

IN THE MATTER OF  
GENERAL FOODS CORPORATION

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF  
SECS. 2 (a), 2 (d), AND 2 (e) OF THE CLAYTON ACT

*Docket 6018. Complaint, July 29, 1952—Decision, Feb. 15, 1956*

Order requiring a corporation, engaged in the sale and distribution of its packaged food products, many of them nationally advertised and the subject of considerable consumer demand, and with annual sales in excess of \$500,000,000, to cease discriminating in price in violation of Sec. 2 of the Clayton Act, as amended, through—

- (1) Selling to its Institution Contract Wagon Distributor customers (ICWDs) its institution-pack grocery items for 10% less than the price it charged competing conventional wholesalers, and its institution coffee at two cents (2¢) per pound less, in violation of Sec. 2 (a); and
- (2) Furnishing its ICWDs with institution-size packaging of its products and institution blends of coffee, without making such packaging and blends available to competing conventional wholesalers on proportionally equal terms in violation of Sec. 2 (e); and

Dismissing for want of proof Count II of the complaint, charging violation of Sec. 2 (d) of the Clayton Act.

*Mr. Eldon P. Schrup and Mr. Francis C. Mayer* for the Commission.

*Mr. Lester E. Waterbury, Mr. Frederick F. Mack and Mr. Frederick H. Heck*, of White Plains, N. Y., for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The respondent, General Foods Corporation, is charged in this proceeding, in three separate counts of the complaint, with having violated Sections 2 (a), 2 (d) and 2 (e) of the Clayton Act (U.S.C. Title 15, Sec. 13) as amended by the Robinson-Patman Act. The pertinent parts of these sections are as follows:

SEC. 2. (a): \* \* \* it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent dif-

ferentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: \* \* \*.

\* \* \* \* \*

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

(e) \* \* \* it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

After answer by respondent, hearings were held, at which voluminous testimony, numerous exhibits and other evidence were received, duly recorded, and later filed in the office of the Commission. Proposed findings of fact and conclusions of law, accompanied by supporting memoranda of law, have been submitted by counsel. On the basis of the entire record, the following findings of fact are made:

1. The respondent, General Foods Corporation, is now, and has been at all times pertinent to this proceeding, a Delaware corporation. Its office and principal place of business is now at 250 North Street, White Plains, New York.

2. Respondent is now, and at all times pertinent to the issues herein has been, engaged in the sale and distribution in interstate commerce of packaged food products manufactured by one or more of its Divisions. Many of these products are nationally advertised and well-known throughout the entire United States, and are the subject of considerable consumer demand and acceptance. Respondent's annual sales are in excess of \$500,000,000; it is in substantial competition with other corporations, firms and individuals similarly engaged; and many of the purchasers of respondent's products are in competition with each other.

3. Among the many products sold and distributed by the respondent are Maxwell House, Sanka, Kaffee Hag, Yuban, Bliss and other brands of coffee, breakfast cereals (Grapenuts, Post Toasties, Post's Bran Flakes, Post's Puffed Wheat, Puffed Rice, etc.), Maxwell House tea, Baker's cocoa, Jello brand gelatin desserts, pud-

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dings and pie mixes, Minute tapioca, Log Cabin and Wigwam syrups, and Calumet baking powder. Many of respondent's products are marketed in various sizes and types of packages; some are sold in containers and units particularly suitable for use by public feeding establishments, such as hospitals, hotels, restaurants, factory lunchrooms and the like, and are referred to as institution-pack products; others, in sizes and styles of containers designed for household use and for retail distribution through grocery stores, are referred to as grocery-pack products.

Institution coffee is blended to retain flavor and meet the aroma requirements of institution trade, and often is processed by respondent to meet the taste of a specific institution or chef. Ordinarily respondent's Maxwell House institution coffee is a blend of six different kinds of coffee beans, while the grocery-pack formula calls for five kinds; the additional kind of bean in the institution pack is to provide "staying" qualities in the coffee to insure longer periods of freshness. There is some variance also in the roasting processes, resulting in some difference between the two types of coffee in color and taste. Maxwell House grocery-pack coffee is not always of identical blend, and, of course, varies in grind.

4. Respondent's organization through which its institution products are distributed consists of a sales force of some 2,300 persons. As of January, 1953, these employees included 96 institution representatives who contact institution wholesalers in the field, 19 institution sales supervisors who supervise the 96 institution representatives and are otherwise responsible for the sale of institution products, and 24 district managers, each of whom either performs the duties of an institution sales supervisor or supervises an institution sales supervisor. In addition, respondent maintains a staff in the Institution Department of its Sales Division, whose duties relate principally, but not solely, to the sale of respondent's institution products. As of March, 1951, respondent sold institution products to 239 Institution Contract Wagon Distributors (hereinafter referred to as ICWDs), to 301 wholesalers dealing exclusively in institution products, to 2,813 wholesalers who dealt in both institution and grocery-pack products, and to numerous direct-buying purchasers who operate public feeding establishments. Its grocery-pack products were sold to wholesalers who resell to retail grocers, to chain stores, to company commissaries and others.

5. Institution products are sold to all customers on the basis of current uniform price lists issued by respondent, subject to a standard 2% discount for prompt payment, with uniform allowances for quantity purchases. On institution coffee, quantity allowances are computed on the basis of total annual purchases.

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6. During the period from 1947 through 1953, respondent's total sales of institution products to ICWDs amounted to approximately \$89,758,000, of which \$70,079,000 represented coffee sales and \$19,679,000 represented sales of other institution products. During this same period, respondent paid ICWDs, in allowances pursuant to the terms of the ICWD contracts, a total of \$3,798,000, of which \$1,830,000 was in connection with coffee sales and \$1,968,000 in connection with sales of other institution products.

Table I, which follows, of respondent's civilian sales of institution products by years, shows that during the period 1947-1951, sales to ICWDs increased 645.7%, while sales to other than ICWDs decreased 13.7%. During this period the ICWD percentage of respondent's civilian institution business rose from 24.8% to 74%. The record contains no statistics by which comparisons can be made beyond 1951, but respondent's sales to ICWDs continued to show such substantial increases that it is reasonable to assume that the percentage of respondent's institution business represented by ICWD purchases also continued to increase through 1953.

TABLE I.—Respondent's sales of all institution products, except those to government outlets

|                                 | 1<br>Total sales | 2<br>Sales to<br>other than<br>ICWDs | 3<br>Sales to<br>ICWDs | 4<br>ICWD per-<br>centage of<br>all sales |
|---------------------------------|------------------|--------------------------------------|------------------------|-------------------------------------------|
| 1. 1947.....                    | \$9,493,723      | \$7,138,432                          | \$2,355,291            | 24.809                                    |
| 2. 1948.....                    | 11,530,022       | 6,922,027                            | 4,607,995              | 39.965                                    |
| 3. 1949.....                    | 13,608,654       | 5,917,120                            | 7,691,534              | 56.519                                    |
| 4. 1950.....                    | 19,566,069       | 5,601,715                            | 13,964,354             | 71.370                                    |
| 5. 1951.....                    | 23,722,121       | 6,156,892                            | 17,565,229             | 74.046                                    |
| 6. 1952.....                    | (1)              | (1)                                  | 21,121,599             | (1)                                       |
| 7. 1953.....                    | (1)              | (1)                                  | 22,451,800             | (1)                                       |
| 8. 1947-1951 <sup>2</sup> ..... | 149,872          | -13.750                              | 645.777                | 198.464                                   |
| 9. 1947-1953 <sup>2</sup> ..... | (1)              | (1)                                  | 953,250                | (1)                                       |

<sup>1</sup> NOTE.—Figures not available after 1951.

<sup>2</sup> Percent increase.

7. The agreement with respondent under which a wagon distributor operates provides that he shall act as a non-exclusive distributor of respondent's institution products to certain types of public feeding establishments<sup>1</sup> in a specifically designated territory, that during the term of the agreement he will purchase from respondent all his requirements of respondent's institution products excepting Postum cereal beverage, and that he will sell such

<sup>1</sup> Hotels, restaurants, diners, hospitals, charitable and educational institutions, clubs, resorts, soda fountains, cafeterias, caterers and other similar establishments, excepting Army, Navy, Coast Guard, Marine Corps and other United States Government installations, except Post Exchanges.

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products upon specified terms and conditions, among which are the following:

(C) Distributor shall use its best efforts to promote the sales of such General Foods Sales Division Institution Products to the above-mentioned types of public feeding establishments in the Designated Territory by performing the following services, the performance of which shall qualify Distributor for the allowance referred to under item (D) of subject (2):

1. Aggressively sell customers General Foods Sales Division Institution Products;
2. Provide store-door delivery from wagon on all such products at time of sale;
3. Offer services generally offered by competitors in the Designated Territory;
4. Maintain adequate stocks;
5. Arrange to move older stocks first;
6. Handle damaged merchandise in accordance with General Foods policy;
7. Arrange for distribution and proper use of display and promotional material provided;
8. Maintain replacement parts for coffee-making equipment for resale by Distributor;
9. Arrange for appropriate displays of products in public feeding establishments;
10. Make deliveries, at General Foods request, of General Foods Sales Division Institution Products to individual units of multiple food service operators designated by General Foods, General Foods to handle billing, Distributor to make deliveries and to be reimbursed by Credit memoranda for merchandise delivered.

Item (D) of subject (2), relating to allowances, is as follows:

"All goods delivered hereunder by General Foods to be resold by Distributor shall be billed to Distributor on the basis of price lists attached to and made part of this agreement, which prices are (except as to coffee) subject to an allowance of ten (10) per cent for services rendered hereunder, payable in cash or by credit memorandum at General Foods election, and which prices as to restaurant coffee are subject to an allowance of two (2¢) cents per pound of such coffee, said last named allowance to be deducted by General Foods on the invoices. Said price lists are subject to change by General Foods without prior notice to Distributor;"

The contract further provides that the ICWD will, upon respondent's request, notify it not more than four times in a given twelve-months' period of the names and addresses of all customers sold by him during that period and the products sold each. The agreement may be terminated by either party upon sixty days' notice, or in case of bankruptcy or "of the substantial failure of Distributor to perform any one or more of Distributor's obligations under this agreement," respondent may terminate the agreement on five days' notice.

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Upon and since the initiation of the ICWD program by respondent, some conventional wholesalers were offered ICWD contracts. A few accepted and operated under such contracts; others were never offered the contracts. Of this latter group, some assert that they would have accepted such a contract; others were not interested.

8. Respondent's ICWD arrangement was adopted early in 1947 in an effort to increase respondent's share of the total institutional business, following an extensive study of this field of operations. As shown by Table I, above, respondent's institution business is substantial. Table II, which follows, is a tabulation, by years, of respondent's institution sales and allowances to ICWDs, so arranged as to show the sales and allowances pertaining to products other than coffee, and those pertaining to coffee alone. During the seven years covered by the tabulation, the ICWD allowances on institution grocery products under the 10% provision of the contract have amounted to \$1,967,900 on \$19,679,000 of purchases, while the allowances on coffee at 2¢ per pound (the rate was 1¢ per pound prior to November 22, 1948) amounted to \$1,830,000 on \$70,078,000 purchases, approximately 2.6%.

TABLE II.—Respondent's sales and allowances to ICWDs, by years

| 1                               | Institution products other than coffee |                           | Coffee                       |                |                              |
|---------------------------------|----------------------------------------|---------------------------|------------------------------|----------------|------------------------------|
|                                 | Sales by respondent to ICWDs           | ICWD 10 percent allowance | Sales by respondent to ICWDs | ICWD allowance | Percent allowed <sup>1</sup> |
| 2                               | 3                                      | 4                         | 5                            | 6              |                              |
| 1. 1947.....                    | \$403,188                              | \$40,319                  | \$1,952,104                  | \$47,039       | 2.410                        |
| 2. 1948.....                    | 1,086,356                              | 108,636                   | 3,521,639                    | 86,168         | 2.447                        |
| 3. 1949.....                    | 2,100,971                              | 210,097                   | 5,590,563                    | 218,808        | 3.914                        |
| 4. 1950.....                    | 3,231,819                              | 323,182                   | 10,732,536                   | 289,287        | 2.695                        |
| 5. 1951.....                    | 3,770,850                              | 377,085                   | 13,794,379                   | 346,168        | 2.509                        |
| 6. 1952.....                    | 4,554,619                              | 455,462                   | 16,566,980                   | 414,174        | 2.500                        |
| 7. 1953.....                    | 4,531,343                              | 453,134                   | 17,920,456                   | 428,719        | 2.392                        |
| Total.....                      | 19,679,146                             | 1,967,915                 | 70,078,657                   | 1,830,353      | -----                        |
| Percent Increase                |                                        |                           |                              |                |                              |
| 8. 1947-1951 <sup>2</sup> ..... | 835.231                                | -----                     | 596.396                      | -----          | -----                        |
| 9. 1947-1953 <sup>2</sup> ..... | 1,023.901                              | -----                     | 818.007                      | 811.412        | -----                        |

<sup>1</sup> All percentage figures are computed.

<sup>2</sup> Percent increase.

9. Testimony in this proceeding was taken in Dallas, Houston and San Antonio, Texas; Atlanta, Georgia; Boston and Springfield, Massachusetts; and Buffalo, New York—areas considered to be typical of respondent's general practices throughout the United States. Statistics similar to those contained in Table II were made available for three of these areas, and are presented in Table III, below. They show specifically for these smaller areas substantially

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the same relationships disclosed in Table II, that respondent's sales of coffee to ICWDs far exceeded its sales of institution products other than coffee, yet the allowances, dollar-wise, were nearly the same on the two classes of products. The coffee allowance, in percentage, in the three areas approximated the nation-wide average.

TABLE III.—ICWD transactions for 12-month period ending July 1, 1953

|                       | Food products |                       | Coffee only |            |
|-----------------------|---------------|-----------------------|-------------|------------|
|                       | Purchases     | 10 percent allowances | Purchases   | Allowances |
| Boston.....           | \$50,030      | \$5,003               | \$240,812   | \$5,945    |
| Springfield.....      | 36,890        | 3,689                 | 183,745     | 4,536      |
| Buffalo.....          | 24,170        | 2,417                 | 68,007      | 1,701      |
| Total.....            | 111,090       | 11,109                | 493,464     | 12,182     |
| Computed percent..... |               |                       |             | 2.468      |

The amounts paid in the same areas to ICWDs by respondent for delivery service pursuant to Item 10 of Paragraph (C) of the ICWD contract during the same period of time covered by Table III are shown below in Table IV.

TABLE IV.—General Foods' direct-buying public feeding accounts for 12-month period ending July 1, 1953

|                  | Total number | Number receiving ICWD delivery | Amount paid ICWD for delivery | Number of ICWDs |
|------------------|--------------|--------------------------------|-------------------------------|-----------------|
| Boston.....      | 11           | 7                              | \$1,166                       | 2               |
| Springfield..... | 2            | 2                              | 470                           | 2               |
| Buffalo.....     | 14           | 8                              | 1,213                         | 1               |
| Total.....       | 27           | 17                             | 2,849                         | 5               |

10. ICWD operations differ from those of the ordinary institution grocery wholesaler in that while the wholesaler may handle as many as 3,000 items, including bulky staple commodities and many competitive brands, sometimes including private brands of his own, the ICWD deals in a limited number of items and customarily carries on the truck which he operates an ample quantity of all his goods to supply his customers with their immediate needs. The ICWD handles chiefly respondent's products. Items not of respondent's manufacture are, in general, supplementary products such as guest checks, griddle cleaners, urn supplies, or products of other manufacturers substantially unlike respondent's products, such as pickles, spices, olives.

The ICWD does not ordinarily take orders for future delivery, but attempts, by frequent visits, to anticipate the needs of his customers. If on occasion he fails to have in his truck the needed supply of a particular product, he will make special deliveries. The ordinary grocery wholesaler customarily sends out salesmen who take orders for future delivery, but, in emergencies, he too will make special deliveries. The ICWD sells exclusively to the institution trade, whereas the majority of conventional wholesalers sell to institutions and to retail grocery outlets. The ICWD makes "store-door" delivery, frequently to the customer's stockroom; rotates or rearranges stocks so that older merchandise will be used first; replaces damaged, spoiled or stale goods; and, with the owner's consent, checks to see what items are needed. The institution wholesaler usually delivers in large quantities to the customer's receiving door or platform.

The ICWD may conduct a coffee demonstration to secure a new account, usually supplies his customers with urn bags, filters, cleaners and parts, and will repair and service coffee urns. He distributes to his customers advertising and promotional materials of various sorts—recipes and recipe booklets, dessert plans, cost analysis forms, menu blanks, menu tip-ons, cereal racks, banners and signs—which are provided by respondent. These things the conventional institution wholesaler does not do. Respondent polices operations of the ICWD by sending a representative to ride with him about once every six weeks to observe performance. His customers are checked separately about every three months as to services rendered by him.

Respondent's salesmen also make irregular calls on users or potential users of institution products and solicit orders, which are filled, at the option of the purchaser, by wholesalers or by ICWDs who deliver and bill the merchandise ordinarily at their own prices, although there are instances where respondent's representative has turned such orders over to an ICWD with instruction or suggestion that the purchaser be billed at respondent's list price. However, such instances were not shown to be customary or numerous.

11. The wagon distribution method is used by many other firms engaged in business similar to that of the respondent, and it was estimated that 85% of all the coffee sold to public feeding establishments throughout the United States is so distributed. Many of these other firms use their own personnel and their own facilities for wagon distribution, whereas the respondent operates under the contract system herein described.

12. Wagon distributors, sometimes referred to as wagon wholesalers, were recognized by the Federal wartime regulations of the

Office of Price Administration and Office of Price Stabilization. Because of the specialized nature of their services, they were exempted from many of the price restrictions limiting resale markups that were imposed on other institution wholesalers. For example, wagon distributors were permitted to continue their customary markup margins, including 25% on breakfast cereals, whereas the regular institutional wholesalers were restricted to a markup of 6% on coffee and 8% on breakfast cereals.<sup>2</sup>

13. Under respondent's ICWD program, twenty two-day sales and cooking schools were conducted at which demonstrations and instructions were given by trained personnel in the preparation for serving of respondent's various products, and in sales techniques. These were designed to better prepare ICWDs for demonstrating and selling respondent's products to institutional users, for whose benefit respondent also has made available several hundred recipes for preparing its various products in quantities appropriate for institutional use.

14. On merchandise purchased for resale by ICWDs, allowances to which they are entitled under the contract are paid in the following manner: on coffee the 2¢-per-pound allowance is paid by the simple device of permitting the ICWD to deduct that amount from the face of each invoice and remit the balance due to the respondent, subject, of course, to other regular deductions and allowances for cash payment or quantity discount; on products other than coffee, the 10% allowance is computed by the respondent at the end of each month, and a credit memorandum issued to the ICWD.

With respect to institution products delivered by ICWDs on respondent's account to respondent's direct-buying Multiple Food Service Accounts pursuant to Section (2) (C) (10) of the ICWD contract, the custom is for the ICWD to make delivery from his own stock. Respondent then issues a stock transfer credit memorandum which, in effect, replaces the stock or reimburses the ICWD for the original cost of goods so delivered. The 10% service payment for delivery of products other than coffee is then included in the monthly credit memorandum. On coffee, for the delivery of which the ICWD is paid 3¢ per pound, 2¢ per pound is subtracted from the face of each invoice, and the other 1¢ per pound is added to the stock transfer credit memorandum just mentioned.

These are the substantial facts upon which a determination of the issues in this proceeding rests.

<sup>2</sup> Food Products Regulation 1, Supp. 11, issued March 7, 1945, 10 F.R. 2614; RX 39A-D. See also Selling Price Regulation 14, Section 33 (e), April 5, 1951, 16 F.R. 2725, and Regulation 14, Amendment 5, dated August 22, 1951; also Amendment 11 to Maximum Price Regulation 237, issued March 1, 1943, 8 F.R. 2671.

## COUNT I

Under Count I of the complaint it is charged that respondent has discriminated in the selling price of its products between different competing customers—first, by granting discounts and allowances to ICWDs on their purchases of institution products while competing institution wholesalers who purchase the same kinds of products are not granted like discounts and allowances; second, by permitting certain preferred retailers and food-serving outlets to purchase respondent's grocery and institution products direct from respondent at respondent's current list prices while others competing with these preferred direct customers can procure respondent's products only through wholesalers at substantially higher and less favorable prices.

Respondent contends that the discounts and allowances granted the ICWDs on goods purchased by them for resale are not price reductions or rebates, but are payments to them for services actually rendered pursuant to their contracts, made in good faith in amounts commensurate with work performed, and that it indulges in no price discriminations whatsoever. The ICWD contracts recite that performance of the enumerated services is a pre-requisite to the allowance by respondent of 10% discount on institution grocery items, and 2¢ per pound discount on institution coffee. But the contracts also recognize that the relationship between General Foods and the ICWD is that of seller and purchaser, and that the goods delivered by General Foods to the ICWD are for resale by him. The enumerated services are performed by the ICWD in connection with the resale by him of this merchandise.

These services include such items as selling General Foods products aggressively, providing store-door delivery, maintaining adequate stocks, moving older stocks first, properly handling damaged merchandise, distributing display and promotional advertising material, arranging adequate and appropriate displays of products, maintaining a stock of replacement parts for coffee-making equipment for resale, and offering "services generally offered by competitors." The record shows generally, and it may be assumed, that these services have been performed conscientiously by each ICWD. The fact remains, however, that they were performed by him in connection with the resale of goods which he had already purchased and paid for or was obligated to pay for. They are services which, the record indicates, are similar to services performed by the ICWD's competitors, and which are advantageous, if not essential, to the successful operation of his business. By helping the ICWD procure and keep customers, these services react necessarily but secondarily

to the benefit of the Respondent who sells him his merchandise; the primary advantage is to the ICWD.

The record shows that services performed by the ICWDs frequently exceed those required under the contract. For instance, although the contract requires only that the ICWD "maintain replacement parts for coffee-making equipment for resale," in practice he ordinarily furnishes complete urn service, including replacement of parts, repairs, adjustments and day or night emergency service. One ICWD testified that he maintained a coffee-equipment repair shop and had one employee who devoted much of his time to repair and maintenance work. Sometimes ICWDs charge for this service; often it is furnished free. In some instances the ICWD loans rather than sells coffee-making equipment to customers.

Obviously these services are performed to create and maintain good will, to increase sales and profits, and for self-preservation, to stay in business. Other coffee distributors selling other than respondent's brands of coffee perform similar services, and competition is extremely keen. The coffee-roasting and distributing business is one that can be undertaken with little equipment and small investment. Consequently there are, in addition to the national processors, numerous local coffee-roasters with whose salesmen and distributors ICWDs must compete.

With reference to institution grocery products, the situation is similar. There is much competition. Public-feeding operators like frequent deliveries, which guarantee them fresh supplies and permit low inventories. Some of them appreciate and use the aids provided—menu tip-ons, back-bar advertising materials, recipe service, cost explanations; others find such services not desirable, but the ICWD, to meet competition, must be in a position to render these services or extend these favors. It is good business practice.

Anyone who has sat in the early morning at a lunch counter in a wayside restaurant or a small urban eating place has observed the at-home manner of procedure of the truck-delivery salesmen who carry in fresh supplies, rearrange sales racks, remove stale stock, and leave advertising material. That these services are appreciated by the small business operator is evident. That such services are not ordinarily performed by the conventional institution grocery wholesaler is admitted.

The respondent introduced evidence and urged by brief that the two federal agencies—the Office of Price Administration, during World War II, and the Office of Price Stabilization, during the Korean conflict, recognized ICWD services and made provision that "wagon wholesalers," within which classification ICWDs clearly fall,

be allowed a greater markup over cost than that permitted the conventional wholesaler, and that this followed a finding that wagon wholesalers' traditional markup margin had been substantially greater than that of other wholesalers. OPA and OPS recognition of wagon-distributor services, however, does not justify respondent's practice of making allowances to its ICWDs. Clearly the two government agencies believed that the extra services were performed by the wagon distributors for the benefit of their customers, who, under government regulations, could be required, because of the greater markup margins permitted, to pay higher prices for merchandise purchased from wagon distributors than they would have had to pay if they had purchased that same merchandise from conventional wholesalers. Had these price-regulating agencies been of the opinion that wagon-distributor services were for the benefit of the manufacturer, they would have made provision whereby the manufacturer would bear the cost of such services. This they did not do. Both agencies correlated the cost with the benefit by permitting the one rendering the services to recoup the cost of those services from the purchasers for whom the services were rendered. Respondent can get no solace or support for its contentions from the OPA or OPS practices and regulations.

Services rendered by a dealer for the benefit of his customers are services which the dealer must somehow pay for out of his profit, which is the difference between his cost price and his selling price. If those services are exceptional in nature, he is justified in selling his goods at higher prices than are charged in his less-accommodating competitors; or he may consider it good business practice to render such services at no increase in selling price, trusting that he will be adequately compensated by the good will and extra business which may be generated. In no event can he, under the law, be subsidized by or collect the cost of such services from the manufacturer or the distributor from whom his merchandise has been purchased.

A similar problem was presented in the Champion Spark Plug case.<sup>3</sup> Champion allowed certain of its dealers a "special sales service compensation" of 10%, which the Commission found to be in fact a reduction in price and in violation of § 2 (a) of the Act. Among the "sales service[s]" for which the allowance was made were the following—performing sales promotional work, serving franchise accounts satisfactorily, providing periodic reports of purchases by certain accounts, paying bills promptly and conducting business in a manner satisfactory to Champion. As in the instant case, the

<sup>3</sup> F.T.C. Docket No. 3977, in the matter of Champion Spark Plug Company, decided July 10, 1953, 50 F.T.C. 30.

services were performed in connection with goods which had been purchased for resale from a manufacturing respondent.

It is well established that a seller cannot justify allowances to purchasers which, in fact, constitute payment to them for doing their own work in the resale of goods purchased and owned by them. Sales activities of wholesaler customers in reselling respondent's merchandise redound, as hereinbefore pointed out, secondarily to respondent's advantage, but the respondent cannot, under the law, measure such advantage and give each such customer a proportionate allowance or payment therefor. The Act provides that different customers may be charged different prices, provided the price differentials "make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which said commodities are to such purchasers sold or delivered." No such cost differential was shown to exist or offered as a justification in this proceeding.

The fact that some customers have greater business costs than others has never been accepted as justification for price differentials. Respondent states in its brief that "the ICWD's added cost of doing business is, as a result of Respondent's ICWD program, passed backwards, to Respondent, rather than forward, to the ICWD's customer." This is exactly what the law says cannot be done. Otherwise respondent could appraise the cost of doing business of its customers, evaluate their efforts and efficiencies, subsidize their deficiencies, and have a different selling price for each—an end which the law was designed to prevent.

The net result of respondent's practices is that ICWDs get respondent's institution-pack grocery items for 10% less than the price paid by competing conventional wholesalers, and respondent's institution coffee at 2¢ per pound less. The products are of like grade and quality—in fact, identical. Price discrimination has been established by clear and convincing evidence.

The effect of respondent's price discrimination, on a nation-wide basis, has been to lessen competition and to injure, destroy and prevent competition.

Table I, above, in column 3 shows that from 1947 to 1951, respondent's sales of institution products to ICWDs increased 645%, while its civilian sales to all purchasers, column 1, increased but 149%, and its sales to others than ICWDs, column 2, decreased 13%. These statistics support the conclusion that the growth of ICWD business was at the expense of the conventional wholesalers, particularly since the growth of ICWD business has been substantially greater than the growth of respondent's overall institution business.

The ICWD has picked up considerable business, much of which must have come through business diverted from competing wholesalers. Table II shows that during this same period the institution grocery business of ICWDs increased 835% while their coffee business increased 596%, the greater increase being in the field in which there was the greater competition between ICWDs and conventional wholesalers, since many wholesalers are not granted the privilege of handling respondent's institution coffee. Between 1951 and 1953 Table I shows that ICWD business has continued to increase at a substantial rate—from 645% to 953%. It is reasonable, therefore, to assume that the conclusions reached on the basis of the 1947–1951 tabulations are valid for the later period also, and would be factually supported if pertinent figures were available. Respondent presented no statistics to justify any other assumption.

As to specific injury to competition resulting, actually or potentially, from respondent's price discriminations, the record shows that ICWDs have made sales to some customers at respondent's list prices, relying upon their contract allowances of 10% on institution grocery products, and 2¢ per pound on institution coffee, for recompense for their services and for profit. Instances of such sales are numerous enough to justify the conclusion that there are very few ICWDs who do not, on occasion, engage in this practice, although customarily they attempt to sell at prices which will give them margins of profit over and above respondent's list prices. When competition is keen, however, ICWDs take advantage of their ability to accept business at respondent's list prices and still make a satisfactory margin of profit. To meet such competition, the conventional institution wholesaler must also sell at respondent's list price, and is limited to such profit as he can realize by availing himself of the quantity and cash discounts which he is entitled to receive on the same basis as the ICWD. He suffers competitively, and is injured, therefore, to the extent that he receives from the respondent no 10% discount on institution grocery products, and no 2¢ per pound allowance on coffee. The operations of conventional wholesalers are on such a narrow margin that their annual profit often depends upon their ability to take advantage of cash and quantity discounts. Under these conditions a differential of 2% favoring their competitors is substantial, and one of 10% becomes vital.

In some instances, ICWDs have sold respondent's institution products at very small markups, forcing conventional wholesale grocers to reduce their customary markups, and consequently their profits, to meet ICWD competition. Because of his lower cost price, the ICWD is in a preferred position. Even if both the ICWD and the

conventional wholesaler resell respondent's products at the same price, the ICWD still has the competitive advantage of respondent's preferential allowances, giving him the larger profit.

The person who has to pay more than his competitor for the same grade and quality of merchandise will have less left as profit than his competitor, and therefore less with which to improve his facilities for better serving the requirements of his trade, to enlarge his promotional activities, to augment his sales force, or to expand his stock. The preferential price differential granted by respondent to the ICWD is available for whatever use he chooses to make of it. Clearly injury is done. Argument to the contrary is but to say that a lower price is not advantageous to the one receiving it, and therefore is not preferential, which is preposterous. The fact that a non-favored customer may achieve some sales expansion and business growth in spite of his handicap does not alter nor detract from the validity of this conclusion. Specific instances were shown in which trade was lost by conventional wholesalers to ICWDs because of the lower resale prices offered by ICWDs. When faced with ICWD price competition, the conventional wholesaler has no practical choice except to withdraw from that area of business, or operate at an extremely low rate of profit.

From all the facts of record, the conclusion is reached that respondent's discrimination in price between its ICWD customers and its conventional-wholesaler customers, who compete in the resale of its institution products, has had and will continue to have the effect of substantially lessening, or preventing, competition between these two types of customers, and of injuring the non-favored conventional-wholesaler customers.

Most food-serving establishments and retailers who use or handle respondent's products have no choice but to buy those products from wholesalers, while some competing food-serving establishments and retailers, usually large hotels, restaurants or chain stores, are recognized by respondent as direct-buying accounts and purchase respondent's products at its current list prices, which are substantially lower than the prices charged by wholesalers. This also is alleged to be in violation of § 2 (a) of the Act. But no further facts were introduced to bring this situation within the purview of the Act, and no pertinent cases were cited to support such a theory.

It was urged by counsel supporting the complaint that users of respondent's products who procure their goods from conventional wholesalers or from ICWDs upon orders procured by respondent's salesmen and turned over by them to such suppliers, are in fact "purchasers" from respondent and are discriminated against in that

they have to pay wholesalers' or ICWDs' prices instead of respondent's list prices.

Under the doctrine recognized in Commission cases and accepted by the courts, it is possible to consider a customer's customer as a "purchaser" within the meaning of § 2 (a) if in fact the original seller exercises such a degree of control over sales by its direct customer that the latter's sales are essentially sales by the original seller. However, the decided cases disclose no common requirement, the absence of which would fail to establish an indirect customer of a manufacturer to be a "purchaser" from such seller. No case goes so far as to hold that solicitation of orders by a respondent manufacturer and turning over those orders to an intermediate distributor for billing and handling is sufficient to establish a seller-purchaser relationship between the manufacturer and the persons from whom such orders were procured. The fact that respondent's representatives may have suggested billing prices in a few instances does not indicate a policy or practice on the part of the respondent, and in the absence of further facts, there is no basis in the present record for a finding that the users who thus procure respondent's merchandise fall within the "purchaser" category envisioned by § 2 (a) of the Act.

On the whole record, the conclusion is reached that there is insufficient reliable, probative and substantial evidence to support the conclusion that any of the users of respondent's products who procure those products indirectly through intermediate sources of supply are "purchasers" from respondent within the meaning of the Act.

The order which will be issued, based upon the conclusion that respondent has violated § 2 (a) of the Act by its ICWD program, will be applicable to every situation that has arisen or may arise violative of that section, and if any factual development occurs which will bring any other practices within the scope of the Act, that order will be fully adequate.

#### COUNT II

Under Count II of the complaint it is charged that respondent has violated § 2 (d) of the Clayton Act by paying ICWDs for services and facilities furnished by or through them in connection with the handling, sale or offering for sale of respondent's products, without making such payments available on proportionally equal terms to other customers competing in the distribution of such products. Specifically in question are the payments or allowances by respondent to ICWDs of 10% for delivery of institution grocery products, and 3¢ per pound for delivery of institution coffee to

respondent's direct-buying customers—services rendered pursuant to subparagraph 10 of the ICWD contract. It is argued that such payments are actually reductions in price and constitute violation of § 2 (a) of the Act, but that contention is rejected. The payments are liberal, but, in the absence of some showing that they are grossly in excess of the cost or value of the services rendered, it cannot be found that they constitute any sort of a rebate or price reduction on other merchandise bought by the ICWD from respondent for resale. Table IV, above, shows, as to three areas, the amount of merchandise delivered by ICWDs and the amount of money paid by respondent for such deliveries, but no conclusion can be drawn from those figures, and no other evidence was offered, on this phase of the case.

Deliveries made pursuant to subparagraph 10 are made from merchandise which the ICWD carries in stock to accounts which purchase direct from, are billed by, and make payments to respondent. To recompense the ICWD for merchandise so delivered from his stock-in-trade, the respondent, each month, issues a stock transfer credit memo through which the ICWD's stocks may be and are replenished. The end result is that the ICWD has warehoused this merchandise from the time it came into his possession until the date of delivery. Payments made by respondent to him under this section of the contract are exclusively for warehousing and delivery services. They are not payments made to him as a customer, and do not relate to the resale of merchandise bought by him from respondent.

The public-feeding outlets receiving deliveries under this provision of the contract are direct-buying customers of respondent and entitled to delivery. Customarily they are given the choice of ICWD or other delivery, but that fact seems to be immaterial so long as the delivery service rendered is satisfactory to them, and no complaints were indicated in the record. Likewise, it is immaterial whether other than ICWD purchasers from respondent are given the opportunity to render and be paid for delivery service to these direct-buying public-feeding accounts.

It seems to be clear, from the record, that this method used by respondent for effecting delivery of merchandise sold directly by it to the public-feeding outlets is not the kind of practice which is within the prohibitions contemplated by § 2 (d) of the Act. The primary purpose of § 2 (d) is to prevent a seller from helping some purchasers through furnishing services and facilities, usually selling aids, sales help, advertising contributions, unless he offers competing purchasers comparable aids. No such problem arises in this case.

Respondent's practice of sending out salesmen at irregular intervals to solicit orders for prospective users of its products and turning such orders over to a supplier selected by the purchaser is questioned as being in violation of § 2 (d). It has hereinbefore been concluded that this practice does not give rise to a violation of § 2 (a). It is suggested that the supplier is not always selected by the purchaser, and that this is a device by which respondent can aid some of its customers without offering similar aid to other competing customers.

It is true that the device might be so used, but there is not sufficient evidence in the record to establish that it has been so used. There is evidence of one specific instance where respondent's salesman procured orders from prospective users and turned those orders over to a particular ICWD, but in this instance there was a family relationship, the salesman being the father of the ICWD. The particular instance stands out as an exception to an established rule rather than as proof of a practice. The record shows that such orders were referred both to ICWDs and to conventional wholesalers; except in this one instance, there is no contradiction of respondent's assertion that the choice of supplier was at the option of the purchaser. There is no basis for an inference that the orders were referred in a manner which would benefit one customer of respondent more than another.

Count II of the complaint must therefore be dismissed, because the charges therein set forth are not supported by reliable, probative and substantial evidence.

#### COUNT III

Under Count III the respondent is charged with having discriminated in favor of some purchasers and against other purchasers of commodities bought for competitive resale by contracting to furnish or furnishing services or facilities connected with the processing, handling, sale or offering for sale of such commodities upon terms not accorded to all competing purchasers on proportionally equal terms.

As illustrative of the discrimination charged, it is alleged that respondent furnishes its ICWDs with institution-size packaging of its products and institution blends of coffee, but does not make such packaging and blends available to competing conventional wholesalers.

The record shows that while some ICWDs sell respondent's entire line of institution products to some customers, there are other customers to whom they sell only coffee, and still others to whom they

sell all or most of respondent's other products exclusive of coffee. Likewise, the conventional wholesale grocers do not sell respondent's entire line of institution products to all their institution customers. Many wholesalers do not handle respondent's institution coffee at all, because it is unavailable to them due to the fact that in the area in which they operate, the competing ICWDs have exclusive right to distribute respondent's institution coffee. Frequently such wholesalers handle none of respondent's coffee, either institution pack or grocery pack. In such areas the conventional wholesalers and the ICWDs compete only in the resale of respondent's institution-pack grocery products. In other areas conventional wholesalers, who resell both to institutions and to retail grocers, sell all respondent's institution-pack products except coffee, and all respondent's grocery-pack products including coffee.

In such cases there is full competition, product-wise, between the ICWD and the conventional wholesaler, because the conventional wholesaler can sometimes sell, to an institution user, respondent's grocery-pack Maxwell House coffee in competition with respondent's institution-pack Maxwell House coffee offered by an ICWD. One such instance is shown in the record. The conventional wholesaler involved in this transaction stated that he had sold the grocery-pack Maxwell House coffee to one of his restaurant customers after having requested respondent to furnish him with Maxwell House coffee in the institution pack and blend, and being refused.

Under the rulings in the Luxor case<sup>4</sup> this refusal to furnish the conventional wholesaler with Maxwell House institution-pack coffee would support a finding that respondent had violated § 2 (e) of the Act, provided Maxwell House coffee in the two types of packages could be found to be of like grade and quality. Elsewhere herein it has been pointed out that Maxwell House institution coffee is a blend of six types of coffee beans, one added particularly for "staying qualities" to insure a longer freshness after the coffee has been brewed, while Maxwell House grocery-pack coffee is a blend of five types of beans. There are variations in the kinds of grind of both types of Maxwell House coffee—fine, regular, drip, glassmaker, pulverized—and a variety of packs suitable for convenient use in various sizes and types of coffee-making equipment. These are variations which are without relationship to and have no effect upon the grade and quality of the coffee. As stated in the findings of facts, paragraph 3, above, respondent sells other grades and types of coffee under other than the Maxwell House brand name.

<sup>4</sup> In the Matter of Luxor, Ltd., 31 F.T.C. 658.

The question of like grade and quality as to respondent's Maxwell House coffee may therefore be resolved by a determination as to whether the addition of the extra type of coffee bean in the institution coffee changes its grade and quality. The conclusion reached on the basis of the evidence of record is that it does not. The two types of Maxwell House coffee can be and are sold for the same use, sometimes competitively. There is no requirement under the law that they be identical products. In fact, there are slight differences between different roastings of the same coffee blends, differences between blends of the same types of coffee beans if made from coffee shipped at different seasons or from different crops, and other differences due to other technical or crop variations.

The respondent has labeled the institution-pack and the grocery-pack coffee here involved as Maxwell House coffee, lending, at least, the presumption that the two packs are of like grade and quality. This presumption is strengthened by the fact that respondent sells other coffees under other brand names. Against this presumption is the fact that the institution-pack has the extra type of coffee bean in its blend, but that fact can be construed as proof that the two packs are not identical, and does not necessarily establish that the two packs are not of like grade and quality.

However, a finding that respondent has violated § 2 (e) does not rest alone upon the conclusion that the two packs of coffee are of like grade and quality. There are other products identical in grade and quality which are distributed by respondent in grocery-size packs and in institution packs. This is true of cereals, Jello, baking powder and dessert preparations. There are instances disclosed in the record where some conventional wholesalers could and did purchase these products in the institution pack for resale, but could not get the same merchandise from respondent in grocery-pack sizes. Other competing wholesalers did get these products in both packs. These facts are sufficient to bring this case within the ruling of the Luxor case, above. It differs in that the practice in the Luxor case involved a substantial quantity of the manufacturer's output, while in the instant proceeding there are no facts from which the extent of the practice and the volume of merchandise involved can be determined. However, such a determination is not a *sine qua non* to a finding that respondent has violated § 2 (e) of the Act.

Upon all the facts of record it is concluded that the respondent has discriminated in favor of some purchasers and against other purchasers of commodities bought for competitive resale by making available and furnishing certain sizes and packagings of merchandise to some purchasers without making available or furnishing the same

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sizes and packagings to competitive purchasers of such commodities on proportionally equal terms.

## CONCLUSION

Upon all the facts of record, the respondent is found to have violated the provisions of §§ 2 (a) and 2 (e) of the Act, as charged in Counts I and III of the complaint, as hereinabove more fully set forth. It is found, however, also as hereinabove more fully set forth, that the charge in Count II of the complaint, that respondent has violated § 2 (d) of the Act, is not supported by substantial, reliable and probative evidence.

The proceeding is found to be in the public interest. Therefore, *It is ordered*, That the respondent, General Foods Corporation, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of food and grocery commodities in commerce as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

1. discriminating directly or indirectly in price between different purchasers of any such commodity of like grade and quality for use, consumption, or resale, by granting to its institution contract wagon distributor purchasers, or any other purchaser or purchasers, discounts or allowances in the guise of payments for services or in any other manner, which result in a lower and more favorable net price to such purchaser or purchasers than that at which it sells such commodity to another purchaser competing with said favored purchaser;

2. furnishing to any purchaser any such products packaged in containers of a certain size and style, unless all purchasers of such products competing in the resale thereof are accorded the opportunity to purchase such products, packaged in containers of like size and style, on proportionally equal terms.

*It is further ordered*, That Count II of the complaint herein be, and the same hereby is, dismissed.

## OPINION OF THE COMMISSION

By GWYNNE, Chairman:

The complaint charges respondent, in Counts I, II and III respectively, with violations of Sections 2 (a), 2 (d) and 2 (e) of the amended Clayton Act. The hearing examiner entered an order against respondent on Counts I and III and dismissed Count II. Both parties appeal.

Respondent is engaged in the manufacture, sale and distribution of grocery products. Its annual sales are in excess of \$500 million dollars, making it one of the largest of its class in the country. Sales are to conventional wholesale grocers, Institution Contract Wagon Distributors (known as ICWDs), retail grocers and to certain customers known as Multiple Food Service Accounts (known as MFSAs).

Some of respondent's products, sold in sizes and styles of containers designed for household use and for retail distribution through grocery stores, are referred to as grocery pack products; others, known as institution pack products, are sold in units and containers particularly suitable for use by public feeding establishments such as restaurants, hotels, hospitals, schools and others engaged in feeding large numbers of people. As of March, 1951, respondent sold institution products to 239 ICWDs, to 301 wholesalers dealing exclusively in institution products, to 2,813 wholesalers who dealt in both institution and grocery pack products, and to numerous direct buying purchasers who operate public feeding establishments. The issues in this case have to do with the sale of institution pack products and particularly with the part played therein by the ICWDs.

In 1946 the respondent, being dissatisfied with its share of the institution pack market, made a survey of the situation. As a result, it entered into contracts with various individuals for the sale and distribution of certain of its products to feeding institutions in a prescribed area. These contracts contain the following provisions:

(C) Distributor shall use its best efforts to promote the sales of such General Foods Sales Division Institution Products to the above-mentioned types of public feeding establishments in the Designated Territory by performing the following services, the performance of which shall qualify Distributor for the allowance referred to under item (D) of subject (2):

1. Aggressively sell customers General Foods Sales Division Institution Products;
2. Provide store-door delivery from wagon on all such products at time of sale;
3. Offer services generally offered by competitors in the Designated Territory;
4. Maintain adequate stocks;
5. Arrange to move older stocks first;
6. Handle damaged merchandise in accordance with General Foods policy;
7. Arrange for distribution and proper use of display and promotional material provided;
8. Maintain replacement parts for coffee-making equipment for resale by Distributor;
9. Arrange for appropriate displays of products in public feeding establishments;

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10. Make deliveries, at General Foods request, of General Foods Sales Division Institution Products to individual units of multiple food service operators designated by General Foods, General Foods to handle billing, distributor to make deliveries and to be reimbursed by Credit memoranda for merchandise delivered.

Item (d) of subject (2), relating to allowances, is as follows:

All goods delivered hereunder by General Foods to be resold by Distributor shall be billed to Distributor on the basis of price lists attached to and made part of this agreement, which prices are (except as to coffee) subject to an allowance of ten (10) percent for services rendered hereunder, payable in cash or by credit memorandum at General Foods election, and which prices as to restaurant coffee are subject to an allowance of two (2¢) cents per pound of such coffee, said last named allowance to be deducted by General Foods on the invoices. Said price lists are subject to change by General Foods without prior notice to Distributor.

The ICWD is usually a relatively small operator making sales directly from his truck to the kitchen of the institution. Although selling chiefly respondent's products, he also handles supplementary products, such as guest checks, coffee urn supplies, etc. He distributes promotional and advertising material of various sorts which are furnished by respondent, and at times gives demonstrations, particularly in connection with coffee sales.

It also appears that respondent has set up a system for policing the work of the ICWDs and that the so-called wagon distribution method is used by many other firms engaged in businesses similar to that of respondent. Some of these firms use their own personnel and facilities for wagon distribution. It is estimated that 85% of all the coffee sold to public feeding establishments in the United States is distributed by the general method herein described.

## RESPONDENT'S APPEAL

## COUNT I

It is clear that the ICWD and the conventional wholesale grocer are in competition with each other for the feeding institution business; that they handle commodities of like grade and quality and that the ICWDs receive a discount in buying from respondent, which discount the conventional wholesaler does not receive. This discount amounts to 2¢ per pound on coffee (1¢ prior to November 22, 1948) and 10% on other products.

There is a difference of opinion on the question of competitive injury. Considerable testimony was introduced on this subject and the same is reviewed at some length in the Initial Decision from which we quote the following:

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Table I, above, in column 3 shows that from 1947 to 1951, respondent's sales of institution products to ICWDs increased 645%, while its civilian sales to all purchasers, column 1, increased but 149%, and its sales to others than ICWDs, column 2, decreased 13%. These statistics support the conclusion that the growth of ICWD business was at the expense of the conventional wholesalers, particularly since the growth of ICWD business has been substantially greater than the growth of respondent's overall institution business. The ICWD has picked up considerable business, much of which must have come through business diverted from competing wholesalers. Table II shows that during this same period the institution grocery business of ICWDs increased 835% while their coffee business increased 596%, the greater increase being in the field in which there was the greater competition between ICWDs and conventional wholesalers, since many wholesalers are not granted the privilege of handling respondent's institution coffee. Between 1951 and 1953 Table I shows that ICWD business has continued to increase at a substantial rate—from 645% to 953%. It is reasonable, therefore, to assume that the conclusions reached on the basis of the 1947-1951 tabulations are valid for the later period also, and would be factually supported if pertinent figures were available. Respondent presented no statistics to justify any other assumption.

As to specific injury to competition resulting, actually or potentially, from respondent's price discriminations, the record shows that ICWDs have made sales to some customers at respondent's list prices, relying upon their contract allowances of 10% on institution grocery products, and 2¢ per pound on institution coffee, for recompense for their services and for profit. Instances of such sales are numerous enough to justify the conclusion that there are very few ICWDs who do not, on occasion, engage in this practice, although customarily they attempt to sell at prices which will give them margins of profit over and above respondent's list prices. When competition is keen, however, ICWDs take advantage of their ability to accept business at respondent's list prices and still make a satisfactory margin of profit. To meet such competition, the conventional institution wholesaler must also sell at respondent's list price, and is limited to such profit as he can realize by availing himself of the quantity and cash discounts which he is entitled to receive on the same basis as the ICWD. He suffers competitively, and is injured, therefore, to the extent that he receives from the respondent no 10% discount on institution grocery products and no 2¢ per pound allowance on coffee. The operations of conventional wholesalers are on such a narrow margin that their annual profit often depends upon their ability to take advantage of cash and quantity discounts. Under these conditions a differential of 2% favoring their competitors is substantial, and one of 10% becomes vital.

In some instances, ICWDs have sold respondent's institution products at very small markups, forcing conventional wholesale grocers to reduce their customary markups, and consequently their profits, to meet ICWD competition. Because of his lower cost price, the ICWD is in a preferred position. Even if both the ICWD and the conventional wholesaler resell respondent's products at the same price, the ICWD still has the competitive advantage of respondent's preferential allowances, giving him the larger profit.

Respondent's brief calls attention to the fact that over a period (1947 to 1951) purchases of institution products by ICWDs rose from \$2,400,000 to \$17,600,000, while purchases of others than

ICWD's dropped only from \$7,100,000 to \$6,100,000. It is argued therefrom that much of the ICWDs' gains must have represented new business in respondent's products.

No issue of injury in the primary line was made by the pleadings and no attempt was made to show what, if any, gains were made at the expense of respondent's competitors or what, if any, may have been due to other causes such as increased consumer demand at feeding institutions, etc. Nevertheless, from a consideration of the whole record we agree with the finding of the hearing examiner that "the effect of respondent's price discrimination, on a nation-wide basis, has been to lessen competition and to injure, destroy and prevent competition."

Respondent argues that the discounts allowed their ICWDs were payments for substantial services actually rendered; that instead of a discrimination prohibited by Section 2 (a), they are payments properly made under Section 2 (d).

In construing Section 2 (d), consideration must be given to (1) the evil which it was designed to eliminate, and (2) its specific place in the overall purpose of the Robinson-Patman Act.

Legislative history indicates that the purpose of Section 2 (d) was to reach the evil of granting discriminations in the form of special allowances in purported payment of advertising and other sales promotional services. (See Senate Report No. 1502 and House Report No. 2287, 74th Congress, 2d Sess.) Congressman Utterback, in explaining Sections 2(d) and 2 (e), said:

The existing evil at which this part of the bill is aimed is, of course, the grant of discriminations under the guise of payments for advertising and promotional services which, whether or not the services are actually rendered as agreed, results in an advantage to the customer so favored as compared with others who have to bear the cost of such services themselves. The prohibitions of the bill, however, are made intentionally broader than this one sphere, in order to prevent evasion in resort to others by which the same purpose might be accomplished, and it prohibits payment for such services or facilities, whether furnished "in connection with the processing, handling, sale or offering for sale of the products concerned." (80 Cong. Rec. 9418.)

The services for which payment may be made under Section 2 (d) must be of such a character that they can be made available on proportionally equal terms to all customers. The whole purpose was to bring about substantial equality of treatment based on services actually rendered rather than on the mere willingness or potentiality of rendering the services. As was said by Professor S. Chesterfield Oppenheim in *Price and Service Discriminations Under the Robinson-Patman Act*:

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Proof of performance of specified services should be required before payments are made; payments should not be made if buyers have not actually rendered services.

In the past failure to furnish the services, or the pretended furnishing, was one of the principal reasons for adopting Section 2 (d). Thus in the matter of Colgate-Palmolive Peet Company, et al., Dockets 5585, 5586 and 5587, the Commission said:

Section 2 (d) permits payments for services or facilities actually furnished. Certainly payments for services or facilities not furnished are not authorized.

The same thought was expressed in the rules promulgated for the Corset, Brassiere and Allied Products Industry:

*Note 1:* Industry members giving advertising allowances to competing customers must exercise precaution and diligence in seeing that all of such allowances are used in accordance with the terms of their offers.

*Note 2:* When an industry member gives allowances to competing customers for advertising in a newspaper or periodical, the fact that a lower advertising rate for equivalent space is available to one or more, but not all, such customers, is not to be regarded by the industry member as warranting the retention by such customer or customers of any portion of the allowance for his or their personal use or benefit.

There must be a discernible relationship between the amounts paid and the cost or reasonable value of the services rendered. In other words, each type of service must be capable of having a price or value tag put on it.

The discounts given to ICWDs do not meet the requirements of Section 2 (d). In the first place, payments were not made for services actually rendered. The contract required the ICWD to perform certain enumerated services. It is obvious that all would not perform the same services, nor in the same amount, nor of the same quality. Some of the services could not be rendered unless the customer elected to receive them. Nevertheless, each ICWD receives the same allowances whether he actually furnishes all the services, none of them, or only a part. In the second place, some of the services required were of such a character that even if rendered in accordance with the contract, a price tag could not be put on them. This applies particularly to "(1) aggressively selling customers General Foods Sales Division Institution Products," and "(3) offer services generally offered by competitors in the Designated Territory."

The hearing examiner found that "the record showed generally, and it may be assumed, that these services have been performed conscientiously by each ICWD."

From none of these findings, or any others, can it be concluded that the requirement of payment for services actually rendered was

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observed as required by law. Respondent was really contracting for willingness and potentiality to perform certain services. It was paying for a certain method of doing business rather than for specific services actually rendered.

The policing done by respondent was directed toward the general operation of a plan rather than toward checking services actually rendered as is usually done, for example, in advertising allowances. The contract with the ICWD provided that in case "of the substantial failure of a distributor to perform any one or more of the distributor's obligations under this agreement," respondent may terminate the agreement on five day's notice. Furthermore, the time and method of payments to the ICWDs are not related to actual services rendered and paid only after an accounting thereof. For example, the coffee allowance is paid by deducting the amount from the face of each invoice and remitting the balance subject to other allowances, such as cash discounts.

The payments involved here were not of a character intended by Section 2 (d). See in the Matter of *Champion Spark Plug Company* (1953), Docket 3977.

Respondent next claims that the ICWDs constitute a class that is functionally distinct from respondent's other customers, and that because they perform their selling in a different manner than the conventional wholesaler, the lower prices to them are justified.

Over the years in the chain of distribution from the producer to the ultimate consumer, various groups have come into being, each having a particular status and performing its particular function. Familiar examples are wholesalers and retailers. Prices to these groups take into account their status and the part they play in distribution by virtue of that status. Characteristically, the members of each group compete with each other but not with the members of a different group.

While the Robinson-Patman Act does not mention functional pricing, it was written nevertheless against the background of the distribution system then in effect. As pointed out by respondent, a seller is not forbidden to sell at different prices to buyers in different functional classes and orders have been issued permitting lower prices to one functional class as against another, provided that injury to commerce as contemplated in the law does not result. For example, in the Matter of *Albert L. Whiting and Lucille D. Whiting, trading as Urbana Laboratories*, 26 F.T.C. 312, the Commission found that the functional classification made by the seller resulted in differences in prices to various customers all engaged competi-

tively in the selling to consumers and entered an order against the practice. In *FTC v. The Ruberoid Company* (1951) 343 U.S. 470, the Supreme Court said:

The roofing material customers of Ruberoid may be classified as wholesalers, retailers, and roofing contractors or applicators. The discriminations found by the Commission were in sales to retailers and applicators. The Commission held that there was insufficient evidence in the record to establish discrimination among wholesalers, as such. Ruberoid contends that the order should have been similarly limited to sales to retailers and applicators. But there was ample evidence that Ruberoid's classification of its customers did not follow real functional differences. Thus some purchasers which Ruberoid designated as "wholesalers" and to which Ruberoid allowed extra discounts in fact competed with other purchasers as applicators. And the Commission found that some purchasers operated as both wholesalers and applicators. So finding, the Commission disregarded these ambiguous labels, which might be used to cloak discriminatory discounts to favored customers, and stated its order in terms of "purchasers who in fact compete."

The ICWD and the conventional grocer both sell to the feeding institutions. They are in competition with each other. As already pointed out, the special discounts to the ICWDs cause injury to that competition. It is true that by virtue of the contract with respondent, the ICWD performs his function of reselling in a different manner than most of the conventional wholesalers. He furnishes certain services specified in the contract. The law permits the seller to pay for services or facilities furnished in the resale of goods. If he elects to do so, however, the payments must be in accordance with the terms and conditions laid down in Section 2 (d). To hold that the rendering of special services ipso facto gives him a separate functional classification would be to read Section 2 (d) out of the Act.

#### COUNT III

This count charges respondent with the violation of section 2 (e) of the Clayton Act in selling certain products to some purchasers in packs and sizes not accorded to all competing purchasers on proportionally equal terms.

There is considerable variation in the selling practices of ICWDs and conventional wholesalers in the selling of institution products. For example, the hearing examiner found that:

The record shows that while some ICWDs sell respondent's entire line of institution products to some customers, there are other customers to whom they sell only coffee, and still others to whom they sell all or most of respondent's other products exclusive of coffee. Likewise, the conventional wholesale grocers do not sell respondent's entire line of institution products to all their institution customers. Many wholesalers do not handle respondent's institution coffee at all, because it is unavailable to them due to the fact that in the area

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in which they operate, the competing ICWDs have exclusive right to distribute respondent's institution coffee. Frequently such wholesalers handle none of respondent's coffee, either institution pack or grocery pack. In such areas the conventional wholesalers and the ICWDs compete only in the resale of respondent's institution-pack grocery products. In other areas conventional wholesalers, who resell both to institutions and to retail grocers, sell all respondent's institution-pack products except coffee, and all respondent's grocery-pack products including coffee.

In such cases there is full competition, product-wise, between the ICWD and the conventional wholesaler, because the conventional wholesaler can sometimes sell, to an institution user, respondent's grocery-pack Maxwell House coffee in competition with respondent's institution-pack Maxwell House coffee offered by an ICWD.

One conventional wholesaler testified that Maxwell House coffee (respondent's product) in institution size and type packaging had not been made available to him in spite of his request for it. On one occasion at least he filled an order to a feeding institution with grocery-pack coffee. Other instances as to other products also appear in the record.

Section 2 (e) prohibits the furnishing by a seller of "any services or facilities" connected with the sale or offering for sale of a commodity purchased for resale upon terms not accorded to all purchasers on proportionally equal terms. Respondent first argues that the matter of varied packaging is not included within the purview of this section for the reason that proportionality in such cases is not practical. In the matter of *Luxor, Limited* (1940), 31 F.T.C. 658, the products involved were cosmetics, certain ones of which were put up in a "Junior" package size, retailing for 10¢, and also in a "Regular" package size retailing for 49¢. The Junior size was retailed through 5¢ and 10¢ stores and the Regular size through drug stores, to which class of customers, respondents refused to sell the Junior size package. The Commission found that the 5¢ and 10¢ stores and the drug stores were in competition with each other, that the smaller packaging was an aid in selling, and that the furnishing of the "Junior" size package constituted a service or facility supplied in connection with the handling, sale or offering to sell of such commodities.

Respondent next argues that the goods involved were not of like grade and quality. Although this requirement is not expressly stated in either Section 2 (d) or 2 (e), nevertheless, in the Matter of *Golf Ball Manufacturers Association*, 26 F.T.C. 824 (under 2 (d)), the words "such products or commodities" were construed as referring to goods of like grade and quality. In any event, the essence of the hearing examiner's finding is that the products (while in all cases not identical) were of like grade and quality.

Another argument is that respondent's institution pack and its grocery pack product are sold in different markets and are therefore non-competitive. Nevertheless, the fact remains that, in many instances, conventional grocers and the ICWDs were in competition for the feeding institution business and that the services and facilities in the matter of containers were not accorded to all on the basis required by Section 2 (e).

In *Corn Products Refining Co. v. FTC* (1944), 142 F. 2d 212, the court said:

There is no requirement in Section 2 (e) that there be proof of actual substantial benefit to one, or substantial injury to another, of two or more competitors. This paragraph does not require even probability of adverse effect upon competition as does Section 2 (a). We think it is satisfied by proof of special services rendered one purchaser not rendered to similar competing purchasers engaged in the same business and using the commodity for the same purpose.

#### APPEAL OF COUNSEL SUPPORTING THE COMPLAINT

Appeal by counsel supporting the complaint is based on the dismissal of the charge in Count II that respondent had violated Section 2 (d) of the Clayton Act. The appeal is based on:

1. The legal conclusion that Section 2 (d) is inapplicable to the charge of Count II of the complaint, and the failure to hold that the record facts establish a violation of Section 2 (d).
2. The failure to hold upon dismissing Count II, that the record facts establish a violation of Section 2 (a) under the charge of Count I of the complaint.
3. The failure to hold that the record facts establish a violation of Section 2 (e) under the charge of Count III of the complaint, in that respondent furnishes certain sales services to some favored purchasers on terms not accorded other purchasers of its products for competitive resale.

It appears that in some instances, respondent sells institution-pack products to a class of customers (MFSAs), such as hotels and drug store chains operating food serving establishments, usually in several different locations). These sales are made through respondent's own representatives, are charged to the buyers, and payment is remitted directly to respondent. If requested by the buyer, respondent often directs an ICWD to make delivery of the amount purchased out of stock which he has on hand and belonging to him. Deliveries are sometimes also made in a similar manner by conventional wholesalers. So far as the ICWD is concerned, this service is one which respondent has bargained for in (C) 10 of its contract with the ICWD. The ICWD is reimbursed for the product delivered by a stock credit memorandum (issued once each month) through which the stock is replaced. For the service of storage and delivery, the

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ICWD receives payment of 3¢ per pound for coffee and 10% on other products.

These payments do not violate Section 2 (d) for the reason that they are not payments made to the ICWD as a customer and are not made in connection with the resale of goods bought by him from respondent. The respondent has already made the sale and simply calls on the ICWD to make delivery as provided in his contract.

As to the alternative claim that the payments are actually reductions in price in violation of Section 2 (a), the hearing examiner in refusing such contention had this to say:

It is argued that such payments are actually reductions in price and constitute violation of Sec. 2 (a) of the Act, but that contention is rejected. The payments are liberal, but, in the absence of some showing that they are grossly in excess of the cost or value of the services rendered, it cannot be found that they constitute any sort of a rebate or price reduction on other merchandise bought by the ICWD from respondent for resale. Table IV, above, shows as to three areas, the amount of merchandise delivered by ICWDs and the amount of money paid by respondent for such deliveries, but no conclusion can be drawn from those figures, and no other evidence was offered, on this phase of the case.

Complaint is next made that respondent's practices of securing orders direct from MFSAs and turning them over to the ICWDs or a conventional grocer is a violation of Section 2 (e), on the ground that it is the furnishing of merchandising services not proportionalized as required by law. On this phase of the case, the hearing examiner said:

It is suggested that the supplier is not always selected by the purchaser, and that this is a device by which respondent can aid some of its customers without offering similar aid to other competing customers.

It is true that the device might be so used, but there is not sufficient evidence in the record to establish that it has been so used. There is evidence of one specific instance where respondent's salesman procured orders from prospective users and turned those orders over to a particular ICWD, but in this instance there was a family relationship, the salesman being the father of the ICWD. The particular instance stands out as an exception to an established rule rather than as proof of a practice. The record shows that such orders were referred both to ICWDs and to conventional wholesalers; except in this one instance there is no contradiction of respondent's assertion that the choice of supplier was at the option of the purchaser. There is no basis for an inference that the orders were referred in a manner which would benefit one customer of respondent more than another.

We conclude that the hearing examiner correctly dismissed Count II.

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Finally, respondent contends that the breadth of the hearing examiner's order is unwarranted, and is not justified by the findings

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made. We conclude that the order is in accordance with orders previously made by the Commission in similar cases and is within the directions laid down by the Supreme Court in *FTC v. The Ruberoid Company*, 343 U.S. 470.

The findings and order of the hearing examiner are adopted as the findings and order of the Commission. Both appeals are denied and it is directed that an order issue in accordance herewith.

## FINAL ORDER

This matter having been heard by the Commission upon cross appeals by respondent and counsel in support of the complaint, briefs in support of and in opposition to said appeals, and upon oral argument before the Commission; and

The Commission having rendered its decision denying both appeals and adopting the findings, conclusion, and order contained in the initial decision:

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

IN THE MATTER OF  
BELTONE HEARING AID COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 3  
OF THE CLAYTON ACT

*Docket 5825. Complaint, Nov. 2, 1950—Decision, Feb. 16, 1956*

Order requiring one of the largest manufacturers of hearing aid instruments in the United States—in 1953 having written exclusive-dealing franchise agreements with 167 of its 187 independent distributors and exclusive-dealing understandings with the remainder—to cease selling its hearing aids to dealer distributors on condition that they not handle similar products of its competitors.

*Mr. Andrew C. Goodhope* for the Commission.  
*Crowell & Leibman*, of Chicago, Ill., for respondent.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is before the undersigned Hearing Examiner for final consideration upon the complaint, amended and supplemental answer thereto, testimony and other evidence, proposed findings as to the facts and conclusion presented by counsel and oral argument thereon.

The complaint in this proceeding was issued November 2, 1950, charging respondent Beltone Hearing Aid Company, a corporation, with having violated the provisions of Section 3 of the Clayton Act by reason of respondent's practice of selling its hearing aids to certain of its customers on condition, agreement or understanding that such customers shall not use or deal in hearing aids sold and distributed by competitors of respondent.

The respondent filed its answer to the complaint on November 30, 1950, but later on January 11, 1951, the respondent withdrew said answer by filing an answer admitting all the material allegations of fact set forth in said complaint and waiving all intervening procedure and further hearing as to said facts. Subsequent thereto Webster Ballinger, a duly designated Hearing Examiner of the Commission, issued his initial decision in this proceeding. Thereafter, on motion of the respondent, the Commission on February 18, 1954, issued its order setting aside the initial decision of the Hearing Examiner, granting leave to respondent to file an amended and supplemental answer, and remanding this proceeding to the Hearing