499.....	10	6	10,660
\$12,500-\$14,999.....	12	4	13,667
\$15,000-\$17,499.....	14	5	9,277
\$17,500-\$19,999.....	15	2	18,735
\$20,000-\$22,499.....	16	0	
\$22,500-\$24,999.....	17	1	23,444
\$25,000-\$27,499.....	18	1	26,887
\$27,500 and over.....	19	5	33,471

The substantiality of respondent's price differences and the probability of injury to competition can best be shown by comparing it with the competitive effect of the amount represented by respondent's standard 2% discount for cash given to all customers. Distributors of respondent testified that they invariably took advantage of this 2% cash discount and that this discount was essential to the conduct of their respective businesses. Testimony in the record also indicates that the market in which these distributors compete is highly competitive with many dealers handling from 15 to 75 different lines of automotive products consisting of thousands of items, many of which sell for only a few cents. The dealers' financial life depends on the aggregate of small margins of profits made on a number of individual automotive items. One jobber in Dallas, Texas, ranking third or fourth in that area, testified that his overall net profit on automotive items ran less than 4%. With overall net profit so low discounts to favored customers, ranging up to 19%, could well mean the difference between commercial life and death if these discounts were extended to a sufficient number of items purchased by a distributor. Nor is it controlling that the items herein considered may constitute only a very small part of the dealers' total sales. As the Supreme Court said in the *Morton Salt* case:²

"There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect the merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery stock consists of many comparatively small articles, there is no possible way to effectively protect a

² *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37 (1948).

grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store."

Respondent contends that the evidence in the record does not support the hearing examiner's finding that "the effect of such discriminations may be to substantially lessen, injure, destroy or prevent competition between customers receiving the benefit of said discriminations and customers who do not receive the benefit of such discriminations." This contention appears to be based largely on the fact that respondent's customers testified generally that they had not been injured by reason of the higher prices paid by them as compared with prices paid by their competitors in the same trading area. On cross examination, however, these same witnesses admitted that their reasons for so testifying was due to the fact that both they and their competitors followed the suggested resale prices of the respondent and that there was no price competition in their particular trade areas. The adherence by respondent's customers to its suggested resale prices does not eliminate the question of injury to competition. As the Supreme Court said in the *Corn Products* case:³

"But it is asserted that there is no evidence that the allowances ever were reflected in the purchasers' resale prices. This argument loses sight of the statutory command. As we have said, the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect. We think that it was permissible for the Commission to infer that these discriminatory allowances were a substantial threat to competition."

The hearing examiner in his initial decision found that:

"Any saving or advantage in price obtained by one competitor as against another increases his margin of profit, permits additional services to be extended to customers, the use of additional salesmen, the carrying of larger and more varied stocks, and the establishment of branch houses for expansion of the business. While price competition among customers was more or less non-existent, except in isolated instances, in the areas where testimony was taken, the possibility of price competition is ever present where lower prices to certain competing customers exist."⁴

In support of the hearing examiner's finding of the requisite statutory injury, there is in the record reliable respectable probative evidence in the form of testimony that respondent's 2% discounts for

³ *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726, 742 (1945).

⁴ Cf. Initial Decision of the Hearing Examiner, Docket 5771, In the Matter of Namsco, Inc., adopted by the Commission March 17, 1953.

cash were invariably taken by respondent's customers and that these customers considered this discount essential to the conduct of their business. Additionally, some witnesses testified that in order to expand their business, it would be necessary to hire additional salesmen, handle more lines, and provide additional services to customers which could only be effected through increased profits. We believe that the hearing examiner was justified in concluding that respondent's annual volume rebate plan resulted in price discriminations violative of the Robinson-Patman Act.

Respondent further contends that the evidence does not establish that it has discriminated in price between any specifically named purchaser of the same type of automotive products or supplies of like grade and quality who were competitively engaged in the resale thereof during the same period of time and in the same market area. Respondent's customers do not purchase respondent's products as individual items. They purchase them as part of a line designed to supply the needs of garages and others to whom the products are resold. The rebates were not granted on the basis of the individual items purchased but on the basis of the total dollar purchases of a particular line. The price differentials involved did not arise from any difference in the grade or quality of the products sold to different customers. Instead, they arose from varying rebates on an entire line. The very nature of the businesses carried on by respondent's customers required that they carry substantially all of the items in a particular line, and many purchasers of the same line of respondent's products were in competition with each other in the resale of such products to garages, service stations, and others. We think the hearing examiner properly found that the discriminations in price were made in connection with the sale and distribution of merchandise of like grade and quality.

We now consider respondent's objection to the order to cease and desist in the initial decision. Respondent contends that the order is too broad in its scope and exceeds the authority of the Commission by including the officers, representatives, agents and employees of the respondent and by covering "piston rings" and "other related items". Respondent additionally contends that the order is faulty in that it is not limited to prohibiting price discriminations which injure secondary line competition; that it is not limited to prohibiting price discriminations in the sale of specific types of automotive replacement parts, and that it contains no guiding yardstick by means of which respondent can determine the lawfulness or unlawfulness of its pricing practices.

In support of its argument that the order should not run against its officers, representatives and employees, respondent cites the decision of the United States Court of Appeals for the Seventh Circuit in the *Reynolds Tobacco* case⁵ which involved an order issued pursuant to the Federal Trade Commission Act. The Seventh Circuit Court in its more recent decision in the *Anchor Serum* case⁶ held, however, that the order in a Clayton Act case was properly directed against the "officers, representatives and employees" of the corporate respondent and this same holding appears appropriate here.

The further argument that the order should not include "piston rings" and "other related items" appears to be without merit. The record shows that respondent sells piston rings to the same type of purchasers, that is, automotive jobbers, as it sells its other products, and that similar pricing practices were employed. The Commission's power is not limited to prohibiting the identical practices which have resulted in illegal price discriminations. It has the authority and duty to also prohibit acts of the same type or class as those which have been committed in the past.⁷

The Supreme Court in the *Ruberoid* case⁸ considered arguments with respect to the breadth of Commission orders to cease and desist in a Section 2 (a) proceeding similar to those here presented by respondent. The Court observed that:

"Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity."

In rejecting respondent's contention that the order to cease and desist in the initial decision is too broad in scope, it is pointed out that under the decision in the *Ruberoid* case the fact that the order does not spell out in detail every phase of the statute does not in any way prejudice the respondent. Implicit in every Commission order are all the statutory defenses by means of which respondent can determine the lawfulness or unlawfulness of its practices just as if the order

⁵ *Reynolds Tobacco Co. v. F. T. C.*, 192 F. 2d 535 (1951).

⁶ *Anchor Serum Co. v. F. T. C.*, 217 F. 2d 867 (1954).

⁷ *Hershey Chocolate Co. v. F. T. C.*, 121 F. 2d 968 (1941).

⁸ *F. T. C. v. Ruberoid Company*, 343 U. S. 470 (1952).

had set them out *in extenso*. We believe that the order, as drafted, is proper and that the statute and the courts have provided respondent with a proper yardstick for determining, under the order, the lawfulness or unlawfulness of its future practices.

Finally, we consider respondent's contention that:

"Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, as construed and applied in this proceeding offends the constitutional standards of definiteness and reasonableness of due process of law under the Fifth Amendment to the Constitution of the United States."

Respondent argues under this contention that Section 2 (a) of the amended Clayton Act "is admittedly a vague, indefinite ambiguous statute", and that it is well settled that "a statute may be so vague as to violate the due process clause of the Fifth Amendment to the Constitution of the United States". If, as we construe it, respondent's contention in this regard can be interpreted as raising the issue of the constitutionality of Section 2 (a) of the amended Clayton Act, the obvious answer is that it is not within the province of this Commission to pass upon the constitutionality of the statutes it is charged with administering.

" * * * an administrative agency, invested with discretion, has no jurisdiction to entertain constitutional questions where no provision has been made therefor."⁹

We believe that the initial decision of the hearing examiner is adequate and appropriate to dispose of this proceeding, and respondent's appeal therefrom is accordingly denied.

Commissioner Mason dissents.

Chairman HOWREY, concurring:

The record contains direct and substantial evidence showing probability of injury to competition in the secondary line, namely, in the distribution of automotive parts through jobbers and dealers. For this reason I concur in the majority opinion.

DISSENTING OPINION

By MASON, Commissioner:

This is a Section 2 (a) Clayton Act case. Three elements must be found present to legitimize a cease and desist order here. They are:

1. Interstate commerce;
2. Disparate discounts or rebates to competing customers (these

⁹ *Engineers Public Service Co. v. Securities & Exchange Commission*, 138 F. 2d 936, April 29, 1955.

two we need not consider because in the instant case both sides concede their existence) ; and

3. The disparate discounts must have at least one of the following effects:

- a. May substantially lessen competition ;
- b. Tend to create a monopoly ;
- c. Injure, destroy or prevent competition.

As long as the billion dollar auto parts makers are around, we need not fear defendant Moog will destroy General Motors, Ford, Chrysler, et al., nor is this independent auto parts maker apt to create monopoly or substantially lessen, destroy or prevent competition with these or any of the other big companies in the primary line of commerce.

This leaves but one question for us to answer. Has there been injury in the secondary line of commerce; that is, injury to those customers of Moog who got smaller quantity discounts than others?

The Supreme Court has always held that an inference of injury can be drawn from the substantial difference in discounts alone, without any direct testimony of injury. For as the late Mr. Justice Jackson once opined:

"The law of this case, in a nutshell, is that no quantity discount is valid if the Commission chooses to say it is not."¹⁰

Relying on this carte blanche authority granted us,¹¹ the prosecutor based his case on the disparate discounts admitted by both sides.

At this stage in the case if the Commission chose to infer (and it did) that the discounts injured some of Moog's customers, it could do so, and well enough. The prosecution's contention that injury to competition existed was based upon inferences drawn from the fact that there were differences in discounts and rebates.

This is as far as the prosecution had to go, though, of course, the direct and most sensible way to ascertain the real truth regarding injury would be to call those who were supposed to be injured; that is, Moog's customers who received the smaller quantity discounts.

These, the prosecution by-passed.

However, before the trial was over, the defendant himself subpoenaed the missing witnesses.

This meant traveling all over the country—Dallas, Denver, New Orleans, Memphis and New York City. Of course, defendant could have avoided these long journeys if it had been willing to admit for the sake of the record that it had injured its customers, but it refused

¹⁰ *F. T. C. v. Morton Salt Co.*, 334 U. S. 37, at page 58.

¹¹ "The Commission is authorized by the Act to bar discriminatory prices upon the 'reasonable possibility' that different prices for like goods to competing purchasers may have the defined effect on competition." *F. T. C. v. Morton Salt Co.*, 334 U. S. at page 47.

to do so. In the ensuing safari, every witness called positively denied he suffered any competitive injury from the challenged discounts or rebates¹²—a position they all stoutly maintained in spite of the badgering the prosecutor gave them for ruining the Government's case.

In this day and age of phony informers, it is heartening to behold American businessmen reject Government's cozening of witnesses to get them to say they were injured, when in fact they weren't. The Government's position is faintly reminiscent of the personal injury lawyer whose advice at the scene of an accident was to "lie down and groan until the claim agent arrives."

Only in the instant case the so-called "injured competitors" refused to lie down or groan.

To top all of this, the Government was finally forced to concede that if all other jobber witnesses who received the lesser discounts were to be summoned to the stand, they, too, would deny they had been injured.¹³

If there had been no direct evidence on the question of injury, inferences could fill in the empty spaces. But the spaces had best be empty of direct facts before an inference is invited in.

With many hundreds of witnesses¹⁴ admittedly ready to back up the testimony of a dozen or more who had already denied the injury, and with not a soul willing to impeach their assertions of no injury, we find an entirely different aspect put upon the case.

Justice requires that we give precedence to direct evidence over inferences.

For inferences and facts are two different things. Their standing might be compared to mistresses and wives.

Inferences are compliant things, swaying to the whim of those who draw them. While facts, like wives, can be harsh, unbending, and often block the selfish aims of those who must live with them; they do nevertheless carry a badge of legitimacy that no unsupported inference has ever been able to achieve.

To prevent predilections guiding our judgments rather than cold facts, reviewing courts frown on us if our orders are based on inferences when direct testimony to the contrary bars the way. For as Mr. Justice Stephens says in *United States v. U. S. Gypsum*:

"A fact may not be inferred from a proven fact or facts where unimpeached and uncontradicted testimony consistent with such proven

¹² See digest of testimony in appendix.

¹³ R. p. 943.

¹⁴ The number of defendant's accounts is not set out with exactitude, but the Hearing Examiner's report indicates they run into the thousands.

fact or facts but inconsistent with the fact sought to be inferred, is in the record."¹⁵

Like a belligerent wife crashing in on an assignation with a hussy, the direct testimony of the alleged injured customers that they in fact were not injured, broke up the inference of injury so necessary to the Government's case.

In spite of this, my learned majority of the Commission has
Divorced Cold Solid Reason from its bed
And taken Inferences Instead.¹⁶

On such a pretense Government has snatched itself a victory, but at what a cost.

In my opinion, the effectiveness of cease and desist orders rests on the respect their paternity commands.

An order born from the legitimate union of direct facts naturally ranks highest. In the absence of direct factual testimony, findings on inferences may support an order, but it will be countenanced with about the same degree of condescension a common law wife receives in polite society.

But not even this low degree of acceptance will be accorded the order in the instant case, for in the face of direct testimony controverting the inferences of guilt, the Commission has drawn an order which commands neither the respect of the public nor, in my opinion, will it receive the approval of reviewing courts.

We are judged by the level at which we solve our problems.

To take inferences that serve our ends and reject facts presents an inaccurate and unhappy picture of what should be our most sacred institution—the judiciary.

The Commission has won a cease and desist order.

But I doubt if the ends are worth the means.

For myself—

I am against it.

APPENDIX

(Digest of testimony, R. pages 617-899)

Q. Have the pricing practices of Moog in the leaf spring line or in this coil action sales line, have either or both of them injured you competitively necessarily?

A. No.

* * * * *

Q. I will ask you whether you know whether or not the fact that an allowance of 15 percent was made to the Terry Automotive Supply Company injured your company, American Gear and Parts Company, competitively in the distribution

¹⁵ 67 F. Supp. 397 (1946) at page 450.

¹⁶ With apologies to Omar Khayyam.

931

Appendix

of Moog Industries' leaf springs, coil springs, and chassis parts during the period indicated?

A. No, sir.

Q. Do you know whether it did?

A. No, sir. Frankly, I didn't know Terry Automotive had Moog up until three or four months ago.

Q. Well, were you injured competitively by it?

A. No, sir.

Q. By virtue of the spread you were not?

A. No, sir.

* * * * *

Q. And I will ask you if you know whether or not you were injured competitively during that period of time by virtue of the fact of this differential spread on allowances off distributor's net prices in the purchase of Moog leaf springs, coil springs and chassis parts resold by you to your customers?

A. Yes.

Q. You were so injured?

A. No.

Q. I ask you if you know whether or not for that period of time the Motor Supply Company of Dallas suffered any competitive injury by virtue of this differential in allowances off of distributor's net prices in purchases of leaf springs, coil springs and chassis parts from Moog Industries, which they purchased from Moog and resold to its customers? Do you know whether or not you were injured?

A. I do.

Q. Were you so injured?

A. No.

* * * * *

Q. And I will ask you would you know whether or not by virtue of the spread and differential in allowances off of distributor's net prices the Henderson Auto Parts Company was competitively injured in the purchase of leaf springs, coil springs and chassis parts from Moog Industries, Inc., in the sale of such products to its customers?

A. Yes.

Q. Was it so injured?

A. I do not think so.

* * * * *

Q. Do you know whether by virtue of this difference in percentages in payment for coil action parts from Moog Industries by your company and the other companies shown there, do you know whether or not you were injured competitively?

A. Yes, I know.

Q. Were you injured competitively?

A. No, I was not injured competitively, in my opinion.

* * * * *

Q. Now do you know whether for that period of time so shown on that exhibit Auto Chassis and Spring Company was injured competitively in the purchase and sale of Moog coil action parts in New Orleans, by virtue of that differential from the distributor's net prices or difference in allowances?

A. No, it was not.

Q. It was not?

A. It was not hurt.

* * * * *

Q. Do you know whether you suffered an injury or not?

A. No, I didn't suffer.

COUNSEL FOR PROSECUTION. Just a minute. We aren't so interested in getting your answer you are making as we are to find out whether or not you have the knowledge, yes or no, whether you know, and at that time I would like to make my objection.

The WITNESS. You want to know what, now? What is your question?

COUNSEL FOR PROSECUTION. I think Mr. Butterfield has a question pending.

TRIAL EXAMINER. Mr. Witness, the question is directed to your knowledge as to whether or not you know, not whether or not you did or did not, but whether or not you know whether you did or not. That calls for a yes or no answer.

The WITNESS. Whether I know I was injured, that is the question he asked me, was I injured.

TRIAL EXAMINER. Do you know whether or not you were injured? You know or you don't know. He will ask you a further question on that.

The WITNESS. My answer still was no.

COUNSEL FOR PROSECUTION. I think the witness misunderstands the question.

The WITNESS. You asked me if I was injured.

COUNSEL FOR DEFENDANT. I ask if you know whether or not you were injured.

The WITNESS. Do I know whether or not I was injured?

Q. Yes.

A. The answer is I don't think I was injured. I don't see how I could be injured. I would say, whether I know whether I was injured or not?

Q. Yes, do you know?

A. I don't know as far as either way. I am not injured in any way. I mean, the question was asked, am I injured. We have, all the fellows are competitors.

Q. Who in your organization would know better than you whether you were injured or not?

A. Whether I was injured, in what way are you asking? Your question is whether or not I was injured?

Q. That is right.

A. No, I am not injured.

COUNSEL FOR PROSECUTION. I still move that answer be stricken and we have a yes or no answer to the question.

TRIAL EXAMINER. We will let the answer stand.

COUNSEL FOR DEFENDANT. You may cross examine.

TRIAL EXAMINER. It is too complicated to get straightened out.

* * * * *

TRIAL EXAMINER. The question is whether or not you know; not whether or not you were injured, but whether or not you know whether or not you were injured.

WITNESS. Yes, I would know.

COUNSEL FOR DEFENDANT. Were you so injured? What was the company, how was the company injured by virtue of the differentials?

WITNESS. We were not to my knowledge.

* * * * *

Q. I ask you to study this exhibit showing these sales and rebates, and I ask you if, by virtue of any of the differentials shown in rebates or commissions or differences on this sheet, whether you know if American Motor Specialties was

931

Order

injured competitively in its resale of the coil action parts of Moog Industries, Inc. for the years indicated?

A. No. The same as it was in the other case.

Q. And by "no" you mean that you were not injured competitively by reason of the differentials shown on this sheet.

* * * * *

Q. Do you know whether you were competitively injured?

A. No, I don't believe I have been.

Q. By that you mean that you have not been competitively injured?

A. No.

* * * * *

COUNSEL FOR DEFENDANT. I will ask you to examine this chart and tell me whether or not you know whether Sapiro Auto Parts Company was or was not competitively injured by virtue of the differentials in rebates shown on that chart?

COUNSEL FOR PROSECUTION. We have the same objection we have had heretofore.

TRIAL EXAMINER. Objection overruled.

WITNESS. As far as I can say, we in Sapiro Auto Parts Company more or less mind our own business, and we are not interested in what Clinton Square Auto Parts gets, or what they do, because there seems to be enough business in the territory for all of us, and we all get our share of the business, and we all make our profit.

COUNSEL FOR DEFENDANT. Do you know whether or not you were injured competitively by virtue of these differentials?

WITNESS. Not as far as I know, no.

Q. By "not as far as you know," you mean that you were not injured competitively?

A. That is right.

* * * * *

FINAL ORDER

Respondent Moog Industries, Inc., having filed on July 13, 1954, its appeal from the initial decision of the hearing examiner in this proceeding; and the matter having been heard by the Commission on briefs and oral argument; and the Commission having rendered its decision denying the appeal and affirming the initial decision:

It is ordered, That respondent Moog Industries, Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order contained in said initial decision.

Commissioner Mason dissenting.

IN THE MATTER OF
WHITAKER CABLE CORPORATION

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (a)
OF THE CLAYTON ACT AS AMENDED

Docket 5722. Complaint, Dec. 20, 1949—Decision, Apr. 29, 1955

Order requiring a manufacturer of automotive replacement cable products and related items in North Kansas City, Mo., to cease discriminating in price between different customers by selling its products of like grade and quality at higher and less favorable prices to numerous small businessmen than to their larger competitors, in violation of sec. 2 (a) of the Clayton Act as amended.

Before *Mr. Earl J. Kolb*, hearing examiner.

Mr. Eldon P. Schrup, *Mr. James E. Corkey* and *Mr. Francis C. Mayer* for the Commission.

Mr. Edwin S. D. Butterfield, of Chicago, Ill., for respondent.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

Pursuant to the provisions of the Clayton Act and the Federal Trade Commission Act, the Federal Trade Commission on December 20, 1949, issued and subsequently served its complaint in this proceeding upon the respondent Whitaker Cable Corporation, a corporation, charging it with the violation of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. After the filing of answer to the complaint, hearings were held at which testimony and other evidence in support of, and in opposition to, the allegations of the complaint were introduced before the above-named Hearing Examiner, theretofore duly designated by the Commission, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final consideration by said Hearing Examiner on the complaint, answer thereto, testimony and other evidence and proposed findings as to the facts and conclusions presented by counsel and said Hearing Examiner having duly considered the record herein makes the following findings as to the facts, conclusions drawn therefrom, and order: