

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?

The facts are found as follows:

1. Respondent is an Illinois corporation, with its principal office and place of business at 2332 Logan Boulevard, Chicago, Illinois. It manufactures, sells and distributes, admittedly in interstate commerce, three classes or lines of automotive products—brass fittings, flexible fuel lines, and tube tools, categorically called the brass line; hydraulic brake parts, referred to as the brake line; and anti-freeze testers, battery testers, battery fillers, battery service kits and timing lights, known as the glass line—admittedly in competition with the manufacturers or sellers of comparable automotive products. The purchasers of these products, whether from respondent, or from respondent's competitors, are frequently in competition with each other in the resale thereof. Such products are, within each class or line, of like grade and quality.

2. In 1948, there were 10,959 automotive parts wholesalers in the United States, having an aggregate sales volume of \$2,283,686,000. In 1949 respondent's sales volume was \$1,600,000, approximately 45% of which was in the brass line, 2% in the brake line, and 53% in the glass line. These products reach the garage, repair shop, retail dealer and gasoline station through 3,500 to 4,000 purchasers from respondent, of which 35 or 40 were classified by respondent as warehouse distributors purchasing 20% of respondent's sales volume; 15 or 20 were classified by respondent as private-brand accounts, purchasing 12% of respondent's sales; and six were cooperative buying groups purchasing 8% of respondent's sales. Respondent also sells to fifty customers classified by it as industrial accounts, the remainder of respondent's total number of customers being automotive parts jobbers. Respondent's industrial accounts buy its brass line for use in the manufacture of lawn mowers, garden tractors, hot water heaters and other integrated products, and their dealings with respondent are not involved in this proceeding. Respondent's private-brand accounts are chemical, oil, battery and tire companies¹ buying its glass line under their own brand names rather than under the brand name of respondent. Twenty salesmen are employed by respondent in its distribution.

3. Respondent sells nationally on the basis of a list price. Respondent suggests resale prices at all levels down to the consumer, who pays the list price, and these are, so far as the record shows, uniformly adhered to. This is illustrated by the following table showing net prices to be paid for the same part, after discount from list is applied, in the three lines, during the forepart of 1949.

¹ Pure Oil, Shell Oil, Atlas, Dupont, Delco, Auto-Lite, Goodyear, Exide, Firestone, etc.

These differing prices, resulting from deduction from list price of the various trade or functional discounts, except that of the warehouse distributor in part, granted by respondent to its different distributor outlets are not attacked in this proceeding as being discriminatory, but they do form the mathematical basis, at least, of additional discounts which are so attacked. These prices were disseminated to respondent's various distributor categories on printed price sheets, and except as hereinafter outlined, were uniform to all in each category and not deviated from. The record does not reveal the pre-1949 difference between a distributor and a jobber, but in 1949² when respondent increased the discount allowed a warehouse distributor from 15% to 20%, all customers, not classified by respondent as the latter, purchased on the above distributor-price basis as a jobber, the jobber's price sheet being discontinued. Respondent's 2% discount for payment in ten days was uniform to all purchasers and is likewise not involved in this proceeding.

4. In addition to the above discounts, however, respondent allowed to any purchaser from it directly, except the warehouse distributor, a quantity discount on one order of brass fittings shipped at one time to one destination, of 5% on 7,500 assorted fittings, 10% on 15,000, 15% on 25,000 (with two exceptions unimportant here), and 15% on \$1,500 of assorted flexible lines. This is attacked as discriminatory.

	Part No.	List price	Dealer price	Jobber price	Distributor price	Whse. distributor price
Brass Line ¹	B-51 3/4 x 1/2	\$4.12	\$2.47	² \$1.36	\$1.24	³ \$1.16
Brake Line ⁴	M. P. 3093	1.20	0.72	² 0.49	0.44	0.42
Glass Line ⁵	70C	12.75	8.50	⁶ 6.00	⁶ 5.45	⁶ 5.10
				6.50	5.95	5.52

¹ CXs, 38, 34, 16.

² To nearest cent.

³ CX 69—15% blanket discount until mid-1949, 20% thereafter.

⁴ CXs 52, 32, 27.

⁵ CXs 48, 33, 22.

⁶ Variance depends on whether in broken or standard pack.

5. With the approximately 40 of its customers classified by it as warehouse distributors, respondent enters into a uniform contract whereby such customers agree to carry at all times a substantial minimal stock set out in detail as to each of respondent's products, to furnish respondent with a list of those jobbers to whom it resells such products, to cooperate with respondent and aggressively promote resale, to display the products, to permit inventory checking by respondent, to instruct and train both its own salesmen and those of its customers, in consideration whereof respondent agrees to assist

² The evidence is largely confined to the year 1949, which was, by tacit consent of counsel, taken as a sample or test year.

the warehouse distributor in salesmen's training, supply catalogs, price sheets and advertising matter, circularize the warehouse distributor's customers, and to grant to the warehouse distributor a 20% discount on the brass line, 15% discount on the brake line, and 15% on the glass line computed on the jobber's price; in other words, to sell at prices that are much lower than are charged jobbers. Warehouse distributors so purchasing from respondent resell not only to jobbers, but also to the customers of the latter, and in direct competition with such jobbers. There is no complaint in this proceeding of this warehousing discount on respondent's products resold to jobbers, because no competition exists—the contention being that these discounts are discriminatory and injurious when allowed on those products which the warehouse distributor resells in competition with the jobbers to the retailer because the warehouse distributor's cost of acquisition is 15%, later 20%, lower than that of the jobber, regardless of whether the jobber bought from the warehouse distributor or from respondent directly, which he may do.³

6. These warehouse distributors' discounts are also extended by respondent to six cooperative buying groups. The latter are aggregations of jobbers, many of whom, prior to such aggregation, bought from respondent or its nearest warehouse distributor at the jobber's price. After formation into a buying group, the individual member jobber sends his periodic orders either to respondent directly, with duplicate to the group headquarters, or to the latter for forwarding to respondent. Merchandise so ordered is shipped by respondent directly to the individual jobber member, with billing for the same directed to the group office. Monthly settlements are made between respondent and the group office for the aggregate purchases of all members, and each of the latter settles monthly with the group office for its own individual purchases so made. All of these group-buyer transactions are at respondent's jobber's prices. The warehouse rebate is made later. At least one of these buying groups maintains neither warehouse nor stock of respondent's products—the record is silent as to the other five. The warehouse distributor's discounts on the aggregate group purchases are paid by respondent to group headquarters, which in turn distributes the net, after deduction of operating expenses, to the jobber-members in proportion to their individual purchases. In reality, this group set-up is a bookkeeping device for obtaining, collecting and remitting the warehouse discount received from respondent on purchases made by jobber-members. The latter,

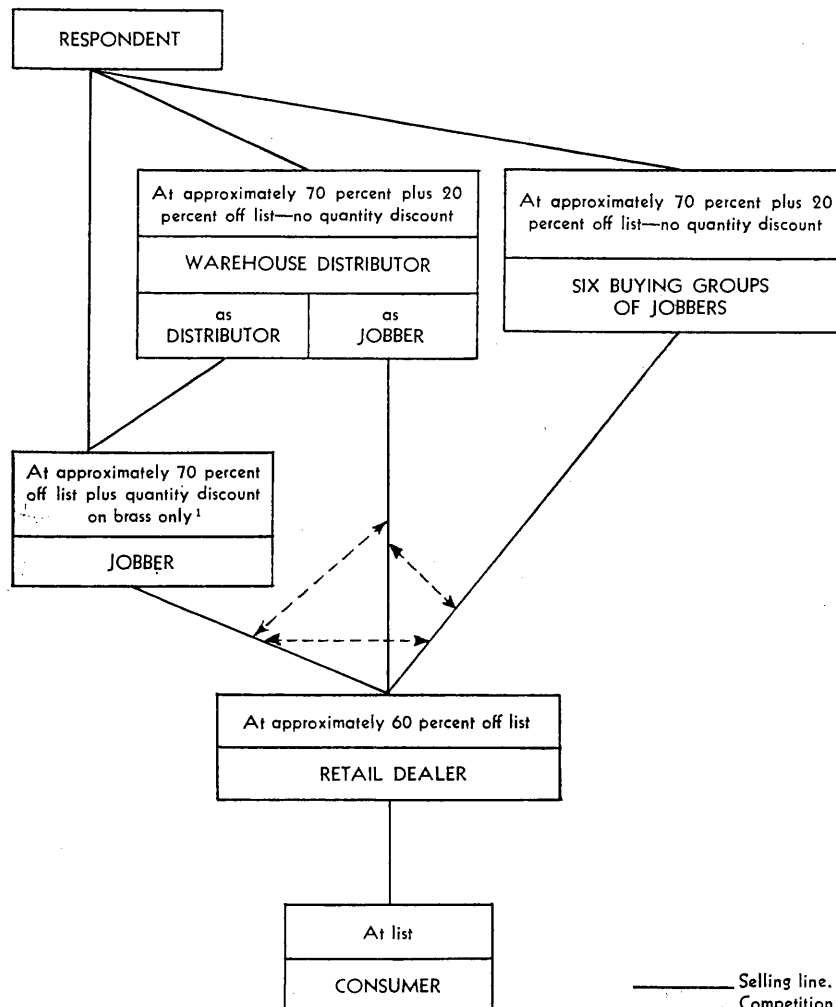
³ A jobber or distributor may buy direct from respondent, but, if he does so, must pay the freight on orders of 100 lbs. or less, whereas if he buys from the warehouse distributor he generally does not have to pay freight.

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in fact, purchase their requirements directly from respondent, receiving close to a 20% better price than if they had bought simply as a lone jobber, instead of as a member of the group. The functional classification as warehouse distributor is basically artificial. This discount is also attacked as discriminatory.

7. Visually presented, respondent's distributive and discount pattern, exclusive of industrial and private brand accounts, since early in 1949, is as follows:



¹The record is not clear whether the quantity discount on the brass line only can be obtained by a jobber buying from a warehouse distributor, and, for the purposes of this proceeding, it is assumed he cannot, and that such discount can be had only on purchases by a jobber direct from respondent. In any event a jobber able to purchase brass in such quantities does compete on resale thereof with a jobber unable so to qualify.

8. The fourth and last discount, or lower net price, contended to be discriminatory was granted by respondent on sales of its glass line to private-brand accounts who purchased on a contract order for a specific quantity as a negotiated price which, in some instances, was as much as $33\frac{1}{3}\%$ less than the price charged respondent's other customers for comparable products. There is some dispute as to the difference in the product sold to private-brand accounts and that sold under respondent's brand to its other customers, but so far as the Hearing Examiner can ascertain from the record, the only differences were the brand name or mark, stamped or lithographed, on the product, and the printed insert in the hydrometer, showing how much of a particular antifreeze, as opposed to a number of antifreezes, was in the radiator solution and how much was needed to prevent solidification. The floats are interchangeable, and apparently there is no basic functional difference. The finding is that these products were of substantially like grade and quality.

9. The foregoing facts found as to respondent, its business background, selling and pricing practices, discounts, both functional and allegedly discriminatory are without substantial dispute on the record. There remain the questions of whether respondent's customers, favored and unfavored pricewise on the four discounts described above, are in competition with each other in the resale of respondent's products, and whether such discounts have any of the three statutorily prescribed effects on either the original sale level, or the resale level.

10. There is substantial evidence in the record that the automotive parts jobber buying from respondent, or its warehouse distributor, competes over a local radius of from fifteen to one hundred miles with every other automotive parts jobber located within such radius, in the attempt to resell respondent's products or those of respondent's competitors; and that they also compete with respondent's warehouse distributors, including the jobbers forming buying groups, for the business of the automotive retail dealer. This evidence comes from not only witnesses produced by counsel for the complaint, but from respondent's witnesses and respondent's president, and applies to all three of respondent's lines. There is also substantial evidence that the members of the six buying groups, classified by respondent as warehouse distributors and receiving the 20% warehouse discount as such, compete with jobbers purchasing from respondent either directly or indirectly, at the higher jobber price, in the attempt to resell to dealers.

11. The competitive picture of the private-brand accounts, vis-à-vis respondent's distributors on respondent's glass line, is not developed and is consequently inconclusive. The record does not

show whether these private-brand accounts, mostly tire and oil companies, resell their individually-branded glass line to their franchised retail stations, or at what price, whether they require such stations, as a consideration of the franchise, to use only such individually branded merchandise, whether respondent's private-brand accounts offer such merchandise generally or restrict it to retail stations handling, exclusively or otherwise, their tire or oil products. None of the officials of these private-brand accounts was called as a witness. If respondent's private-brand accounts distribute respondent's glass line so branded only to their own dealers, and have no competition in doing so, as respondent's president testified, and the latter are required to buy same, either as a franchise restriction, or as a matter of supplier compulsion, then the lower price or discount described in paragraph 8 above would have no significance here, because competition would be aborted or foreclosed regardless of price—respondent's distributors could not sell the glass line branded with respondent's own mark in any event to these retail dealers.

12. The other evidence is sketchy. One jobber, a member of a buying group, testified that gasoline stations were both potential and actual customers of respondent's jobbers, of which he was one, that he did a "very likable size business" with them, that such market has not been falling off. Whether this business, though, was with independent or franchised stations does not appear. Another witness, chief executive of another buying group, stated that "controlled" stations were both a potential and actual market for respondent's glass line, but that he was not concerned with sales thereof, as it was a slow seasonal line. Yet at another point, he stated that his group had never been able to supply the "closed" or "controlled" stations of Standard Oil, Shell, Texaco, Pure Oil, and others, much of respondent's glass line, because of franchise control and apparently not because of the price factor. Apparently, in the first statement, the witness was speaking of independent stations.

13. A jobber-member of the same group testified to encountering competition from these private brand accounts, apparently on respondent's glass line, to the extent that they were, in his opinion, about to put the jobber out of business. Again it does not appear whether this stems from the lower price at which these accounts purchased, or whether it was due to franchise or other control over the stations by the private-brand accounts. Another jobber in Indiana testified he sold respondent's regular glass line to service stations of Texaco and Sun Oil, as well as to independents. Respondent's president testified that, contrary to the exception that this private-brand merchandise

would take away the jobber's business in the standard merchandise, "the idea of this kit becoming standard equipment for the major oil companies made these independent garages and service stations familiar with what we might call standard equipment * * * and it was through the advertising we got and have been getting from the major oil companies that the jobber, I feel, has been able to do a very fine business on battery service kits and our volume has constantly increased on service kits, and was pretty much a dead dodo until we started building these kits for the major oil companies." "If we had been unable to furnish these kits with medallions and have them specialized for these companies, the companies themselves would not have been interested in purchasing the kit, because these major oil companies desire everything that they sell to their stations to be a part of their color scheme and part of their merchandising plan." The Examiner construes this latter testimony to mean that there was no competition, price or otherwise, between the private brand account and respondent's jobbers for the business of the gasoline station or tire store "franchised," "closed," or "controlled" by the private-brand account, that such market was never open to respondent or its distributor.

14. On the whole, the finding is that the evidence is insufficient and too insubstantial to show competition existing between these private-brand accounts and respondent's other customers on respondent's glass line for the business therein of the retail outlets of the private-brand accounts, and that there is no evidence to show that the latter sell, or attempt to sell independent stations or retailers. So far as the discount described in paragraph 8 above is alleged to be discriminatory and in violation of Section 2 (a), the proof therefor has failed to sustain the charge.

15. The next question of whether the differing costs of acquisition of respondent's products by its customers competing in the resale thereof has an adverse competitive effect presents the first of the two most serious issues in this proceeding, which has resulted in much conflicting evidence. For the affirmative, there has been shown by charts⁴ the net cost of acquisition taken from respondent's sales records, after discounts applied, of all of respondent's customers located in various trading areas in Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, North and South Carolina and Tennessee, which net costs vary from 78.1% to 98% of the jobber price. Without deduction of the uniform 2% discount for cash, the variance would be approximately from 80% to 100%. The chart shows purchasers in the same trading area buying as low as 80%, with others

⁴ CXs 145-E, 146, 147.

paying full price or slightly under it. It is also evident from the testimony of jobbers that each takes regular advantage as a matter of financial necessity of the 2% cash discount for prompt payment extended uniformly to all by respondent and not under attack herein, that failure to do so would seriously impair, if not wipe out profit margin.

16. It is apparent that automotive parts jobbers operate on a very small profit margin, and most of them extend the same cash discount they receive to their purchasers; however, the latter is based on a mark-up of acquisition cost, so that if they receive a cash discount of 2% of invoice, upon resale that same percentage may amount to nearly 3% of the cost of acquisition. One jobber in business since 1918 in northern Mississippi, with six branches, testified that his cost of doing business was 23.78% of sales and his gross margin was 27.52% of sales, leaving a net margin of profit (presumably before income tax) of 3.74% of sales, and that if he were to grant a 2% cash discount to his customers and fail to take advantage of the same discount from his suppliers, his loss would be (computed) 3.9% of sales. Obviously he would not remain in business long. Another testified that his profit margin in 1949 was but 4.2% of sales; that he had to take advantage of every cash discount granted by his suppliers; that if he takes it and gives it on resale with a $33\frac{1}{3}\%$ mark-up, he automatically loses 1%; that if he does not take it but does give it upon resale, he loses 5% on the same mark-up basis. Another jobber, in business for thirty years as such, stated that any jobber who can't avail himself of the cash discount is in a very serious condition.

17. Obviously, if 2% discount means the difference between profit and no profit, or accounts for half of the jobber profit, the three discounts remaining under attack in this case, ranging from 5% to 20%, spell the difference between commercial life or death. The testimony also is to the effect that a jobber's profit is made up of an accumulation of small margins of profit on many items. Even the small jobbers handle 30 to 75 lines of products, the larger ones, 100 or more lines, consisting, in the aggregate, of thousands of items. Many of respondent's products are slow-moving but essential items in every jobber's stock. Every jobber must stock them. Although the turnover is slow, and the net profit therefrom small, such profit contributes to the aggregate, which determines whether the jobber prospers, becomes static, retrogresses or fails. With net margins of profit as small as they are, the discounts described in paragraphs 4, 5 and 6, *supra*, even though on only one of many lines handled, contribute directly and powerfully to the recipient jobber's ability to compete.

18. Since respondent's products are slow-moving, purchases by jobbers thereof are small in comparison to their total purchases of all products, and it is contended by respondent that they are so insignificant in relation to the jobber's total business that no adverse effect on his competition can be inferred. This contention has been disposed of by the Supreme Court in the *Morton Salt* case,⁵ which held "there are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect a merchant from competitive injury attributable to discriminatory prices on any and all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery store consists of many comparatively small articles, there is no possible way, effectively, to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store." There is nothing in this record suggesting that any of respondent's products are more insignificant to the automotive jobber than is salt to a grocer.⁶

19. The above constitutes substantially all of the evidence adduced to show the alleged injury to competition—no commercial corpse, bloody or otherwise, was produced by counsel for the complaint, apparently in reliance on the *Morton Salt* case, cited *supra*, which holds "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 those 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 any event, respondent's counsel filed no motion to dismiss for failure to establish a *prima facie* case at the close of the affirmative evidence. The discounts in this proceeding are equally or more substantial than those attacked in the *Morton Salt* case, and the evidence as to the commercial importance of small price percentages goes much further than that case apparently requires. The finding, therefore, is that the evidence received above supports a reasonable inference of the competitive injury alleged.

⁵ 334 U. S. 37.

⁶ In *Standard Brands, Inc.* (30 F. T. C. 1117), $\frac{1}{4}\%$ in the broker's cost of a 1-pound loaf of bread was held substantial because the profit margin of even the largest producer was but $\frac{3}{10}\%$ per pound loaf of bread; and in the glucose cases (324 U. S. 726 and 746), $\frac{1}{8}\%$ per pound in glucose was held substantial to the purchaser making candy therefrom. Furthermore, these products were not bought for resale as such.

20. The opposing evidence adduced by respondent consists mainly of the testimony of three of its jobbers and one of its warehouse distributors. The latter testified at considerable length of the many distributive and promotional services he performed to the benefit of respondent as well as himself, in addition to those required by the warehouse distributor contract—missionary work through his salesmen; loaning money to garage operators and servicemen to set up as jobbers; salesmen's meetings for jobbers and their salesmen; legal advice; bookkeeping and auditing services; paying transportation on jobber orders; and credit risk. To him, this fully justified the extra 20% discount which he received on all purchases from respondent. Approximately 45% of these purchases are resold to jobbers in his distributor function; 55% are jobbed by him to retailers. There is nothing in the record showing whether this extra discount exactly or approximately paid for all the services he detailed. He did state that without it, he could not continue as a warehouse distributor, but must revert to a jobbing basis. There is no holding that, if that extra discount did no more than so compensate him, it was justified, even though that has been suggested⁷ where a price-favored purchaser performs a dual function. In any event, such question is probably academic here, because the extra discount on products which he resells as a warehouse distributor is not here attacked—it is that discount on products which he resells to dealers in competition with the jobbers to whom he sells as a warehouse distributor that is claimed to be illegal.

21. On this point, respondent's president testified that respondent did not know what products were resold by the warehouse distributor in the two different channels, and respondent's counsel contends that respondent cannot ascertain this. However, two of respondent's principal competitors, both larger than respondent, allow a warehousing discount only on those purchases which are resold in that capacity to jobbers, and reports of such sales must be made to the supplier by the warehouse distributor.⁸ Thus, it apparently can be done, and, to avoid discrimination, should be done.⁹

22. The warehouse distributor witness further testified that of his \$8,500.00 purchases from respondent in 1949, 55% was resold by him to dealers at a sales expense of 9% of the invoice, and 45% to jobbers at a sales expense of 3¼% of invoice, and that he was preparing a

⁷ Functional Discounts under the Robinson-Patman Act: The Standard Oil Litigation; Gold & McGrath, Harvard Law Review, Vol. 67 No. 2 Dec. 1953.

⁸ RXs 5, 6, 7; Tr. 1550-2, 1579-83.

⁹ "Determining price by use" doctrine: see *Sherwin-Williams Co.*, 36 F. T. C. 25; *Standard Oil Co. v. F. T. C.*, 43 F. T. C. 56, 340 U. S. 23; see also "Tyranny of Labels," Shneiderman, 60 Harvard Law Review 571 at 600-3.

breakdown of his business operations in his two functions, and would supply same to respondent within thirty days. If supplied, it was not entered in evidence. This witness also testified his net operating profit in 1949 was 1.22% before taxes, 0.74% after taxes, of sales, but that he did not know whether his percentage of profit was higher in his warehousing function or on his jobbing function; that he performed no warehousing function when reselling to dealers. He also testified that he has told his jobber customers of his extra discount over theirs from respondent, but had had no complaints from them. His testimony was given under the impression that a successful termination of this proceeding in favor of proponent counsel would deprive him of 45% of his business, would take away his warehouse-distributor status with respondent, deprive him of his merchandising discount, limit his traveling, revert him to jobber status and compel him to establish branch houses and compete with more jobbers.

23. The three jobbers of respondent who testified, collectively corroborated the warehouse distributor's testimony briefed above, stressing that they can and do freely buy from the warehouse distributor or from respondent directly at the same price, but that purchasing from the former has the advantage of prepaid freight on less than 100 pounds, free phone calls, speed of delivery, and relief from having capital tied up in an inventory of slow-moving items. They all resold to retail dealers such as service stations, garages, car and implement dealers, and competed for such business with each other, with the warehouse distributor, and with jobbers reselling similar products of competitors of respondent. They all knew the warehouse distributor bought at a lower price than they did, but did not know how much lower, and all stated that they did not care; that the warehouse distributor's competition with them had not injured them in any way; that competition at their level was keen, and had been for years; that they knew of no lessening therein, nor any corraling of business by one or a few of their competitors. All of them have grown in size over a decade or more. One of them purchased two-thirds of his requirements of respondent's products from respondent and one-third from the warehouse distributor; another splits his purchases about evenly; the third did not know. All agreed that when the warehouse distributor resold to a dealer in competition with them, none of the warehouseman's services, enumerated above, inured to their benefit.

24. All three of these witnesses, however, were and had been buying at lower than jobber prices other lines of automotive products, whether classed as warehouse distributors or under some other name,

and all were then testifying under the impression that the complaint in this proceeding endangered, not only those preferential set-ups, but also their ability to buy at jobber prices from respondent or its warehouse distributor. One of them, in fact, testified that 50% of his total purchases were on such preferential set-up, and that 80% of his sales were as a jobber. This direct interest in the outcome of this proceeding compels the giving of less weight to their testimony than if it were wholly objective. In addition, all stated that cost of product acquisition was the most important factor in their profit margin,¹⁰ and one insisted he was entitled to the same price as respondent's warehouse distributor from whom he bought, although he did not know exactly what that net price was. And another stated he would be much better off profitwise if he were able to buy at the same price as the warehouse distributor. All of them, in testifying that the competition of the warehouse distributor did not injure them, explained that that was because the former did not cut respondent's suggested resale prices.¹¹ The record as a whole shows that the latter were universally adhered to, voluntarily, at all levels of distribution.

25. This brings up the contention of respondent's counsel that where preferential discounts are not used by the recipient to cut prices on resale, there can be no competitive injury—a contention which has been expressly rejected by the Supreme Court in *Corn Products Refining Co. vs. F. T. C.*, 324 U. S. 726 at 742:

"It was stipulated and the Commission found, that the allowances in question were 'sufficient,' in and when reflected in whole or substantial part in resale prices, to attract business to the favored purchasers away from their competitors, 'or to force competitors to resell * * * at a substantially reduced profit, or to refrain from reselling.' But, it is asserted here, that there is no evidence that the allowances ever were reflected in the purchasers' resale prices. This argument loses sight of the statutory command * * *. We think it was permissible for the Commission to infer that these discriminatory allowances were a substantial threat to competition."

Furthermore, price is but one competitive weapon—there are other

¹⁰ While a number of respondent's customers testified that respondent's unique method of packaging brass fittings in transparent cellophane bags, a given number to each bag, made display, handling, inventory, checking and sales much easier and was an important influence on buying from respondent rather than from its competitors, the evidence is practically unanimous that cost of product acquisition is still the most important factor in profit margin.

¹¹ This "*idée fixe*" that competition is fair, has not been and cannot be injured if discounts are not used to cut resale prices, characterizes all of respondent's defense and the evidence in support thereof.

forms of competition, such as additional service to customers, greater and more varied stocking, branch houses, additional salesmen, the institution or expansion of which depends directly on operating profit margin, a major factor in which, on this record, is cost of merchandise purchased.

26. In connection also with the "Incipency doctrine"¹² in evaluating the conflicting testimony as to competitive effect on the secondary and lower levels, there must be considered a possible change in economic cycle, from the inflationary to the deflationary, from the "seller's market" to the "Buyer's market." Seller's pricing practices are a matter of less import in the seller's market, but where the buyer's profit margin is so perilously thin and so directly affected as the unanimous evidence in this record shows, any change in the national economic picture to where the dollar hardens, orders shrink, inventories become a fear instead of a boast, the preferential discounts present here necessarily must loom larger and more important to the non-recipients.

27. While it may be true that the larger a jobber becomes in sales volume, the more his overhead increases and the lower his percentage profit per dollar of sales becomes, and that some jobbers voluntarily cease expanding after reaching what they consider a breaking point in their particular operation, the statutory command and its legislative intent are obviously equality of opportunity, at the seller-buyer level—what the buyer does with that opportunity thereafter is no concern of present law, and therefore is immaterial.

28. Lastly, the testimony of three of more than 3,000 jobbers, that they have grown and prospered in spite of a competitive price disadvantage, does not, to the Hearing Examiner, outweigh a basic economic factor present throughout the entire jobbing line (3,000 or more here), namely, the extremely narrow profit margin and its immediate sensitivity to cost of product acquisition. The latter is an objective fact, the former subjective. The latter may well have been influenced by the fact that these three jobber witnesses were receiving preferential price treatment on other lines of automotive products. To illustrate by analogy: if an objective test for malnutrition reveals that malnutrition exists in a large segment of population, such as all the inhabitants of a town, country, or other area, the assertion of good health and general euphoria by several such inhabitants cannot overcome the objective determination.

¹² Kelley: Functional Discounts Under the Robinson-Patman Act, 40 Calif. Law Review 526, at 533.

29. Another line of evidence introduced by respondent, based on United States census figures, shows that the number of wholesalers of automotive parts, accessories, tires and equipment increased from 6,982 in 1939 to 12,423 in 1948, and that their aggregate sales similarly increased from 611 million in 1939 to 2,641 million in 1948. This, it is contended, shows that competition and business in the wholesale line has increased instead of substantially lessening. But the cause thereof is not shown. It is just as reasonable to infer that this overall growth was due to increase in automotive registrations, to the war, when replacement parts were frequently not up to demand, or to the inflationary forces at work during the years in question, as to infer, as contended, that it was due to respondent's pricing system and those of its competitors. Furthermore, this is an overall picture, including the myriad products not sold by respondent, and stasis or retrogression in brass fittings, hydraulic brake parts, and battery testers, might easily be over-compensated by pronounced expansion in ignition points, valves, brake linings or tires and tubes.

30. Also in the record is a table for 1948, compiled from United States census figures, as follows:

	Number of estab- lishments	Sales en- tire year \$1,000	Number of estab- lishments percent of total	Business percent of total
Automotive parts—accessories total.....	10,959	2,283,686	-----	-----
5 Million and over.....	11	146,612	0.102	6.41
2 to 5 million.....	68	210,841	.62	9.23
1 to 2 million.....	190	255,087	1.733	11.17
One-half to 1 million.....	573	386,998	5.22	16.92
300,000 to 500,000.....	941	355,709	8.59	15.58
200,000 to 300,000.....	1,134	275,749	10.34	12.08
100,000 to 200,000.....	2,778	392,547	25.35	17.19
50,000 to 100,000.....	2,598	187,171	23.65	8.28
Under 50,000.....	2,666	70,972	24.35	3.1

This shows that nearly half of the wholesalers in 1948 were small-sized jobbers (those doing an annual volume of \$100,000 or less), from which it is contended that commercial life and profit among the unfavored price-wise must be healthy, or there would not be so many of them. But there is no such necessary causal relationship. There are degrees of injury, substantial or otherwise, which, while hurting, may not kill, and there is nothing in the record to show how these 48% of small jobbers were faring in 1948—whether they were healthy or moribund commercially, whether there were other more than compensating factors in their operation, which overcame price discriminations against them by this respondent or by other suppliers.

Furthermore, respondent sells only 3 of the many lines of automotive products involved. It will also be noted that the 48% of wholesalers did only 11.38% of the sales volume.

31. On the issue of competitive effect, the *Minneapolis-Honeywell Regulator Company* case, 191 F. 2d 786, is strongly relied on by counsel for respondent as dispositive of that issue in the negative. There is, however, a basic factual difference between this proceeding and that. Here we have a product bought for resale as is; there the product purchased became a part of an assembled final product, and the Court found no causal relationship between the cost of the one and the price of the other, saying,

"It may be true that if the manufacturers were generally selling controls as such, a differential of two or three dollars in the price they paid for them would have a substantial effect on the price obtained. Under such circumstances a finding that a competitive advantage in purchase price paid would necessarily give rise to a competitive advantage in sale price would perhaps be justified."

There is also, running through the opinion, a philosophy that unless a price advantage is used to lower the resale price and attract business thereby away from non-favored competitors, no competitive injury can result—a theory which seems, to this Hearing Examiner, directly contrary to the opinions in the *Morton Salt* case and the *Corn Products Refining Co.* case, *supra*.

32. The conclusion and finding is that respondent's preferential warehousing and quantity discounts, ranging from 5% to 20% as described in paragraphs 4, 5 and 6, are discriminatory in that it is "reasonably probable" as well as "reasonably possible" that they substantially lessen competition at the secondary level, and injure, destroy or prevent competition at that level. No other conclusion is possible, unless the *Morton Salt* case is to be ignored. The degree of control exercised by the respondent over its jobbers, by calling on them through salesmen, selling to them directly, by missionary work with them, etc., as appears above, was such as to constitute them purchasers even when they bought through a warehouse distributor.¹³

33. As for "tendency to create a monopoly," the doctrinaire approach regards this as an inevitable *sequitur* of any substantial lessening of competition. However, in the setting of this case, the Hearing Examiner construes this phrase to mean that the probable result of the discriminatory pricing practice found will be such a concentration of economic power in the price-favored as will enable them to affect

¹³ *Champion Spark Plug Co.*, D. 3977; *Elizabeth Arden v. F. T. C.*, 156 F. 2d 123, 135; *Kraft Phenix Cheese Corp.*, 25 F. T. C. 537; *Luxor Ltd.*, 31 F. T. C. 658.

substantially the market in which they sell, if not to dominate and dictate the commercial acts of the unfavored. The record here fails to establish this. The challenged pricing practices have been followed for a substantial number of years, but there is no substantial evidence of such concentration in the price-favored at the secondary level.

34. As to competitive injury at the primary level—that is, respondent and its competitors—the record is somewhat less than fragmentary. It does appear that in one instance, when respondent artificially classified a newly formed buying group as a warehouse distributor and extended its 20% warehouse discount, one or two jobber members, formerly buying from other sources than respondent as unaffiliated jobbers, began thereafter to buy through the group from respondent. But there is evidence that others did not, and that other group members have switched from respondent to other sources of supply. Whether the preferential discount had any causal connection is not shown. On the contrary, the record shows that respondent's two principal competitors have similar price-preference set-ups, and that any switching of suppliers has been general among the three. Also, the record shows that respondent ranks below these two and one other competitor in size, and that its rate of growth has not been as high as the remainder of the industry. Respondent's true share of the market is not shown. Respondent claims this to be only .07% on the basis of national sales volume of all automotive products being \$2,283,686,000, and respondent's sales volume being only \$1,600,000. But respondent does not compete except on the three lines which it sells, and there are no figures in the record to show national sales volume on these products. At least one of respondent's competitors did not start in business until 1946, but has grown steadily since then. The finding is, therefore, that there is no substantial evidence of a tendency toward monopoly in any line, and no substantial evidence of a substantial lessening of competition or of injury, destruction or prevention of competition between respondent and its competitors.

35. Respondent, while denying the competitive effects charged to result from its admitted price differentials and those just above found to exist, asserts by answer that, if so found, they were made in good faith to meet the equally low prices of competitors within the meaning of Section 2 (b) of the Clayton Act, and are therefore justified.¹⁴ In support thereof, it has named thirty-two of its competitors, and introduced the 1949 price lists of twelve thereof. Of these, the testi-

¹⁴ This defense is confined largely to respondent's brass line. It contends that its glass line is so unique that competition plays no part in determining price or discount.

mony is unequivocal that respondent regards the Weatherhead Company and the Imperial Brass Mfg. Company as its principal and only really important competitors, because they both sell nation-wide, and sell full lines, as does respondent. Respondent's other competitors are fringe fighters, so to speak, operating in a few localities, offering for sale only the fast-moving and high-profit items in brass, and while they do offer stiff competition in certain limited areas and on certain items, and some of them have taken business away from respondent, the latter has generally refused to meet their quotations. None of this group have a warehouse discount such as respondent's; most of them sell on a net price basis, and of those who do give quantity discounts, the latter are not set out in detail, or, with one or two exceptions, are not comparable in either percentage or quantity with those of respondent.¹⁵ A comparison of respondent's jobber price (disregarding any of the discounts under attack in this proceeding) with the net price of seven of these competitors for the same brass fitting shows the latter to be generally lower than respondent's. But, as stated, this does not reveal a true comparison because it ignores respondent's special discounts.

36. Much of respondent's testimony has to do with the important missionary and distributive service which respondent's warehouse distributors perform in reselling to jobbers, probably offered as a justification for their 20% warehouse discount, but this evidence is immaterial here, because that discount is not under attack herein when given on products resold to jobbers. It is unquestioned on this record that none of these services are performed by the warehouse distributor when it resells to dealers in competition with its jobber customers.

37. A substantial portion of the remaining testimony, largely from three of respondent's salesmen, indicates that respondent is in keen and even bitter competition with both Weatherhead and Imperial nationally; that in 1949 Weatherhead's net prices, after all discounts, were generally higher than respondent's for the same items; that Imperial's were about the same, on some items being higher, on others being lower. It is obvious, of course, that no seller can exactly meet the differing prices of two or more competitors, and respondent did not attempt to do so. Its attempt herein was apparently to fix its prices on a level where it could retain most of its business, and would be enabled to obtain more.

¹⁵ An equally low price of a competitor means for the same quantity (*F. T. C. v. Standard Brands*, 189 Fed. 510).

38. Counsel for the complaint contend that this affirmative defense does not comply with the statute (Section 2 (b)) for a number of reasons:

1. That under the *Staley* decision¹⁶ the price "made in good faith to meet an equally low price of a competitor" means meeting a special price of an individual competitor in a given locality and not a generalized effort to "remain competitive," exactly meeting nothing;

2. That under the *Standard Oil* decision¹⁷ respondent has failed to show that the competitive prices it claimed to have met were, in addition to being equally low, lawful as well;

3. That respondent's officials, as reasonably prudent business men, knew or should have known that competitors' discounts or resultant prices were discriminatory and unlawful.

39. Before discussion and disposition of these contentions, some background must be related. When respondent rested its defense, counsel in support of the complaint moved to strike out all evidence tending to support the affirmative defense, on several grounds, one of which was respondent's failure to introduce any evidence showing that competitors' prices, claimed to have been met, were lawful and non-discriminatory prices, a failure which respondent's counsel admitted. On this ground, the Hearing Examiner granted the motion, which ruling was appealed interlocutorily by respondent, and about a year later reversed by the Commission, but without cited reasons. At the same time, the Commission granted a subsequently-filed motion to reopen the case for the purpose of taking testimony intended to show that respondent neither knew, nor should have known, that the prices of its competitors which it met were unlawful, and that the respondent acted as would a reasonable and prudent business man. This evidence was taken. These Commission rulings do not state that the "lawfulness" essential of the *Standard Oil* case is required or is not required to be shown. Nor do they state that if respondent did not know, or, as a reasonably prudent business man, should not have known them to be unlawful, such constituted a defense. The Hearing Examiner construes them to mean that lawfulness of competitors' prices is not, *per se*, an indispensable prerequisite to establishing a defense under Section 2 (b); that it will be sufficient, whether lawful or unlawful, if respondent did not know their legal status, or should not have known it. The Hearing Examiner cannot assume that the

¹⁶ 324 U. S. 746 at 752. "But Section 2 (b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers * * * The Act thus places emphasis on individual competitive situations, rather than on a general system of competition."

¹⁷ 340 U. S. 231.

Commission would do a futile thing—order evidence taken on its new and different standard of knowledge, actual or imputed, if such evidence did not, with other requirements, constitute a defense.

40. Taking up the contentions of counsel in support of the complaint in reverse order, the Hearing Examiner finds against the third. Proponent counsel argue that respondent's officials, as reasonably prudent men, knew, or should have known, that Imperial's volume discount was unlawful and discriminatory, because they knew that respondent's was; that respondent admittedly had no cost justification therefor; that they knew Imperial's cost for material, labor and sales, although not its overhead, and that these were approximately the same as respondent's; that Imperial is located in the same city as respondent and has roughly the same type of distribution; that they knew of no cost justification by Imperial for the latter's cumulative volume discount; and that such a volume discount cannot be justified in any event. To say that Respondent, in 1949, knew its own discounts to be unlawful, when complaint herein was not issued until a year later, and respondent is still contending its discounts to be lawful, and then to build on this basic fallacy the argument that it must therefore have known that a competitor with partially parallel costs must be charging similarly unlawful prices, not cost-justified because respondent's were not, is to pile inference upon inference. This contention is rejected.

41. The second contention, that respondent must show the substantive legality of every competitive price it claims to have met, highlights the administrative confusion and enforcement futility which such a rigid test would cause. Manifestly very few, if any, respondents could finance the undertaking of showing that every competitive price schedule was lawful in all respects. Contrariwise, the Commission could hardly prove that each such price was unlawful. No matter where the burden lay, its assumption would involve trying many cases instead of one; records would be gargantuan, and clarity wellnigh impossible. Perhaps it was this dilemma which induced the Commission to modify such a substantive and rigid test, to the one of what the respondent knew, or should have known, as a reasonably prudent man, of the legality of its competitors' price structure. Respondent's principal officials all testified that they had no reason to suspect illegality in their competitors' pricing practices; that quantity, cumulative volume, and warehousing discounts had long obtained, and, in fact, were traditional with the industry; and that they knew of no legal challenges thereto, either private or governmental, until the instant proceeding was brought against respondent.

ent. There is nothing in the record to indicate otherwise—nothing substantial to indicate that they knew, or should have known—their competitors' prices were illegal. The second contention is accordingly rejected.

42. The first contention, that respondent has not met the Staley decision test, is sustained. Respondent admittedly did not exactly meet the different prices of its two principal competitors, nor those of any other competitor. Obviously it could not. This the Staley case holds respondent must do. Respondent's warehousing discount, under attack here, is the 20% on those products bought and resold, not as a warehouseman, but as a jobber to a dealer, in competition with the jobbers who purchase from the warehouseman. Both of respondent's principal competitors, Weatherhead and Imperial, allow a comparable discount only on products bought and resold as a warehouseman. Hence there was no discount of competitors for respondent to meet. Furthermore, a comparison of net prices of respondent and Imperial on the same 332 brass fittings discloses respondent's prices to be lower on 217, higher on 7, and identical on 109.¹⁸ A similar net price comparison on 285 comparable items between respondent and Weatherhead discloses that respondent's price was lower on 260, higher on 6, and identical on 19 items.¹⁹ There is here no "meeting of the equally low price" of its competitor. The statute does not permit undercutting, prevalent here; it permits only a meeting, incidental here. The same is generally true of respondent's quantity discounts. Weatherhead grants no quantity discount. Imperial grants a cumulative volume discount, whereas respondent's is not cumulative, but only on a single order. Imperial's volume discount goes from 3% to 14%; respondent's, from 5% to 15%. Furthermore, of 175 of respondent's customers located in 80 cities and 12 states, according to their annual purchase volume, none could have qualified for Imperial's volume discount of 10% or more, and only 14 could have obtained Imperial's 5% discount.

43. Respondent's pricing system is a continuing one, related, not to existing competition, but to future competition; not geared to individual competitive offers or localized price-cutting; but is a nation-wide system designed to come close enough to the pricing systems of its two principal competitors to allow it to retain most of its customers, and perhaps gain a few more. This is condemned as defensively ineffective by the Staley case, where there was at least an exact meeting, not present here. The finding is, therefore, that respondent has not, in

¹⁸ See Proposed Findings of counsel in support of the complaint, Appendix A.

¹⁹ Appendix B of Proposed Findings by counsel in support of the complaint.

good faith, met the equally low, whether lawful or not, price of its competitors.

44. Respondent contends that the *Staley* case decision, applied here, will eventuate in making Section 2 (b) a dead letter to any respondent such as this one, which entered albeit feebly at first, into an industry, all of whose then powerful members sold on the same or similar pricing system, i. e., quantity, volume and distributive (warehouse) discounts, and which respondent contends, even today, it cannot do otherwise without commercial death or moribundity, and which cannot exactly meet all of the equally low prices of various competitors. Respondent contends, therefore, for a re-assessment or re-interpretation of Section 2 (b) in the light of its economic position, with a view of either limiting the *Staley* decision, differentiating it from the instant case, or creating an exception to its application here. If such is to come, it must come from above. The Hearing Examiner has not received any judicial accolade of expertise, either personal or categorical, which gives him this freedom. Unable to differentiate the basic facts in that case from those in this proceeding, he is bound to follow the holding in that case.

45. The above opinion and findings are based on a consideration of the entire record in the case, the testimony and exhibits filed with the Commission, the pleadings, briefs, proposed findings and conclusions submitted by all counsel.

46. It is concluded that respondent has violated the provisions of Section 2 (a) of the Clayton Act as amended (15 U. S. C. 13).

ORDER

It is ordered, That respondent E. Edelman & Company, a corporation,²⁰ and its officers, representatives, agents and employees directly or through any corporate or other device, in or in connection with the sale of automotive products in commerce, as "commerce" is defined in the Clayton Act as amended, do forthwith cease and desist from discriminating, directly or indirectly, in the price of said automotive products of like grade and quality, by selling to any direct or indirect purchaser at net prices higher than the net prices charged any other purchaser, direct or indirect, competing in fact in the resale and distribution of said products.

²⁰ The phrase "officers, representatives, agents and employees" is omitted on the authority of *R. J. Reynolds Tobacco Co. v. F. T. C.*, 192 F. 2d 535, 540-4, which case the Hearing Examiner regards as apposite and binding on himself and the Commission.

OPINION OF THE COMMISSION

By SECRET, Commissioner:

The initial decision filed by the hearing examiner held that respondent had discriminated in price among purchasers of its automotive parts and equipment in violation of Section 2 (a) of the Clayton Act, as amended. The order contained in the initial decision directs the respondent to cease and desist from discriminating in price in connection with the sale of its products in commerce for replacement purposes by selling to any direct or indirect purchaser at net prices higher than the net prices charged any other purchasers, direct or indirect, competing in fact in the resale and distribution of such merchandise. Counsel for the respondent and counsel supporting the complaint have filed separate appeals from that decision. In its appeal, the respondent contends that the rulings that respondent's pricing practices have been in violation of law are erroneous in their entirety. The appeal of counsel supporting the complaint is limited in scope and urges that the decision below should have ruled that certain evidence presented by the respondent in the course of its defense was legally insufficient for reasons additional to those stated in the initial decision.

Located in Chicago, the respondent manufactures and nationally distributes three classes of automotive products and equipment which have been referred to throughout the course of the proceedings below as its brass, glass, and brake lines. Its merchandise consists of certain automotive replacement parts testing equipment and tools, and, except for such products as are sold to oil companies and other private brand and industrial accounts, its products reach the garages, repair shops, gasoline stations, and other retail dealers through 3500 to 4000 purchasers buying for resale into those channels. Respondent's purchasers are automotive parts jobbers or wholesalers and, in addition to respondent's equipment, they handle a large number of other articles likewise required for the maintenance and operation of automobiles.

Since sometime prior to the middle of 1949, jobbers acquiring respondent's equipment for resale purchased on the basis of a distributor's net price. The price differentials which were found in the initial decision to constitute unlawful discriminations were those under which a discount of 20% from the distributor's net price was allowed on purchases of respondent's brass line and 15% on purchases of respondent's glass and brake lines, these being accorded to approximately 40 jobber customers who were buying under the terms of a warehouse distributor's contract. The foregoing wholesale distributor's discounts from the jobber's price were likewise ex-

tended by respondent to six cooperative buying groups on their purchases. The other price differentiations held discriminatory and unlawful in the initial decision were those incident to a quantity discount schedule providing for discounts to jobbers of 5%, 10% and 15%, offered in the price lists on single orders for brass fittings totaling \$7,500, \$15,000 and \$25,000; and those incident to a discount of 15% on single orders totaling \$15,000 on assorted flexible lines shipped to one destination at one time.

With the approximately 40 customers classified by respondent as warehouse distributors and receiving its warehouse distributor discounts, the respondent enters into a uniform contract whereby they agree to carry at all times a substantial minimal stock as prescribed in the contract. The warehouse distributors further agree, among other things, to aggressively promote the sale of the manufacturer's merchandise, to distribute respondent's catalogues to jobbers, and to use their best efforts to train jobbers' salesmen. Jobbers have their choice of purchasing from respondent directly or may purchase from a warehouse distributor and, in either case, pay the respondent's distributor's net price unless eligible for receipt of quantity or volume discounts. Unchallenged, in these connections, is the holding below that the relations and contacts maintained by respondent with jobbers purchasing its merchandise through warehouse distributors have been such as to constitute such jobbers as "purchasers" within the meaning of the Act.

Purchasers buying under the warehouse distributor's contract sell respondent's merchandise not only to jobbers, but also to garages, filling stations and other outlets at respondent's suggested dealer's price in direct competition with other jobbers marketing the Edelmänn merchandise into these channels. No challenge was directed in the proceeding below to the warehouse distributors' discount on products resold to jobbers. Challenged, however, as discriminatory were respondent's sales of merchandise at lower prices to warehousemen when such merchandise was sold in competition with jobbers who did not receive the greater discounts.

That the respondent has sold its merchandise in commerce at lower prices reflecting the previously described warehouse distributor's discounts and certain of the quantity discounts to purchasers who were competing in the resale of respondent's products with other purchasers paying higher prices for respondent's merchandise is undisputed. The initial decision found that there was reasonable probability that respondent's pricing practices substantially lessened competition at the secondary level; that is, among purchasers compet-

ing in the resale of respondent's line of merchandise, and that the effect of respondent's discriminations may be to injure, destroy or prevent competition between purchasers receiving the benefits of the discriminations and those to whom they were not accorded. This holding is excepted to by the respondent as are various related conclusions of fact and law cited as reasons for its adoption.

All purchasers of respondent's merchandise, whether direct or indirect, have been offered a cash discount of 2%—10 days, and the record shows that jobbers invariably avail themselves of this cash discount. During the course of the proceedings below, certain of the witnesses testified that their margins of net profit were small and that failure on their part to take advantage of this cash discount would seriously impair or wipe out their profit margins. Additionally, witnesses testified generally that the cost of product acquisition was the most important factor in determining their profit margin. On this and other bases the hearing examiner correctly found that respondent's discounts ranging from 5% to 20% contribute directly and powerfully to recipient jobbers' ability to compete in the resale of respondent's merchandise.²¹

In urging that we conclude instead that the differences in profit derived by competing purchasers are small or infinitesimal and can only have negligible competitive effects, respondent states that the net amounts returned to members of cooperative buying groups after the expenses of the central buying offices are deducted are inconsequential and therefore that the matter is legally disposable under the maxim *de minimis non curat lex*. Documentary evidence contained in the record relating to one buying group indicates, however, that in 1949 it returned to members approximately 85% of the rebates received by it from manufacturers on member purchasers. In that year the volume discounts or other rebates accorded by the respondent to the 18 members of the group in the aggregate exceeded \$7,500.

On this point too, the respondent cites the testimony, among others, of a St. Louis jobber receiving its warehouse distributor discounts. This warehouse jobber reported that his net profit, after taxes, was 0.74% on sales and an analysis appears in the brief in support of contentions that this customer's favored position profitwise with com-

²¹ Testimony in the record on this point reveals that respondent's discounts were deemed essential by favored purchasers to their continued operation. One favored purchaser testified, in effect, that if his preferential discounts were discontinued it would necessitate a change in his prices, compel him to cut his forces in half, prevent him from adequately covering his territory and would result in his business being "45 percent smaller than it is at the present time". Unfavored purchasers testified that with additional discounts they could stock more items and generally compete more effectively with their favored counterparts.

peting jobbers might represent only \$3.00 annually. These matters notwithstanding, his gross margin on that portion of Edelmann products resold by him to dealers competitively with other jobbers would exceed by approximately \$1,000 the gross profit which could be derived by jobbers making similar aggregate sales from stocks acquired at respondent's regular distributor's net prices. That costs of product acquisition is an important factor in determining profit margins is obvious. These and other facts contained in the record²² preclude our adopting the view that only infinitesimal profit differences have resulted from respondent's price discrimination.

The additional circumstance that many of the articles included in the respondent's lines are slow moving and that volume of business on its products may be small in comparison to jobbers' volume on other types of automotive equipment does not mean that the lower prices afford only negligible competitive advantages and incentives for recipients. To secure his share of the business, a jobber of respondent's line must, as do his rivals, canvass the garages and other outlets for products in this category. That substantial sales expense attends the keen competition which exists in this and other respects is evidenced by the small net profit margins which prevail. Nor is the probability of competitive injury refuted by the circumstance that the record does not show that the lower profit margins resulting from respondent's higher prices to some of its customers may have, in instances, resulted in financial failure. There is less likelihood of the "commercial corpse" of bygone days in an era and in a market of virtual price uniformity at the retail level.²³ Even assuming a commercial corpus delicti, it would be sheer conjecture as to who caused the demise where, as here, dealers handle many lines of products and sometimes thousands of individual items. That Congress intended to protect a merchant from competitive injury attributable to discriminatory prices on any and all goods purchased by him irrespective of whether

²² Additional corroboration for views that substantial differences in gross profit and, presumably, net profit margins have attended the respondent's discriminations among competing purchasers is contained in an exhibit representing a sales analysis for the year 1949 relating to merchandise bought directly from the respondent by purchasers in specified markets in nine Southern States. In Charlotte, North Carolina, for example, where the respondent was selling to ten customers, only two received its preferential discounts. One of the these received \$138.40 on purchases of \$1,453, and the other received \$279.93 on purchases aggregating \$1,515.31. Among the local purchasers to whom discounts were denied, one purchased \$1,474.21 worth of respondent's products, another \$758.60 and a third, \$577.21. Of seven customers located in New Orleans, the respective purchases of two of the four customers who received no discounts were \$555.79 and \$639.91; but one of their competitors was accorded discounts of \$153.41 on purchases of \$830.46 and another \$165.28 on transactions totalling \$1,108.97.

²³ There is little evidence of retail price competition in the record due to respondent's jobbers' adherence to its suggested resale prices.

the particular merchandise involved constitutes a major or minor portion of his stock has already been decided.²⁴

This principle is nowise affected by the fact that respondent is not one of our country's largest producers of automotive parts or that the recipients of its discounts do not appear to be concerns of great size and resources engaged in distributing the products on a national basis. Additionally, respondent asserts that conclusions that only negligible competitive effects can stem from its pricing practices are corroborated by the fact that its volume of business accounts for only 0.07% of the total volume of business in the automotive replacement parts and equipment field. Evidence bearing on its relative position in the industry is material to a consideration of the effects of respondent's preferential discounts upon competing manufacturers and manifestly was considered in connection with the holding below that no showing was made of substantial lessening of competition between respondent and its competitors. Its relevance on that issue does not mean, however, that it is important as among its purchasers in evaluating respondent's pricing practices.

While there are two, perhaps three, other manufacturers of automotive brass fittings which exceed respondent in volume of business, the record clearly discloses that respondent's lines are well established in the automotive field. Furthermore, its volume of business is substantial. In 1949, the company's aggregate volume was \$1,600,000 and its products were handled, moreover, by almost 40% of the established automotive jobbers in this country. In these circumstances, respondent's relative position among manufacturers in the automotive replacement field is not controlling in appraising the probable competitive effects of its pricing practices upon its purchasers.

Respondent's products are customarily resold by purchasers at its suggested resale prices. On the authority of the Supreme Court's decision in *Corn Products Refining Company v. Federal Trade Commission*,²⁵ the hearing examiner properly rejected respondent's contention that, where preferential discounts are not used by recipients to cut prices on resale, competitive injury cannot be present. Stating

²⁴ *Federal Trade Commission v. Morton Salt Company*, 334 U. S. 37.

²⁵ 324 U. S. 726. The holding of the Court pertinent in this respect (742) reads: "But it is asserted that these discriminations did not violate paragraph 2 (a), since there was not the requisite effect on competition.

"It was stipulated, and the Commission found, that the allowances in question were 'sufficient' if and when reflected in whole or in substantial part in resale prices, to attract business to the favored purchasers away from their competitors, 'or to force [their] competitors to resell * * * at a substantially reduced profit, or to refrain from reselling.' But it is asserted that there is no evidence that the allowances ever were reflected in the purchasers' resale prices * * *. We think that it was permissible for the Commission to infer that these discriminatory allowances were a substantial threat to competition."

that price competition is but one competitive weapon, the initial decision points to other forms of competition which are commercially prevalent, including additional services to customers, greater and more varied stocks, more branch houses, and additional salesmen. Obviously, the institution or expansion of these services and facilities depends directly on operating profit margin as determined in major part by cost of acquisition of merchandise. As observed in the initial decision also, the preferential discounts would be even greater threats to the competitive positions of non-recipients in the event of marked adverse changes in the economic cycle. In our view, the examiner's findings in these regards have adequate support in the record and are otherwise in accord with the greater weight of the evidence.

Another contention advanced by respondent is that the hearing examiner erred in failing to find that the discounts given its wholesalers and others selling in competition with jobbers were justified for the reason that the extra discounts compensated them for promotional services performed. It is true that purchasers receiving larger discounts in instances have rendered bookkeeping service and other promotional services for jobbers and others and even on occasion loaned money to garage operators and service men to set them up as jobbers. These measures inured to the benefit of the affected customers and indirectly to respondent. It is clear, however, that the services performed by recipients of the discounts in the course of sales of their own merchandise to dealers did not justify the discounts. The hearing examiner, accordingly, did not err in failing to adopt the respondent's suggested finding.

Nor did he err in declining to find expressly that substantial savings are afforded to the respondent when selling to unincorporated buying groups, even though certain testimony indicates that these groups afford their members merchandising aid in selling respondent's products. Had the respondent undertaken to present competent evidence, including cost data, directed to showing that the discounts to the favored customers were justified by savings in the cost of sale, delivery or manufacture resulting from the different methods or quantities in which its products were to those purchasers delivered or sold, the matters to which the suggested finding relates would have been relevant and material. There was no such undertaking by the respondent, however, and the rejection of this finding was proper.

We turn now to consideration of respondent's contentions that the hearing examiner erred in failing to find that respondent's price dif-

ferentials were made in good faith to meet the equally low price of a competitor.²⁶

Although there are various concerns selling limited lines of parts which at times are highly competitive with the respondent in certain areas, the Weatherhead Company and Imperial Brass Manufacturing Company are respondent's only major competitors selling brass on a national basis. Their competition with the respondent is keen and respondent apparently gave consideration to their prices when formulating its own. On the brass line, the evidence shows that respondent's net prices, after discounts, were generally lower than those of these two companies although there were items on which the reverse prevailed and also a considerable number of instances of virtual price identity, particularly as between the respondent and Imperial.

Respondent objects to the finding in the initial decision that these two national competitors allow discounts to warehousemen only on products bought and resold by their purchasers as warehousemen, hence, that no discount could exist for respondent to meet since its discounts found discriminatory were those given to warehousemen as jobbers selling in competition with other jobbers. We believe that the hearing examiner's findings in this and the related findings with reference to the price disparity existing between respondent's products and those of its competitors were essentially correct and that the matters cited by the respondent in the foregoing and related connections do not materially affect the soundness of the hearing examiner's analysis of the pricing situation which existed.

In its pricing practices respondent obviously did not exactly meet the prices of its two principal competitors nor, insofar as this record shows, of any other competitor, and it is evident that respondent's over-all pattern of pricing embraced departures from the systems of all its major competitors. Furthermore, as found in the initial decision, respondent's pricing system is a continuing one related not to existing competition but to future competition. It is not geared to individual competitive offers or localized price cutting, but instead represents a nationwide system designed to come close enough to its two principal competitors' pricing systems to allow it to retain most of its customers and gain perhaps a few more. The exemption provided under Section 2 (b) places emphasis, however, on individual competitive situations rather than upon a general system of competi-

²⁶ Price discriminations prohibited by Section 2 (a) of the Clayton Act are nevertheless justifiable by virtue of Section 2 (b) which declares that nothing in the Act "shall prevent a seller rebutting the prima facie case thus made by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor * * *."

tion. *F. T. C. v. A. E. Staley Mfg. Co.*, 324 U. S. 746. The respondent also contends, in effect, that under the Act and applicable decisions of the courts, a nationwide system of formulating prices to meet competition generally should be regarded as outside the purview of Section 2 (b) only if the prices of the competitor or competitors theretofore being met were shown to be a part of an illegal pricing system. No sound legal precedent supports respondent's position in that regard, and we, as did the hearing examiner, reject this view. The instant proceeding, moreover, does not present a situation in which the price of a competitor or competitors was being met inasmuch as the respondent's prices were generally lower than those of its major competitors.

Respondent also contends that preferential discounts constitute unlawful price differentiations only if shown to be tainted by a purpose of unreasonably restraining trade or attempting to destroy competition, and that its defense shows its pricing practices were not so tainted inasmuch as they were based on a desire to meet competitors' prices on a nationwide basis. If any of the adverse competitive effects which are proscribed are present, however, a seller may violate the Act without guilty knowledge or intent and an intent to injure or destroy competition is not a necessary element under its provisions. In the circumstances here, we share the hearing examiner's views that respondent has not sustained the burden imposed under Section 2 (b) of the Act of showing that its lower prices were made "to meet an equally low price of a competitor."

A graph appearing in the initial decision states that the respondent's discount pattern on some merchandise contemplates sales by jobbers and others to retail dealers at approximately 60% "off" list. This was manifestly inadvertent and, as asserted by the respondent in objecting thereto, dealers pay approximately 60% of list for the brass and flexible tube lines and buy the glass line at 33 $\frac{1}{3}$ % off consumer list. Respondent's exceptions in this regard should be deemed granted. Our consideration of the other specific exceptions interposed by the respondent to various findings as to the facts and conclusions contained in the initial decision convinces us that the determinations objected to are free from prejudicial error; and similarly without merit are the respondent's contentions that the hearing examiner erred in failing to adopt certain of its suggested findings and conclusions to which additional specific exceptions relate.

We turn now to respondent's contentions of error in connection with three of the hearing examiner's rulings excluding certain evidence offered by the respondent. Under the first of such rulings, the hearing

examiner refused to permit respondent to introduce testimony which was intended to show that if respondent were unable (1) to give discounts to wholesale distributors and buying groups additional to those granted to its jobbers, and (2) to give special discounts to jobbers, it would experience a substantial loss of business unless respondent's competitors were precluded from affording lower prices to purchasers in those connections. We think this testimony was properly excluded by the hearing examiner as irrelevant and immaterial to the issues of this proceeding. There is no valid reason, as argued by respondent under the appeal, for making the hearing examiner's order inoperative until all of respondent's competitors are put under similar restraints. To advance the argument is to answer it—obviously this Commission could not function under such restrictive and unwieldy procedures. Orders would be forever pending, and unlawful industry practices rarely, if ever, corrected. Furthermore, implicit in respondent's position on this score, is the erroneous assumption that the respondent could be validly forbidden under the order from, among other things, granting discounts in connection with the sale of its merchandise actually redistributed by its wholesalers to jobbers. The order does not go this far.

The second challenged exclusionary ruling has as its basis the hearing examiner's refusal to receive evidence relating to surveys of the automotive replacement wholesaling business conducted by certain national associations. Among these proffered matters was evidence tending to show that the average percentages of cost of doing business represented by cost of merchandise for the firms reporting was 67.159% for wholesalers doing an annual business of less than \$250,000, 68.41% for those in volume brackets between that and a half-million dollars annually, and 70.95% for wholesalers with annual volume exceeding \$500,000. The surveys also purported to show that net profits, after taxes, for the reporting members of the foregoing groups, were 8.6%, 5.79% and 3.06% respectively, and respondent urges that these and other matters included in the surveys show that the respondent's pricing practices have neither resulted in competitive injury nor tended to create a monopoly in purchasers receiving the benefits of respondent's discrimination.

In his memorandum which ruled on these matters, the hearing examiner set forth reasons and basis for his conclusions that such evidence was hearsay and was not shown to be reliable, probative and substantial. He held that the statutory requirement for cross examination could not possibly be met without the production of the original returns, unrestricted as to the names and addresses from which the

surveys were made up and the people who made them up, as witnesses, so that a "full and true disclosure of the facts," methods used, validity of results obtained, representative character, etc. could be had to determine the "reliability, probative value and substantiality" required by statute. The circumstance that Section 7 (c) of the Administrative Procedure Act provides that any oral or documentary evidence may be received and that administrative agencies shall, as a matter of policy, provide for the exclusion of irrelevant and unduly repetitious evidence does not mean that it is mandatory that all documentary and oral evidence other than that in the irrelevant and unduly repetitious categories be received. Moreover, the materiality of these industry studies as a basis for evaluating the effects of the respondent's individual pricing practices between and among its competing customers is not shown. Everything considered, the matters urged by the respondent in support of this aspect of its appeal do not support conclusions that the ruling below was unduly restrictive or prejudicial or represented an improper exercise of the discretion which the Commission vests in its hearing examiners. Respondent's exception is accordingly denied.

Under respondent's third offer of proof were respondent's analyses of certain census data which assertedly showed, among other things, that a greater portion of available purchaser dollars was obtained by "small" automotive equipment wholesalers than was obtained by "small" wholesalers throughout other industries. We have reviewed these matters and must reject respondent's contentions that their exclusion was prejudicial or erroneous. As held by the hearing examiner, these proffered matters were not material to the issues of this case.

Respondent excepts also to the form of the order to cease and desist contained in the initial decision, contending in this connection that such order contravenes the Commission's directions to its hearing examiners calling for specificity in drafting of prohibitions, and that it exceeds the scope of the statute. The order necessarily deals with matters in the general sphere of competitive pricing matters and its provisions are reasonably related to the unlawful general course of conduct found to have been engaged in by the respondent. The order's scope, accordingly, cannot be regarded as exceeding the bounds of the statute and we are of the view also that its provisions are sufficiently specific. These exceptions by the respondent to the order, therefore, are not being granted.

Rather than too broad in application, we think instead that the order is unduly restrictive in two respects. Under the terms of its preamble, the order's succeeding proscriptions are directed to discriminations

between competing purchasers made in connection with the sale in commerce of the respondent's automotive products "for replacement purposes." In the initial decision, however, additionally found to constitute unlawful discriminations, were certain price differences resulting from the respondent's discounts among and between competing wholesalers on purchases of its testing equipment and the effect of the quoted phrase may be to exclude inadvertently the latter category of discriminations from the application of the order. Its modification by striking the phrase "for replacement purposes" is, therefore, warranted. The Commission's orders to cease and desist naming corporations as parties customarily are directed also to their respective "officers, representatives, agents and employees." The hearing examiner expressed the opinion that the latter's inclusion would be legally invalid here. His conclusion in that regard was erroneous, however,²⁷ and the phrase was improperly excluded.²⁸ Modification of the order in this respect is likewise warranted.

We turn now to the appeal of counsel supporting the complaint. As previously noted, the hearing examiner held that the respondent's pricing practices essentially represented a continuing discriminatory pricing system under which its lower prices were not equally low but generally lower than major competitors' prices. Citing the *Staley case and holding*, in effect, that the status of such competitors' prices as lawful or unlawful was immaterial, he ruled that the respondent's lower prices did not represent ones made to meet an equally low price or prices of a competitor or competitors within the meaning of the statute. The appeal of counsel supporting the complaint contends that the hearing examiner erred (1) in declining to hold the defense additionally insufficient because no affirmative showing was made in the course of presenting the defense that the competitive prices claimed by the respondent to have been met were, in fact, lawful prices, and (2) in ruling that the record does not support conclusions that the respondent knew or should have known that the lower prices of its rival were illegal. Counsel supporting the complaint interprets the examiner's position on these matters to be that the respondent has successfully carried the burden contemplated under Section 2 (b) of offering necessary proof relative to the lawfulness of the competitive prices upon which respondent's pricing system was patterned. Inasmuch as the defense was held insufficient on the other ground referred to above, decision on the appeal of counsel supporting the complaint

²⁷ *Anchor Serum Co. v. F. T. C.*, 217 F. 2d 867 (C. A. 7, 1954).

²⁸ In the matter of *Hato Company, Inc., et al.* Docket No. 5807 (Decided Oct. 6, 1952).

is not necessary to a determination of the merits of the instant proceeding.

We accordingly are denying the appeal of counsel supporting the complaint, and are granting the respondent's appeal in the respect hereinbefore noted, but such appeal is otherwise denied. With the order to cease and desist modified in the manner previously discussed, the initial decision is affirmed.

Chairman Howrey filed a separate concurring opinion.²⁹

FINAL ORDER

Counsel supporting the complaint and respondent E. Edelmänn & Company, having respectively filed on May 28, 1954, and June 1, 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 appeal of counsel supporting the complaint and granting in part and denying in part the appeal of respondent and affirming the initial decision as modified:

It is ordered, That the order contained in the initial decision be, and it hereby is, modified (1) by adding the words "and its officers, representatives, agents and employees" immediately following the words "E. Edelmänn & Company, a corporation," and (2) by striking from such order the words "for replacement purposes".

It is further ordered, That the respondent E. Edelmänn & Company 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 the initial decision as modified:

A separate concurring opinion will be filed by Chairman Howrey.

²⁹ See p. 951 of the Moog case.

IN THE MATTER OF
STANDARD SEWING EQUIPMENT CORPORATION AND
WILLIAM J. HACKETT AND HARRY KRON

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5
OF THE FEDERAL TRADE COMMISSION ACT

Docket 5888. Complaint, July 13, 1953¹—Decision, May 2, 1955

Order requiring an importer in New York City of sewing machine heads on which appeared the words "Made in Occupied Japan" or "Japan," and of completed sewing machines in the assembling of which those words on the heads were concealed by attachment of the motor, to cease offering their products for sale without clear and conspicuous disclosure of the country of origin of the heads, and to cease using the brand or trade name "Universal" without using in connection therewith in legible and clearly visible marking their corporate name.

Before *Mr. Frank Hier*, hearing examiner.

Mr. William L. Taggart and *Mr. Ames W. Williams* for the Commission.

Schnader, Harrison, Segal & Lewis, of Philadelphia, Pa., and *Holtz & Rose*, of Boston, Mass., for respondents.

Carretta & Counihan, of Washington, D. C., also represented Standard Sewing Equipment Corp. and William J. Hackett.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on June 27, 1951, issued and subsequently served its complaint in this proceeding upon respondents, Standard Sewing Equipment Corporation, a corporation, and William J. Hackett and Harry Kron, individually and as officers of said corporation, charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondents' answer thereto, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of said 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 the proceeding regularly came on for final consideration by said hear-

¹ As amended.