

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:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Whitaker Cable Corporation is a Delaware corporation with its principal office and place of business located at 13th and Burlington Streets, North Kansas City, Missouri, and factory branches at St. Joseph, Missouri, Philadelphia, Pennsylvania, and Los Angeles, California. Said respondent was originally incorporated in 1928 as the Whitaker Battery Supply Co., which corporate name was changed in 1944 to Whitaker Cable Corporation.

PAR. 2. Since its incorporation in 1928, respondent has been engaged in the manufacture and in the sale and distribution in interstate commerce of automotive replacement parts, consisting of automotive cable products and related items, in competition with other concerns who were engaged in the sale and distribution of similar products in interstate commerce. The amount of business transacted by the respondent in the after market replacement field is substantial. The market in automotive replacement parts is a highly competitive one both between respondent and its competitors and between respondent's customers. It was testified by the President of respondent that the total after market replacement volume for automotive parts was around 3 billion dollars. He further testified that respondent sells less than 1 percent of products competitive with its own in the automotive replacement field and sells 8½ percent of the 14,000 jobbers in the United States who sell automotive replacement parts. No relationship between the 3 billion dollars total and products competitive with those sold by respondent was shown. This witness further testified that after 33 years the respondent had a very substantial business in replacements throughout the automotive field and was recognized as one of the leaders in the after market replacement field because of its effective ethics and manner of doing business. In 1949 the respondent published a brochure describing the development of the company over the 25 years of its existence, which was circulated to the trade, stockholders and suppliers. In said brochure it was stated that in 1920 the company "established the first line of after market automotive replacement cables on the American market" and that "during the succeeding years Whitaker Battery Supply Company continued to maintain its position as the largest manufacturer in the world of automobile battery cables and terminals for after market replacement" and by the addition of bulk cable, ignition terminals and wiring assemblies in 1929 became "the most complete line of its kind on the market." (CX 23)

PAR. 3. From time to time the respondent issued its Jobber Price List which listed the basic prices used by respondent in the sale and

Findings

51 F. T. C.

distribution of its products in the automotive after market replacement field. Any discounts, allowances or rebates were off said Jobber Price Lists. Respondent also from time to time issued suggested resale price lists for use by jobbers and dealers in the resale of respondent's products.

PAR. 4. In the course and conduct of its business, the respondent sold its replacement parts, all of which were of like grade and quality, at varying prices to purchasers for resale to dealers and other purchasers. Such customers of the respondent were competitively engaged in the resale of respondent's replacement parts in the various territories and places where customers carried on their business. These customers of the respondent have been variously classified as follows:

1. *Whitaker Warehouse Jobbers*.—Customers so classified operated under the Whitaker Warehouse Jobber Contract and purchased respondent's products on the current Whitaker Jobber Price List subject to annual volume rebates payable by respondent to such customers as follows:

REBATE SCHEDULE—

On net purchases of:

\$ 600.00 or less.....	No Sales Rebate
\$ 600.00-\$1000.00.....	5% Sales Rebate
\$1000.00-\$1500.00.....	7½% Sales Rebate
\$1500.00-\$2000.00.....	10% Sales Rebate
\$2000.00-\$3000.00.....	12½% Sales Rebate
\$3000.00 and over.....	17½% Sales Rebate

Rebates in each bracket will be accumulated to make up total rebate, but are not retroactive.

In addition to the above annual volume rebates, Whitaker Warehouse Jobbers also received a freight allowance on shipments of a certain minimum size and a 5 percent trade discount on shipments in excess of \$150.00. Certain warehouse jobber customers, purchasing in large volume received a 20 percent discount from Jobber List Price in lieu of both the foregoing rebates and the 5 percent trade allowance. Although the Whitaker Warehouse Jobber Contract provides for the signature of the purchasing jobber and the Whitaker Cable Corporation, many customers so classified by Whitaker purchase under the above terms without having signed any such formal agreement. Whitaker Warehouse Jobber customers purchasing from Whitaker are approximately about 450 in number.

2. *Whitaker Group Buying Jobbers*.—Customers so classified purchased respondent's products on the current Whitaker Jobber Price List subject to a freight allowance and 20 percent discount from the Jobber Price List in the case of 4 groups, and 17½ percent discount

from the Jobber Price List plus 5 percent trade discount and freight allowance in the case of another group. In the operation of the group buying procedure, purchase orders of jobber members were forwarded to the respondent either direct by such members or through the group office. Respondent in turn shipped the merchandise so ordered direct to the group member and bills therefor were sent to the group organization and paid by it. Rebates and other discounts earned on such purchases were paid to the group office which in turn distributed the net, after deduction of operating expenses, to the jobber members in proportion to their individual purchases. The group buying organization is 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.

3. *Whitaker Wholesale Distributor Jobbers.*—Customers so classified purchased respondent's products through the Whitaker Warehouse Jobber on the basis of the current Whitaker Jobber Price List subject to the same rebate schedule as contained in the Whitaker Warehouse Jobber Contract. Merchandise so ordered was shipped and billed by the Whitaker Warehouse Jobber. The warehouse distributor was usually located in the same territory covered by the warehouse jobber through whom he purchased respondent's products and consequently was engaged in competition with all warehouse jobbers and other warehouse distributors in his trade area. The Wholesale Distributor Contract, entered into between the wholesale distributor and the respondent, provided for the forwarding of orders of the wholesale distributor to the warehouse jobber, the respondent to furnish the wholesale distributor with necessary catalogs, price sheets and such advertising material as may be issued from time to time to promote respondent's sales. The cumulative rebate was paid by respondent to the wholesale distributor direct when approved by the warehouse jobber. The warehouse jobber obtained the benefit of the volume purchases by both himself and the wholesale distributor giving him a higher rebate based upon the greater volume of purchases. Each wholesale distributor contract issued by respondent specifically provided for the signature of the wholesale distributor, the signature of respondent's district manager, and the approving signature of the Whitaker Warehouse Jobber and the Whitaker Cable Corporation. The degree of control exercised by respondent over sales to the wholesale distributor accounts was such that said sales were in all essential

Findings

51 F. T. C.

respects sales by respondent. The wholesale distributor is therefore a purchaser from respondent within the meaning of the Clayton Act, as amended. There are approximately 700 wholesale distributors so classified purchasing respondent's products.

4. *Private Brand Customers*.—Customers so classified purchased respondent's replacement parts, bearing their individual brand names, for resale to dealers and other purchasers, at discounts from respondent's Jobber Price List as follows:

(a) American Oil Company ("Amoco") at 20 percent of Jobber List Price, plus 2 percent boxing allowance;

(b) Phillips Petroleum Company ("Phillips 66") at 20 percent off Jobber List Price, plus 2 percent boxing allowance;

(c) Sun Oil Company ("Sunoco") at 20 percent off Jobber List Price, plus 3 percent boxing allowance prior to May 24, 1949, and after that date at 28.5 percent discount on most items, including battery cables and one cable assortment, and 26 percent discount on the remainder of the line, covering the items other than battery cables; and

(d) The Goodyear Tire and Rubber Company at 30 percent discount off Jobber List Price, plus 3 percent battery cable boxing allowance until February 2, 1949, then after that date 30 percent to 35 percent off Jobber List Price.

All of said private brand purchasers sold to jobbers and direct to retail dealers and to this extent were in competition with respondent's direct and indirect purchasers hereinabove described.

PAR. 5. In addition to the customers listed in the foregoing paragraph, evidence was introduced in this proceeding with reference to transactions between respondent and the Willard Storage Battery Company on the theory that the contractual relationship between the respondent and Willard and its customers was such as to constitute Willard customers as purchasers from respondent. The record in this proceeding, however, does not support this position, and, consequently, the testimony and other evidence in connection with the Willard Storage Battery Company transactions are not material to the issues in this proceeding.

PAR. 6. Evidence was also introduced with reference to certain purchasers of respondent's products who were classified as service distributors. In sales to these purchasers the Whitaker Service Distributor Contract was used which provided for the signature of the service distributor as purchaser, the Whitaker Warehouse Jobber, the Whitaker Warehouse Jobber salesman, and the approving signature of the Whitaker Cable Corporation. This contract provided that the service distributor should carry a representative stock of respondent's prod-

ucts and required the placing of an initial order of \$25.00 or more to entitle the purchaser to buy at Whitaker Service Distributor prices. Under the contract the service distributor placed his orders with the Whitaker Warehouse Jobber or a Whitaker Wholesale Distributor, who in turn delivered the merchandise to and billed the service distributor. The degree of control exercised by respondent through the execution of the Whitaker Service Distributor Contract was such as to constitute the Whitaker Service Distributor a purchaser from respondent within the meaning of the Clayton Act, as amended. However, the testimony and other evidence in this proceeding is not sufficient to support a finding with respect to competition so far as the Whitaker Service Distributor is concerned.

PAR. 7. In following the pricing practices hereinbefore described, the respondent has discriminated in price by means of the discounts, rebates and allowances allowed by it in the sale of automotive cable products and related items as between (1) respondent's warehouse jobbers; (2) respondent's direct purchasers, namely, warehouse jobbers, group buyers and private brand buyers; (3) respondent's direct purchasers and its indirect purchasers, such as wholesale distributors, 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.

PAR. 8. The respondent did not grant exclusive territory to any of its customers and has had more than one warehouse jobber in various trade areas who were, in fact, in competition with each other and also in competition with Whitaker Wholesale Jobbers, groups buyers and private brand buyers, who sell respondent's replacement parts to dealers and other purchasers in their respective trade areas.

PAR. 9. In the record in this proceeding there are a number of tabulations taken from respondent's books and records which were received in evidence as Commission's Exhibits 37-53, inclusive, showing the prices paid and the discounts received by purchasers located in various trade areas throughout the United States during the year 1949. Testimony was taken of purchasers from respondent in three trading areas shown on these tabulations, Denver, Dallas and New Orleans. There is nothing in the record to indicate that these 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 three 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

Findings

51 F. T. C.

customers reselling its products in the same trading area are in competition with each other in the resale of respondent's products.

PAR. 10. In the Denver area there were six purchasers of respondent's products: three warehouse jobbers, Auto Equipment Co., Colorado Jobbers Supply Co., Hendrie & Bolthoff Co.; two private brand purchasers, Goodyear Tire and Rubber Company, Phillips Petroleum Co.; and one wholesale distributor, Automotive Supply Company. All of these purchasers in the Denver area were in competition with each other in the resale of respondent's products.

In the Dallas area there were seven purchasers of respondent's products: six warehouse jobbers, Automatic Appliance Co., Dallas Parts Service Co., English Equipment Co., Meggs Co., Robertson & King Motor Supply, Texas Auto Parts; and one private brand purchaser, Goodyear Tire and Rubber Co. All of these purchasers in the Dallas area were in competition with each other in the resale of respondent's products.

In the New Orleans area there were five purchasers of respondent's products: three warehouse jobbers, Automotive Wholesalers, Delta Distributors, Inc., Parts Service Co.; one private brand purchaser, Goodyear Tire and Rubber Co.; and one group purchaser, Greiner Auto Parts Co. All of these purchasers in the New Orleans area were in competition with each other in the resale of respondent's products.

The amounts purchased and discounts and rebates received by the purchasers in the above areas, during the year 1949, were as follows:

Name of customer and trading area	Net purchase after deducting freight and allowance	Combined discounts and rebates	
		Amount	Percent of net price
Denver:			
Auto Equipment Co.....	\$12,561.93	\$2,512.35	20.00
Colorado Jobbers Supply Co.....	3,167.22	405.59	12.81
Goodyear Tire and Rubber Co.....	15.79	5.61	35.53
Hendrie & Bolthoff Co.....	22,059.52	4,487.22	20.34
Phillips Petroleum Co.....	987.96	197.60	20.00
Automotive Supply Company.....	852.12	12.62	1.48
Dallas:			
Automatic Appliance Co.....	1,994.35	197.66	9.91
Dallas Parts Service Co.....	1,868.99	162.94	8.72
English Equipment Co.....	888.17	54.05	6.09
Goodyear Tire and Rubber Co.....	215.18	86.88	40.38
Meggs Co.....	7,423.85	1,462.05	19.96
Robertson & King Motor Supply.....	934.86	43.79	4.68
Texas Auto Parts.....	1,265.76	98.57	7.79
New Orleans:			
Automotive Wholesalers.....	687.03	36.69	5.34
Delta Distributors, Inc.....	2,857.90	327.93	11.47
Goodyear Tire and Rubber Co.....	1,133.32	306.93	27.02
Greiner Auto Parts Co.....	4,301.03	860.19	20.00
Parts Service Co.....	2,292.31	244.13	10.65

¹ Based on prices in effect February 1 to May 2, 1949.

PAR. 11. 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 jobbers 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. Practically all of the witnesses, who purchased respondent's products, whether called in support of, or in opposition to, the charges of the complaint, testified that the respondent uniformly gave a 2 percent cash discount and that they invariably took advantage of this 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, area, testified that the overall net profit for his company ran between 3 percent or 4 percent.

PAR. 12. The net purchase price paid by respondent's jobber customers is the price paid subject to and following all applicable rebates, discounts and allowances. 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 received 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.

PAR. 13. 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 was more or less

Conclusions

51 F. T. C.

non existent, except perhaps 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. In fact, one witness in New York testified that he deviated from the suggested resale prices on certain large orders. It must therefore be concluded that respondent's defense in this particular is without merit and that respondent's discrimination in price between customers competing in the resale of its products has had, and may have, the effect of substantially lessening competition among its customers and of injuring and preventing competition among them.

PAR. 14. In its answer, the respondent asserted a defense of meeting competition under Section 2(b) of the Clayton Act. The evidence in this proceeding does not support this defense. The president of respondent corporation testified that about 15 or 18 years ago The Electric Auto-Lite Company came out with a volume rebate plan which respondent considered good and which it adopted. He further testified that it had been the practice of respondent to be the highest priced line in the market, relying on quality of its merchandise and greater amount of selling effort to maintain its competitive position. While respondent did consider and compare competitors' prices in preparing its price lists, the price differentials and the discriminations in price did not occur from the use of the price lists or deviations from such price lists to individual customers, but instead arose out of the pricing practice involving the use of a pricing plan consisting of rebates, discounts and allowances. The defense of meeting competition as provided for under Section 2(b) of the Clayton Act, does not permit "a seller to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others."¹

CONCLUSIONS

1. Respondent's private brand customers: American Oil Company, Phillips Petroleum Company, Sun Oil Company and Goodyear Tire and Rubber Company; and respondent's jobber customers, Whitaker Warehouse Jobbers, Whitaker Group Buying Jobbers and Whitaker Wholesale Distributors, were all engaged in the resale of respondent's products as wholesalers to dealers and other purchasers and as such were all in competition each with the other in their respective trade areas in the resale of respondent's products.

2. Respondent's pricing plan, which was used in selling to its various customers and the various rebates, discounts and allowances allowed by such pricing plan, resulted in a substantially lower price being paid

¹ *F. T. C. v. Cement Institute*, 333 U. S. 683, 725.

by some of its customers than was paid by other of respondent's customers competing in the same trade area in the resale of respondent's products.

3. Such lower price, when reflected in the resale price of respondent's products, enables favored purchasers to attract business away from non-favored purchasers or force the latter to sell at a substantially reduced profit. Said lower purchase price, in the observance of a suggested resale price, enables the favored purchaser to resell said products at a substantially higher profit margin than that obtainable by the non-favored purchaser in such resale.

4. Respondent's contention that no injury to competition can be proven or inferred where the discriminatory discount has not been used to reduce the resale 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.

5. The aforesaid discriminations in price by the respondent as herein found constitute violation of subsection (a) of Section 2 of "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" approved October 15, 1914 (Clayton Act) and amended by Act of Congress June 19, 1936 (Robinson-Patman Act).

ORDER

It is ordered, That the respondent Whitaker Cable Corporation, 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 cable products and 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—

Opinion

51 F. T. C.

1. 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.

2. By selling to any indirect purchaser at net prices higher than the net prices charged any other direct or indirect 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 SECRET, Commissioner:

This case is before the Commission on cross appeals from the hearing examiner's initial decision.

Respondent, Whitaker Cable Corporation, is charged with violation of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act,² by discriminating in price between purchasers of its automotive replacement parts. 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 as between (1) respondent's warehouse jobbers; (2) respondent's direct purchasers, including warehouse jobbers, group buyers and private brand buyers; and (3) respondent's direct and its indirect purchasers, such as wholesale distributors. The hearing examiner found that the effect of respondent's discriminations in price "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," and issued his order accordingly.

Respondent in its appeal excepts to numerous specific findings and conclusions of fact and law in the initial decision, as well as to certain conduct and rulings of the hearing examiner and to the hearing examiner's failure to make certain findings. The appeal of counsel supporting the complaint relates only to the hearing examiner's finding that the contractual relationship between respondent and Willard Storage Battery Company and its customers was not such as to constitute Willard's customers as "purchasers" from respondent within the meaning of the Act.³

² 15 U. S. C. sec. 13.

³ Ibid.

We turn our attention first to respondent's exceptions to the hearing examiner's conduct and rulings. Respondent contends that the hearing examiner erred in accepting an appointment as hearing examiner in another Commission proceeding against a purchaser charged with violation of Section 2 (f) of the Clayton Act, as amended,⁴ involving some of the same transactions considered in this proceeding. Respondent argues that there can be no charge of receiving an illegal discrimination under Section 2 (f) of the Act unless the illegal discrimination was first given by the seller, and that the implied effect of the examiner's accepting the appointment and proceeding to take evidence in another hearing was that this case had already been adjudicated.

In proceedings of this nature each case must be decided on the basis of the individual case record. There is no indication that the hearing examiner considered the evidence in any other proceeding in reaching his decision in this case. We are accordingly rejecting respondent's contention that as a result of the examiner's action the Administrative Procedure Act has been violated, that respondent has not been accorded a fair trial, or that its constitutional rights have been violated.

Respondent excepts to the hearing examiner's refusal to receive in evidence certain exhibits offered by respondent for the purpose of showing that the sales figures set forth in Commission's Exhibits 37A to 53B did not represent goods of like grade and quality. Commission's Exhibits 37A to 53B are tabulations prepared from respondent's books and records showing the prices paid and discounts received by purchasers in various trading areas during specified periods. These tabulations do not show the different items sold to the different customers. Instead, they show the price differences on total sales to customers in the same trading areas. The question raised by this exception, as well as the exception to the hearing examiner's finding that respondent's replacement parts are of like grade and quality, is whether the price differentials involved in this proceeding resulted from different prices on goods of like grade and quality. The price differentials we are considering did not arise from a difference in the grade or quality of the products sold to competing purchasers. They arose from varying discounts off base prices. 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. To illustrate, under the agreement which respondent enters into with its warehouse jobbers, the purchaser is required to "give Whitaker an irrevocable initial order

⁴ 15 U. S. C. sec. 15 (a).

for a representative stock of all items (quantities to be determined by Whitaker) and in all cases to be sufficient to permit Purchaser to take care of jobbing functions on all lines covered by "the contract."⁵ The purchasers also agree to permit Whitaker representatives to check their stocks of respondent's products. We believe the record establishes that the products involved were of like grade and quality and we care of jobbing functions on all lines covered by "the contract."⁵ The exhibits offered by respondent.

At the last hearing in this proceeding 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 commodities included in a single figure and thousands of invoices, there had been placed upon the respondent the almost insurmountable burden of analysis 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 the motion, stating that he did not think it was timely filed and that he did not believe there was any merit to the motion. Respondent contends that such action constituted a denial of a fair trial and violated respondent's constitutional rights of due process.

Respondent's motion was made at a hearing held on June 25, 1953. Counsel supporting the complaint rested their case on March 5, 1952. In the interval between those dates, at hearings in Kansas City, Denver, Dallas, New Orleans, Memphis, New York and Washington, respondent introduced considerable evidence in opposition to the complaint. There is no indication in the record 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's right to establish the contrary was in any way restricted. The tabulations to which respondent refers show details with respect to sales by respondent to customers in different trading areas during

⁵ Commission Exhibit 4-C.

specified periods. It does not appear that respondent, by this motion, challenges the accuracy of the figures appearing in the tabulations. Also, 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 by the tabulations. We believe the hearing examiner was justified in denying the motion and that such denial did not constitute a denial of a fair trial or violate respondent's constitutional rights of due process.

Another action of the hearing examiner to which respondent takes exception was the issuance of a rule to show cause why a hearing should be held which respondent had requested. At a subsequent hearing, held pursuant to the rule to show cause, counsel for respondent and counsel supporting the complaint entered into a stipulation on the record which obviated the necessity for holding the hearing which respondent had requested. There is no indication on the record that counsel for respondent was not entirely satisfied with this stipulation. The hearing examiner in issuing the rule to show cause was acting within his authority to regulate the course of the hearings and respondent's rights were in no way prejudiced.

Having determined that the record discloses no prejudicial procedural errors, we turn now to a consideration of the principal and controlling issues in the case which respondent claims were erroneously resolved by the hearing examiner. The price differential involved in this proceeding arose, for the most part, from respondent's practice of paying rebates or granting discounts to its customers, the amount of the rebate or discount being determined by each customer's total annual net purchases. Respondent's customers are variously classified as (1) Whitaker Warehouse Jobbers, (2) Whitaker Group Buying Jobbers, (3) Whitaker Wholesale Distributor Jobbers, and (4) Private Brand Customers, and the hearing examiner found that all of these customers were competitively engaged in the resale of respondent's replacement parts.

Respondent's products are sold and distributed on a nationwide scale to both the automotive jobbing trade and to various large oil and tire companies. These products are sold under both the Whitaker brand name and various so-called private brand names owned by its customers. In its sales respondent has been charging substantially different net purchase prices for its products, as between its jobbers and its oil and tire company trade, as well as between its various classifications of jobbers and its oil and tire trade.

Respondent's products are sold to the jobbing trade on the basis of its current published jobber list price subject to its published volume

discount applicable to such prices. This graduated and progressively higher discount is based on the dollar amount of annual purchases made by each buyer, irrespective of the dollar amount, size or number, of the individual transactions producing such aggregate dollar purchase amount by the buyer. Additionally, jobbers purchasing from respondent through a so-called group-buying device receive a higher discount rate than would normally be applicable to their individual purchase volume, due to the crediting of the annual purchase volume of all such purchasers to each such purchaser.

The hearing examiner found that respondent's volume discount on jobber list price resulted in the payment of substantially different net purchase prices for respondent's products by the numerous jobber customers of Whitaker purchasing its products for competitive resale. These price differences range from the payment of jobber list price by some jobbers, purchasing \$600 or less annually, to the payment of a net purchase price 17½% below jobber list price by jobbers purchasing \$3000 or more annually. In the case of group buying jobbers, individual jobbers receive as much as 20% off the jobbers' list price.

Jobber members of these buying groups send their orders for respondent's merchandise either direct to respondent or through the group office. Respondent ships the products so ordered direct to the group members. The group organizations are billed for the merchandise shipped to the members and respondent is paid by the group organizations. Rebates and discounts on such purchases are paid to the group buying organizations, which in turn distribute the net, after deducting operating expenses, to their members on the basis of each member's purchases. The hearing examiner properly found that the jobbers who purchased respondent's products through the various buying groups were in fact purchasers from respondent.

Other purchasers of respondent's products were those classified by respondent as Whitaker Wholesale Distributor Jobbers. Respondent's sales to customers so classified were made through Whitaker Warehouse Jobbers on the basis of the current jobber price list, subject to the same rebate schedule as was applicable to sales to warehouse jobbers. Wholesale distributors were appointed by respondent. They executed respondent's standard "Wholesale Distributor Contract," in which both respondent and the wholesale distributor agreed to perform and do certain things. For example, the distributor agreed to maintain an assorted stock of Whitaker products of a specified dollar value; to select a Whitaker Warehouse Jobber and to send orders for respondent's products to such jobber. Respondent agreed, among other things, to supply the distributor with catalogs, price sheets

and advertising material. The cumulative rebates were paid by respondent direct to the wholesale distributor when approved by the warehouse jobber. The contracts provided for the signature of the distributor, of respondent's district manager, and the approving signature of the warehouse jobber and of Whitaker Cable Corporation. We think the hearing examiner correctly found that the degree of control exercised by respondent over sales to the wholesale distributor accounts was such that the sales were in all essential respects sales by respondent and that the wholesale distributors were, therefore, purchasers from respondent within the meaning of the Clayton Act, as amended.⁶

At this point, it is appropriate to consider the question raised by the appeal of counsel supporting the complaint as to whether the contractual relationship between respondent and Willard Storage Battery Company was such as to constitute the Willard customers as purchasers from respondent. The hearing examiner found that the evidence does not support this position. Under the arrangement between respondent and Willard, respondent sold its products bearing the Willard brand to Willard. Shipments were made by Whitaker direct to Willard customers, but invoices covering the shipments were sent to Willard and payments were received from Willard. Willard resold the products purchased from respondent to automotive jobbers handling the Willard line. There is no evidence that respondent in any way participated in the selection of the customers who purchased the Willard line or that respondent was a party to the transactions between Willard and its customers. There is no evidence of control by the respondent of the sales by Willard to its customers, such as that which respondent exercised over the sales to Whitaker warehouse distributors. Accordingly, we reject the contention of counsel supporting the complaint that Willard's customers were purchasers from respondent within the meaning of the Clayton Act, as amended.

With reference to respondent's so-called private brand customers, the record reveals that respondent sold its products to these purchasers at jobbers list price, less varying discounts and allowances. For example, American Oil Company and Phillips Petroleum Company have received a discount of 20% off list price, plus 2% boxing allowance. Sun Oil Company received a discount of 20% off list price, plus 3% boxing allowance prior to May 24, 1949, and after that date received a discount of 28.5% on most items and 26% on the remainder of respondent's line. The Goodyear Tire & Rubber Company received

⁶ *In the Matter of Champion Spark Plug Co.*, Docket No. 3977 (1953); *In the Matter of Kraft Phenix Cheese Corp.*, 25 F. T. C. 537 (1937).

Opinion

51 F. T. C.

a discount of 30% off list price, plus 3% battery cable boxing allowance until February 2, 1949, and after that date received discounts of 30% to 35% off list price. Willard Storage Battery Company received a discount of 30% off list price.

The hearing examiner concluded that respondent's private brand customers and respondent's jobber customers were all engaged in the resale of respondent's products as wholesalers to dealers and other purchasers, and as such were all in competition with each other in their respective trade areas in the resale of respondent's products. The hearing examiner further concluded that respondent's pricing practices had resulted in substantially lower prices being paid by some of its customers and that such lower prices enabled the favored purchaser to resell respondent's products at substantially higher profit margins than was obtainable by its non-favored purchasers.

Respondent contends that the hearing examiner's findings with respect to the effect of its price discriminations are not in accordance with or supported by the evidence in the record. The record contains a number of tabulations, prepared by members of the Commission's staff from the books and records of the respondent, with respect to respondent's sales to customers in selected trading areas. These tabulations graphically disclose the nature and extent of the price differences between competing customers which have resulted from respondent's use of the above-described pricing practices. For example during 1949, respondent sold directly to five purchasers in the New Orleans trading area, in the amounts and at the percentages off list price indicated below:

Customer	Net Purchases after deducting freight and allowances	Percent off list price
		<i>Percent</i>
Automotive Wholesalers.....	\$687.03	5.34
Delta Distributors, Inc.....	2,857.90	11.47
Goodyear Tire and Rubber Co.....	1,133.32	35.02
Greiner Auto Parts Co.....	4,301.03	20.00
Parts Service Co.....	2,292.31	10.65

¹ Based on prices in effect February 1 to May 2, 1949.

Greiner Auto Parts Company purchased respondent's products through a group buying organization. Goodyear Tire and Rubber Company was a private brand purchaser. The other three purchasers were warehouse jobbers. In the Denver trading area, respondent sold directly to three warehouse jobbers and two private brand purchasers, and indirectly to one wholesale distributor, at prices ranging from 1.48% to 35.53% off list price. Testimony of purchasers in these and

other trading areas clearly shows that purchasers of respondent's products were in competition with each other in the resale of such products.

It appears that for the most part purchasers of respondent's products for resale resold at the prices suggested by respondent with the result that in a number of the trading areas there was little, if any, price competition in the resale of such products. In this connection, it is noted that respondent in its appeal brief approves of the hearing examiner's finding that the market in which respondent's customers compete is a highly competitive one, yet disapproves of his finding that the elimination of price competition because of uniformity of resale prices does not eliminate the question of injury to competition. Respondent urges that "where there is no price competition there is no competition whatever".

In rejecting respondent's contention, we note that a similar argument was advanced in the *Corn Products* case⁷ where the Supreme Court said, in part:

"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 substantiality of respondent's price differences and the probability of injury to competition is clearly demonstrated by the record. From the very nature of the businesses operated by respondent's customers, it is clear that their profits are necessarily based upon an accumulation of small margins of profits on many items. The record shows that some of respondent's jobber customers handled from 15 to 75 different lines of automotive replacement parts involving thousands of different items, some of which sell for only a few cents. Witnesses testified that they invariably took advantage of the 2% cash discount offered by respondent; that such discount reduced their cost of acquisition of respondent's products and that it was essential to the operation of their businesses to take the discount. It follows inescapably that the price differences resulting from respondent's pricing practices must materially affect the business health of respondent's customers and that purchasers who paid the higher net prices were at a competitive disadvantage with the purchasers who paid the lower net prices.

⁷ *Corn Products Refining Co. v. F. T. C.*, 324 U. S. 726, 742 (1945).

A further indication of the importance to respondent's customers of lower purchasing prices is the fact that many of them found it expedient to enter into group buying arrangements and thereby receive larger discounts and rebates from respondent and other automotive replacement parts manufacturers. We think the hearing examiner correctly 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 was more or less nonexistent, except perhaps 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. In fact, one witness in New York testified that he deviated from the suggested resale prices on certain large orders. It must therefore be concluded that respondent's defense in this particular is without merit and that respondent's discrimination in price between customers competing in the resale of its products has had, and may have, the effect of substantially lessening competition among its customers and of injuring and preventing competition among them."

The hearing examiner found that respondent's defense of meeting competition under Section 2 (b) of the Clayton Act is not supported by the evidence. Respondent excepts to this finding, claiming that the evidence "demonstrates that respondent, in selling less than 1% of products competitive with its own in the market, in good faith, did only that which it could reasonably do, and that was to use a pricing practice which reflected as near as possible that practice which would render it competitive with the other more than 99% of the sellers in the market." The principal evidence in the record relating to this defense is the testimony of respondent's president, to the effect that about fifteen to eighteen years ago respondent adopted the same volume rebate plan as that used by The Electric Auto-Lite Company. There is no showing that respondent ever actually reduced its prices to meet a competitor's prices. In fact, respondent's president testified that it has always been respondent's practice to have the highest priced line in the market. Respondent's defense of meeting competition clearly has not been established.

Respondent devotes a large part of its brief to the contention that since respondent sells less than 1% of all the products competitive with its own sold in the automotive industry, it is impossible for its pricing practices to have the effect on competition which the hearing examiner

958

Order

found. This argument loses sight of the fact that competitive injury between respondent and its competitors is not at issue in this proceeding and respondent's relative position in the industry is not controlling to a determination that its pricing practices may not have had the effect ascribed to them by the hearing examiner.

There is substantial evidence in the record that respondent is a major manufacturer in that particular industry segment specializing in the making and selling of automotive replacement cables and related parts. Respondent's annual sales volume for the year 1949 approximated \$2,000,000 and according to the testimony of respondent's president, 40% to 50% of this volume represents sales in the after market replacement field. As between respondent's purchasers, we believe that the record as a whole establishes that the amount of business done by the respondent is substantial.

The premises considered, it appears that the initial decision of the hearing examiner is adequate and appropriate to dispose of this proceeding. Accordingly, the appeals of respondent and counsel supporting the complaint are denied.

Commissioner Mason dissents, the rationale therefor being set forth in his dissenting opinion in Docket 5723—Moog Industries, Inc.

FINAL ORDER

Counsel supporting the complaint and respondent Whitaker Cable Corporation having respectively filed on March 19, 1954, and April 30, 1954, their cross-appeals 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 appeals and affirming the initial decision:

It is ordered, That respondent Whitaker Cable Corporation 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, the rationale therefor being set forth in his dissenting opinion in Docket 5723—Moog Industries, Inc.⁸

⁸ See p. 951.

IN THE MATTER OF

E. EDELMANN & COMPANY

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

Docket 5770. Complaint, May 1, 1950—Decision, Apr. 29, 1955

Order requiring a manufacturer of automotive replacement products in Chicago, Ill., 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. Frank Hier*, hearing examiner.

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

Bair, Freeman & Molinare, of Chicago, Ill., for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

The complaint in this proceeding charges that E. Edelmann & Company, respondent, in selling automotive products manufactured by it, on a nationwide scale, has discriminated in price between its customers competitively engaged in the resale of those products, and that the effect thereof may be substantially to lessen competition and tend to create a monopoly in the line of commerce in which respondent and its competitors are engaged, and in the line of commerce in which respondent's and its competitors' customers are engaged, and also to injure, destroy or prevent competition with respondent, with the favored customers, or with the customers of either of them; all in violation of Section 2 (a) of the Clayton Act (15 U. S. C. 13).

Respondent's amended answer admits that it sells its products in interstate commerce, that it has competitors, that its customers compete in the resale of such products with purchasers from its competitors, that it sells its products to different purchasers at different prices, but denies the effects alleged of such sales and affirmatively alleges that any price differences at which it sold were made in good faith to meet an equally low price of a competitor.

The issues therefore are: Have respondent's price differences had the competitive effects charged, and were such price differences made in good faith to meet the equally low price of a competitor?