

IN THE MATTER OF
FRUITVALE CANNING COMPANY

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

Docket 5989. Complaint, May 14, 1952—Decision, June 15, 1956

Order requiring a packer of canned fruits in Oakland, Calif., to cease discriminating in price in violation of Sec. 2 (a) of the Clayton Act as amended, through such practices as the consistent pattern it followed during 1949 and 1950 of charging chain stores in San Francisco, which purchased directly through their buyers, less for its products than it charged buyers who purchased through brokers, by variations in price per dozen cans ranging from 2½¢ to 55¢ during 1950, the majority of which were 5¢ or 10¢ per dozen.

Mr. Edward S. Ragsdale and Mr. Cecil G. Miles for the Commission.

Hadsell, Murman & Bishop, of San Francisco, Calif., and *Carretta & Counihan*, of Washington, D. C., for respondent.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

THE COMPLAINT

On May 14, 1952, the Federal Trade Commission issued its complaint in this proceeding, alleging that the above-named respondent, while engaged in commerce among the several states of the United States in selling and distributing canned fruits, wherein it constitutes a substantial factor, has, since June 19, 1936, discriminated in price between purchasers of such canned fruits of like grade and quality, which respondent sells for use, consumption and resale within the several states of the United States. Such discrimination is alleged to vary from approximately 2½% to approximately 7½% of the price of the commodity sold. Respondent is alleged to use two separate and distinct sales methods, as follows: (1) by selling canned fruits to buyers, principally wholesale grocers and retail chain stores, through brokers; and (2) by selling canned fruits of like grade and quality directly, without the intervention of a broker, to other buyers, most of whom are large retail chain grocers who buy through their buying agencies located in San Francisco, California. Representative of such direct buyers, who are characterized as favored purchasers, are Safeway Stores, Inc.; The Great Atlantic & Pacific Tea Company; The Kroger Company; The American Stores Company; First National Stores; National Retailer Owned Grocers, Inc.; Consolidated Grocery Co., and Topco Associates, Inc.

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It is further alleged that the respondent's purchasers who are favored by respondent's discrimination in price have been competing, directly or indirectly, with respondent's non-favored purchasers in the resale and distribution of such products, and that the effect of such discrimination in price by respondent "* * *" has been or may be substantially to lessen competition in the line of commerce in which "* * *" both favored and non-favored purchasers are engaged, and to injure, destroy or prevent competition between such favored and non-favored purchasers, in violation of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Sec. 13).

The general allegations as set forth above are particularized by specific allegations citing representative discriminations between favored and non-favored buyers of products of like grade and quality during September 1949.

THE ANSWER

On June 16, 1952, respondent submitted its answer admitting its corporate identity, its two selling methods, and the interstate sale and distribution of its products. Respondent's answer denies, however, the principal charges of the complaint, and, as a special defense, avers that if respondent has discriminated in price between buyers of products of like grade and quality, then such buyers were not competing with each other in commerce, or such discrimination was due to one or another of the following factors:

1. "Price changes from time to time in response to changing conditions affecting the market for or the marketability of the goods concerned";
2. "The lower price was made in good faith to meet an equally low price of a competitor";
3. "Any differentials in price made and make only due allowances for differences in the cost of manufacture, sale and delivery resulting from the differing methods or qualities in which respondent sold or sells its commodities to the respective purchasers mentioned, either expressly or generally, in the complaint."

SUBSEQUENT PROCEDURE

Following the joining of issues raised by the pleadings, counsel for the respondent submitted a motion for a more definite statement than that contained in the complaint. This motion was granted by the hearing examiner on August 26, 1952. On February 9, 1953, following an appeal to the Commission, the hearing examiner's order granting the motion was vacated and set aside by the Commission. In due

course evidence was submitted in support of the complaint at hearings in San Francisco, California; Fort Wayne, Indiana; Toledo, Ohio; Philadelphia, Pennsylvania; Baltimore, Maryland; Washington, D. C.; and again in San Francisco, California. At this last-mentioned hearing, counsel supporting the complaint closed his case on June 21, 1955, whereupon counsel for respondent presented his evidence in defense. Thereafter proposed findings as to the facts and proposed conclusions were duly submitted by both counsel.

IDENTITY AND BUSINESS OF THE RESPONDENT

The record shows that the respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office, canning plant and principal place of business located at 905 - 66th Avenue, Oakland, California.

Since 1939 the respondent has been engaged in the business of packing, selling and distributing canned fruits, principally cherries, apricots, peaches, pears and fruit cocktail. Fruit cocktail is a combination of bits of grapes, peaches, pears and pineapple. All of the raw fruit for such canned products is purchased from growers in California except the pineapple, which is procured from the Hawaiian Islands. The harvest season for these fruits runs approximately from June 1st to September 10th, and the canning process proceeds during that time and to as late as November for fruits which have been placed in cold storage. The quantities of these fruits vary from year to year, and the price of the canned products varies accordingly. It is the objective of canners generally to endeavor to sell all of their canned products during the year in which the fruits are produced and canned, so as to have as small a "hold-over pack" as possible, because room is needed in the warehouse for the next season's pack, and because it is economically undesirable to have money invested in stored products.

Although the respondent sells some of its canned fruits under its own labels, the greater part is sold under the brands and private labels of its various purchasers. This factor, however, is not significant in the determination of the issues here involved.

RESPONDENT'S RELATIVE IMPORTANCE IN THE CANNING INDUSTRY

During the period from 1949 to 1954, the respondent processed, on an average, approximately 22% of all cherries canned by California packers; 3% of the apricots; 3% of the peaches; 5% of the fruit cocktail, and 8% of the pears. During 1949 respondent sold canned fruit to Safeway Stores, Inc., in the amount of \$413,210.20; to The Kroger Grocery and Baking Company, \$593,325.78; to The Great Atlantic & Pacific Tea Company, \$730,811.60; and to The American

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Stores Company, \$60,310.00. On an average, 20% of the respondent's products have been sold to chain stores by direct purchase; 50% have been sold to wholesale grocers throughout the United States through brokers; 20% have been sold to the United States Government; and 10% to other outlets. As indicated above, the respondent, although not a dominant factor in the distribution and sale of canned fruit, is nevertheless a substantial one.

COMPETITION

In the course of respondent's business, it is now, and has been during all the times here involved, in active and substantial competition with other firms similarly engaged in the canning, sale and distribution of fruits of like grade and quality. The record also shows that many of respondent's buyers, both favored and non-favored, are likewise engaged in competition with each other and with customers of respondent's competitors in the resale of such products. Furthermore, respondent's wholesale buyers resell respondent's products to their retail customers, who compete directly with the retail outlets of the large chain stores which buy directly from respondent. Some of respondent's wholesale buyers also have their own retail outlets, which likewise compete in the same manner.

RESPONDENT'S SALES METHODS

As admitted by respondent in its answer, respondent sells and distributes its canned fruits by the two separate and distinct methods described in the complaint. Regardless, however, of whether the sale is a direct one to an alleged favored purchaser or a sale to a wholesaler through the intervention of a broker, the transaction is initiated by the respondent entering into a contract with the purchaser, wherein respondent agrees to sell, and the purchaser to buy, a stated amount of canned fruit of a stated grade and quality, some contracts stating the price, others not.

Thereafter the products are shipped to the purchaser at his location, which may be anywhere throughout the United States, and an invoice and bill of lading are forwarded, accompanied, in many instances, by a draft for payment of the amount of the invoice on arrival of the shipment at destination. A discount of 2% is allowed in all cases for cash payment on arrival of the shipment or within ten days thereof. In practically all instances buyers take advantage of this cash discount. Brokers receive from respondent a commission of 2½% of the net selling price. Allowances are made for labels supplied by the buyers, and in most instances the labels are so supplied. In many instances the invoice price varies from that stated in the contract,

but the invoice price is invariably the price actually paid by the purchaser.

DISCRIMINATION IN FAVOR OF DIRECT BUYERS

In August 1949, Mr. Emmett M. Hazlett, who, as Vice President of the respondent corporation, was chiefly responsible for the sale of its canned fruits, called upon substantially all the buyers for the large chain stores maintaining offices in San Francisco, and secured from them contracts for the purchase of substantial quantities of fruit cocktail at prices substantially lower than those announced in respondent's published price list, released to its brokers a few days later. Concerning these transactions, Mr. Hazlett testified on cross-examination at the hearing held in San Francisco, California, on June 22, 1955, as follows:

"Q. Do you recall stating to Mr. Hill that a price difference had been recognized between certain direct buyers and non-direct buyers in 1949 on the purchase of fruit cocktail, that with packing operations about to start, Fruitvale felt it was necessary for the corporation to have some business on hand, against it to start packing and in order to obtain business you called on the direct buyers maintaining buying offices in San Francisco and named prices which were acceptable to such buyers? Is that a correct statement?

"A. Well, if Mr. Hill put that in it must have been that I said that. It sounds reasonable.

"Q. Yes, sir. In other words, you went out and quoted prices, made contracts with the direct buyers at a lower figure than the figure at which you announced your prices to the trade right thereafter?

"A. Later on, that's correct. That's correct.

"Q. And that accounts for the differential to some extent if not entirely in the price at which fruit cocktail was sold to the large direct buyers and to buyers located throughout the country, who were not in that classification, that is the wholesaler?

"A. Yes."

The above testimony constitutes a frank admission that the respondent, in 1949, sold products of like grade and quality to the large chain stores for less than the price at which it sold such products to wholesale grocerymen through brokers. The reason given for this practice was that the respondent corporation needed the assurance of business on hand at the start of the packing season. The prevalence of this practice, resulting in favoritism to the chain stores during 1949 and 1950, is evidenced by many contracts and invoices in the record, typical examples of which show that respondent, during 1949, sold choice fruit cocktail 48/1T in heavy syrup to direct buyers in the marketing area of E. St. Louis, Illinois, and St. Louis, Missouri, as follows:

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Date	Buyer	Number of cases	Price per dozen cans	CX No.
8/31/49	Great A & P Tea Co.....	150	\$1.70	265
9/ 2/49	do.....	400	1.70	282
9/ 6/49	The Kroger Company.....	200	1.70	270
9/30/49	do.....	360	1.70	312
10/14/49	Associated Grocers, Inc. (Nat. Ret. Owned Grocers, Inc.)..	700	1.75	328

During the same period of time, in the same area, respondent sold the same product to buyers purchasing through brokers, the unfavored buyers, as follows:

Date	Buyer	Number of cases	Price per dozen cans	CX No.
9/19/49	J. Eisenstein Wholesale Grocer Co.....	25	\$1.80	289
9/19/49	do.....	35	1.80	290
10/21/49	Wetterau Grocer Co., Inc.....	50	1.75	333

Similar transactions in other areas are as follows:

Date	Buyer	Number of cases	Price per dozen cans	CX No.
PRODUCT: CHOICE FRUIT COCKTAIL 48/1 T IN HEAVY SYRUP				
FAVORED BUYER				
<i>In Fort Wayne, Indiana</i>				
8/22/49	The Kroger Company.....	200	\$1.70	658
9/16/49	do.....	310	1.70	287
10/12/49	do.....	125	1.70	327
12/12/49	do.....	200	1.65	662
NON-FAVORED BUYERS				
8/13/49	A. H. Perfect & Company.....	100	1.80	728
9/ 9/49	Bursley & Company, Inc.....	450	1.80	277
<i>In Toledo, Ohio</i>				
10/19/49	The Kroger Company.....	100	1.70	330
10/24/49	do.....	200	1.70	335
10/24/49	The Great A & P Tea Co.....	200	1.75	338
11/30/49	do.....	250	1.75	357
NON-FAVORED BUYER				
8/31/49	The Bartley Co.....	100	1.80	267
<i>In St. Louis, Missouri</i>				
FAVORED BUYER				
1/19/50	The Kroger Company.....	350	1.65	668
1/27/50	do.....	375	1.65	669
2/16/50	do.....	100	1.65	670
NON-FAVORED BUYER				
2/15/50	Wetterau Grocer Co., Inc.....	200	1.675	715
<i>In Cleveland, Ohio</i>				
FAVORED BUYER				
10/12/49	The Kroger Company.....	100	2.85	325
NON-FAVORED BUYERS				
8/31/49	The Wm. Edwards Co.....	498	2.95	266
9/10/49	Gray Drug Store, Inc.....	50	2.95	281
9/10/49	The Standard Drug Co.....	75	2.95	280
9/10/49	The Great Lakes Food Sup. Co.....	25	2.95	279

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Date	Buyer	Number of cases	Price per dozen cans	CX No.
	<i>In Philadelphia, Pennsylvania</i>			
	FAVORED BUYER			
11/11/49	The Great A & P Tea Co.-----	350	\$2.85	352
	NON-FAVORED BUYER			
11/10/49	David Soffer-----	50	2.95	350
	<i>In Baltimore, Maryland</i>			
10/26/49	The Great A & P Tea Co.-----	200	2.85	339
	NON-FAVORED BUYERS			
9/ 1/49	Baltimore Wholesale Groc. Co.-----	100	2.95	282
9/21/49	Joffee Bros.-----	100	2.95	301
	Product: CHOICE FRUIT COCKTAIL 6/10 IN HEAVY SYRUP			
	<i>Davenport, Iowa</i>			
	FAVORED BUYER			
8/31/49	Western Grocer Co.-----	150	10.00	264
	NON-FAVORED BUYERS			
9/ 8/49	Lagomarcino-Grupe Co.-----	40	10.20	273
9/ 8/49	Smith Brothers & Burdick Co.-----	300	10.20	274
	Product: CHOICE FRUIT COCKTAIL 24/2½ IN HEAVY SYRUP			
	<i>In Omaha, Nebraska</i>			
	FAVORED BUYER			
9/26/49	Safeway Stores, Inc.-----	300	2.85	308
	NON-FAVORED BUYER			
9/27/49	The H. A. Marr Grocery Co.-----	320	2.95	307
	Product: 48/8 oz. CHOICE L. S. R. A. CHERRIES IN HEAVY SYRUP			
	<i>In Philadelphia, Pennsylvania</i>			
	FAVORED BUYERS			
6/16/49	The Great A & P Tea Co.-----	600	1.125	245
6/17/49	American Stores Co.-----	360	1.10	246
2/17/50	The Great A & P Tea Co.-----	250	1.05	606
4/21/50	Do-----	350	1.05	615
6/17/49	Penn Fruit Co.-----	350	1.15	247
6/23/49	H. Kellogg & Sons.-----	200	1.125	248
6/27/49	Frankford Grocery Co.-----	300	1.15	250
8/13/49	Do-----	300	1.15	444
6/27/49	Wm. Montgomery Company-----	40	1.15	249
8/31/49	Do-----	100	1.15	466
7/ 1/49	Alfred Lowry & Bros.-----	100	1.15	251
10/ 7/49	Alfred Lowry & Brother-----	100	1.15	459
7/ 1/49	Richmond Grocery Co.-----	100	1.15	252
12/30/49	Do-----	99	1.15	407
2/15/50	Wm. Montgomery Co.-----	100	1.15	732
	Product: FANCY L. S. R. A. CHERRIES 24/2½ IN HEAVY SYRUP			
	<i>In Philadelphia, Pennsylvania</i>			
	FAVORED BUYERS			
2/17/50	The Great A & P Tea Co.-----	250	3.00	606
4/21/50	Do-----	300	3.00	615
9/13/50	Do-----	200	3.50	625
5/23/50	American Stores Co.-----	750	3.00	570
	NON-FAVORED BUYER			
2/15/50	Wm. Montgomery Co.-----	365	3.425	732
7/12/50	Do-----	655	3.55	733
9/11/50	Do-----	400	3.55	734
10/19/50	Do-----	200	3.55	735

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Date	Buyer	Number of cases	Price per dozen cans	CX No.
	PRODUCT: 24/2½ CHOICE SLICED Y. C. PEACHES IN HEAVY SYRUP			
	<i>In Portland, Maine</i>			
	FAVORED BUYER			
8/19/49	Topco Co., C. C. Shaw.....	25	\$2.10	260
	NON-FAVORED BUYERS			
9/19/49	Cummings Bros.....	200	2.15	288
9/21/49	Hannaford Bros.....	100	2.15	304
	<i>In Jacksonville, Florida</i>			
	FAVORED BUYER			
8/26/49	Consolidated Grocers Corp.....	100	2.10	261
9/22/49	Clark Lewis & Co.....	50	2.15	303
	<i>In Spokane, Washington</i>			
	FAVORED BUYER			
11/ 1/49	Safeway Stores.....	100	2.10	343
	NON-FAVORED BUYER			
9/26/49	The McClintock-Trunkey Co., Inc.....	50	2.15	306
11/31/49	do.....	50	2.15	347
	<i>In Portsmouth, Ohio</i>			
	FAVORED BUYER			
8/ 6/49	The Kroger Company.....	350	2.10	256
	NON-FAVORED BUYER			
10/ 7/49	The Gilbert Grocery Co.....	150	2.15	322
	<i>In Rochester, New York</i>			
	FAVORED BUYER			
10/27/49	Brewster Crittenden & Co.....	100	2.10	340
	NON-FAVORED BUYER			
10/25/49	S. M. Flickinger Company, Inc.....	60	2.15	336
	PRODUCT: STANDARD HALVES Y. C. PEACHES SIZE 24/2½ IN LIGHT SYRUP			
	<i>In St. Louis, Missouri</i>			
	FAVORED BUYER			
12/27/49	The Kroger Company.....	445	1.65	664
	NON-FAVORED BUYER			
10/12/49	Wetterau Grocer Co., Inc.....	200	1.90	713
	PRODUCT: 48/1 CHOICE SLICED Y. C. PEACHES IN HEAVY SYRUP			
	<i>In Columbus, Ohio</i>			
	FAVORED BUYER			
8/21/49	Topco, Big Bear Stores.....	200	1.325	259
	NON-FAVORED BUYER			
8/12/49	S. M. Flickinger.....	75	1.40	324
	PRODUCT: 6/10 CHOICE SLICED Y. C. PEACHES, HEAVY SYRUP			
	FAVORED BUYER			
8/26/49	Consolidated Grocers Corp.....	50	7.30	261
	NON-FAVORED BUYER			
9/22/49	Clark Lewis & Company.....	50	7.55	303

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Comparison of the prices charged the favored buyers with those charged the unfavored buyers in the above-cited transactions reveals variations ranging from 5¢ to 25¢ per dozen cans occurring in respondent's sales in commerce during 1949, and similar price variations, ranging from 2½¢ to 55¢ per dozen cans, occurring during 1950. The great majority of the variations, however, were 5¢ or 10¢ per dozen cans. Similar variations appear in many other transactions documented in the record.

Although the price variations cited above may appear inconclusive when considered separately, when considered as a whole they reveal one consistent factor in respondent's pricing policy throughout the years of 1949 and 1950, which constitutes a definite marketing practice during those years, confirming the admission made in testimony by the vice president of the respondent corporation, and supporting the allegations of the complaint. This one constant is the fact that the favored chain stores, which purchased directly through their buyers in San Francisco during 1949 and 1950, were *consistently charged less* by respondent for products of like grade and quality than respondent charged the unfavored buyers who purchased through brokers.

PRICE DISCRIMINATION NOT JUSTIFIED

The differences in price shown above are not justified by price changes from time to time in response to changing conditions affecting the market of the commodities in question. This is true, because, as previously observed, differences are recorded between the prices granted favored and non-favored buyers on the same day, and because of the consistent pattern throughout 1949 and 1950 of respondent selling to favored buyers at a lower price.

In addition, the price discriminations shown cannot be justified as prices made in good faith to meet equally low prices of a competitor. In some instances the prices granted by the respondent to its direct buyers were actually higher than the prices its competitors were quoting for commodities of like grade and quality. In other words, in those instances price was clearly not the deciding factor which gave respondent this business.

Furthermore, the differentials in price were not due to differences in the cost of manufacture, sale and delivery. Frequently an unfavored buyer purchased a larger quantity at one time, of the same grade and quality of product as a favored buyer, but nevertheless paid the higher price.

COMPETITION AMONG RESPONDENT'S WHOLESALE CUSTOMERS

The discrimination in price herein shown must be considered in the light of the fact that the grocery business, which furnishes the outlet for respondent's products, is highly competitive. The record shows that competition in such business is so keen that the mark-ups on so-called "fast-moving" items, such as canned peaches and fruit cocktail, are very small, sometimes as low as two or three percent. Price is therefore one of the chief factors in making sales. A difference in price of 10¢, or even 5¢, on a dozen cans of fruit is sufficient to divert business from one seller to another, resulting in injury to competition.

CONCLUSIONS

The effect of the discrimination in price of commodities of like grade and quality, as herein found, is such as may tend to, and does, substantially injure, destroy and prevent competition between respondent's favored and non-favored customers, who are competing with each other, directly or indirectly, in their respective sales areas.

Respondent's acts and practices are therefore in violation of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

ORDER

It is ordered, That the respondent, Fruitvale Canning Company, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale or distribution of canned fruits in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of canned fruits of like grade and quality:

1. By selling at differing prices to wholesalers who in fact compete with each other in the resale or distribution of such canned fruits;
2. By selling at differing prices to retailers who in fact compete with each other in the resale or distribution of such canned fruits;
3. By selling to any retailer at prices lower than prices charged any wholesaler who competes, or whose customers compete, with such retailer in the sale or distribution of such canned fruits.

The term "price" as used in this order means the net price after all discounts, rebates or other allowances have been deducted.

ON APPEAL FROM INITIAL DECISION

By KERN, Commissioner:

Respondent, Fruitvale Canning Company, has appealed from an initial decision of the hearing examiner prohibiting it from discrimi-

nating in the price of canned fruits in violation of Section 2 (a) of the amended Clayton Act.

Briefly the hearing examiner found that respondent is a comparatively small, though substantial, factor in the fruit canning industry, packing primarily under private labels; and that, through its sales to favored buyers at lower prices than it charges nonfavored buyers, respondent has engaged in discriminatory pricing tending to substantially injure, destroy and prevent competition between these two categories of customers who are competing with each other in their respective sales areas.

The favored buyers include large retail chain store groups and large wholesalers, all of whom maintain their own direct buying agencies in San Francisco. The nonfavored buyers, who pay consistently higher prices than the favored group, include wholesale grocers and voluntary, or sponsored, retail chain store groups who do not maintain direct buying agencies but purchase, rather, through brokers.

Comparison of prices charged favored buyers with those charged nonfavored buyers reveal, the hearing examiner found, variations in 1949 of from 5 to 25 cents per dozen cans and similar variations in 1950 ranging from 2½ to 55 cents per dozen cans. His finding, however, is that the great majority of the variations documented in the record were from 5 to 10 cents per dozen cans.

The hearing examiner further found that the grocery business is vigorously and highly competitive. Mark-ups on fast-moving items such as canned fruits are as low as 2 or 3% and the record discloses that the 5 to 10 cent price differentials involved in this proceeding are sufficient to divert business from one seller to another. Price, the examiner concluded, is a chief factor in making sales.

The hearing examiner further found that these price differentials were not due to changing market conditions, that the lower prices were not justified as having been made in good faith to meet equally low prices of a competitor, and that they were not cost-justified as asserted by the respondent by way of special defense.

Controverting the special defense that, if respondent has discriminated in price, it has been in response to changing conditions affecting the market, the record contains numerous invoices showing favored buyers paying lower prices than nonfavored buyers on the same day. Reference to the record also shows that the favored direct buyers in San Francisco consistently were charged less by respondent for products of like grade and quality than the respondent charged nonfavored buyers who purchased through brokers. The hearing examiner so found and we have concluded that this defense by respondent is not

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supported by the record made herein. It is clear that respondent granted favored buyers the advantage of discriminatory prices as a customary and normal method of business, not in response to any averred changing market conditions.

On the question of good faith meeting of competition, we also find that special defense is not sustained on the record. In this connection the hearing examiner found instances where respondent's prices to favored direct buyers actually were higher than prices quoted by competitors to direct buyers in San Francisco, thus demonstrating the fallacy of respondent's argument that its discriminatory prices were established to meet the prices of competitors. In passing we note that the record contains documentary evidence of instances where prices respondent charged nonfavored buyers were the same as prices its competitors were quoting for products of like grade and quality, and yet respondent contemporaneously granted lower prices to favored direct buyers.

As to the defense that price differentials were cost-justified, there is nothing in the record to support it. On the contrary, the record discloses numerous instances where nonfavored buyers paid a higher price although purchasing a larger quantity at one time of the same grade and quality of product than favored direct buyers. We find this defense to be without merit.

In its appeal respondent argues that the allegations of the complaint and the findings, conclusions, and order contained in the initial decision are not supported by reliable, probative and substantial evidence, and urges that the complaint should be dismissed for lack of adequate proof. Respondent does not question the Commission's jurisdiction and specifically states that it does not deny it has sold commodities of like grade and quality to different purchasers at different prices.¹

Respondent's position is that unequal price treatment alone does not amount to discrimination prohibited by the statute and that the record is devoid of any evidence to support a conclusion that its pricing practices have produced, or are likely to produce, any injurious effect upon competition.

Counsel in support of the complaint called a number of responsible and reliable merchants with many years of experience in the wholesale grocery business. A composite of their testimony is that they

¹ Respondent's argument on appeal that prices stipulated in contracts between it and its customers, favored and nonfavored, frequently were different from invoiced prices is of no importance here because this proceeding is concerned with the actual prices paid to respondent, Fruitvale, by purchasers from it. The record contains many invoices disclosing sales to favored buyers at prices less than those respondent charged nonfavored buyers and the evidence is that, even where contract and invoice prices differed, the direct buyers got the lower price and it was not lowered to the nonfavored buyers in such situations.

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carried complete inventories of grocery items, including respondent's products; that they sold in sales areas covering radii of from 50 to 125 miles, in competition with the favored chain stores and other favored wholesalers who are customers of respondent; that they always take advantage of the 2% cash discount allowed by Fruitvale; that this 2% cash discount is greater than their annual net profit which runs usually about 1%, or less; that it is important for them to obtain merchandise at a price as low as chains so as to permit them to sell to retail customers at prices that are competitive with retail chain outlets; that the price at which they are able to resell to retailers affects volume as well as profits; that frequent complaints have been made by retail customers when prices appeared out of line with those advertised by the chains; that if all their suppliers charged them 5 to 10 cents more per dozen cans for their products than they charged national chains they, the nonfavored buyers, would not be able to stay in business; and that had they known Fruitvale was selling to chains for less than prices charged nonfavored buyers, they would have complained to Fruitvale or discontinued buying from that company.

A typical retailer, manager of the grocery department in a family-owned supermarket in a Baltimore suburb, was called to illustrate how discriminatory prices in favor of chains affect the retail grocer. His testimony confirms the immediately preceding composite summary of wholesaler testimony. He added that his market purchased substantial amounts of canned fruits from Fruitvale; that the market competes directly with A. & P. and American Stores, both of which have nearby retail outlets; that they have been competing as far back as he can remember; that a lower price of 1 or 2 cents a can on fruit cocktail is sufficient to divert customers, and further that, if so diverted, customers probably would purchase all of their merchandise elsewhere; that price is featured "above all" in the market's advertising handbills; that customers complain if these prices are out of line with those of the chains; that his market's "only salvation" is to buy as cheaply as chains; and that prices affect the market's volume as well as profits.

Counsel in support of the complaint also called Mr. Harold O. Smith, Jr., Executive Vice-President, United States Wholesale Grocers Association, Inc., Washington, D. C. He testified that the U.S.W.G.A. has a membership composed of wholesale grocers not in any way affiliated with any large group; that they are strictly owner-operated, servicing independent retailers who likewise own and operate their own businesses; and that certain exhibits in evidence in this proceeding prepared under his supervision illustrate profit and loss figures compiled from a representative cross-section of the trade and

disclose, in 1949, an average net profit of 1.380%. The high in 1949 was 1.555% and the low .931%. Mr. Smith further testified that in the last five years membership in the association has decreased materially due to wholesale grocery firms going out of business because of inability to operate on the small margin on which they are forced to operate so as to resell to retail customers who must compete directly with national chains; that where a canner sold wholesalers at 10 cents a dozen higher than it sold competing chain stores; both the wholesaler and his retailer customers in such a situation "would be in the red, at those differences"; that if such differentials in prices were general with all suppliers "it would certainly put the independent—both wholesale and retail—out of business in short order"; and, finally, that a 5-cent differential would have the same effect as a 10-cent one except that it would be a little slower and take a little longer.

In addition, a typical food broker in Washington, D. C., testified that he had been a food broker thirty years with offices in Washington, Baltimore, and Harrisburg; that A. & P. and American Stores are active in all these areas, plus Philadelphia, and have numerous outlets therein. He further testified as to the highly competitive nature of the grocery business and corroborated other testimony that any difference in price, whether 5 or 10 cents a dozen cans in favor of a favored chain over a nonfavored wholesaler who must resell to retailers directly competing with the chain would have a tremendous effect on the wholesaler and retailer if done on a broad scale.

The pattern of respondent's pricing practices as established in this proceeding closely parallels those pricing practices uncovered by the Commission Chain Store Investigation of 1934.² Even casual reference to the legislative history makes it clear that these and similar harmful competitive practices provided the major impetus for the passage of the Robinson-Patman Act of 1936. Indeed, as we view it, the main thrust of the Robinson-Patman Act was to curb the predatory use of monopoly power by chain stores and mass buyers and to preserve the place of small business as well as to protect its competitive position. This record discloses substantial price differentials favoring large chain groups and large wholesalers of a type and character identical to those we conceive the Robinson-Patman Act was enacted to curb. The testimony of many witnesses called in support of the complaint as above outlined demonstrates the injurious competitive effect of such price differentials. Having concluded that respondent's special defenses were not sustained on the record, there exists no sound basis for overturning the initial decision of the hearing examiner.

² S. Doc. No. 4, 74th Cong., 1st sess.

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Respondent vigorously excepts to the substance and form of the order to cease and desist, arguing that certain specified inhibitions of the order are erroneous because "they do not specify 'at the same or substantially about the same time.'" It is further contended that the order is too broad in scope and exceeds the authority of the Commission by failing to limit its provisions to instances "where the effect is injury to secondary line competition." Respondent objects also to the fact that the order not only runs against corporate respondent but also is directed against its officers, representatives, agents and employees.

On respondent's point relative to limitation of the order to cover only sales made at the same or substantially the same time it was established here that respondent's prices were discriminatory and that they had the requisite competitive effect. None of the defenses available under the Act has been sustained, and the record is replete with instances of sales on the same day at unlawful price differentials. And respondent, by the order herein, is not precluded "from differentiating in price in a new competitive situation involving different circumstances where it can justify the discrimination in accordance with the statutory provisos."³ This contention of respondent is without merit.

Respondent's argument that the order should be limited in its application to price discrimination "where the effect is injury to secondary line competition" likewise cannot be sustained.

The order prohibits price discrimination between wholesalers, or between retailers, in competition with each other, or the granting of a lower price to a retailer than to a wholesaler who competes, or whose customers compete with such retailer. By implication its operation is limited, as respondent contends it should be, to situations where there will, or might be, injury to competition in the secondary line of competition. It goes only to circumstances where the hearing examiner has found the requisite effect of competitive injury under the terms of the amended Clayton Act. It would be improper for the order to recite that it is limited specifically to instances of unlawful price discriminations in the secondary line of competition as such. The incidence of competitive injury is not a matter appropriate to the order itself. In the *Morton Salt* case substantially the same inhibitions as appear in the order here were considered in detail and expressly approved by the Supreme Court. The reasons there obtaining in support of the form of order equally are applicable here.

Furthermore, the effect of any such limitation would be to shift to the courts the Commission's statutory responsibility to hear evidence

³ *F. T. C. v. The Ruberoid Co.*, 343 U. S. 470 (1952).

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on discriminatory pricing practices and to make findings concerning possible injury to competition, and to then prohibit such practices. In this connection the Supreme Court foreclosed any such possibility when it said in the *Morton Salt* case:⁴

"Such findings are to form the basis for cease and desist orders definitely restraining the particular discriminatory practices which may tend to injure competition without justification. The effective administration of the Act, insofar as the Act entrusts administration to the Commission, would be greatly impaired if, without compelling reasons not here present, the Commission's cease and desist orders did no more than shift to the courts in subsequent contempt proceedings for their violation the very fact questions of injury to competition, etc., which the Act requires the Commission to determine as the basis for its order. The enforcement responsibility of the courts, once a Commission order has become final either by lapse of time or by court approval, 15 U.S.C., § § 21, 45, is to adjudicate questions concerning the order's violation, not questions of fact which support that valid order."

Respondent's exception in this regard is overruled.

Respondent attacks the scope of the order in that it is directed not only against the respondent, Fruitvale Canning Company, but also against "its officers, representatives, agents, and employees" citing *Reynolds Tobacco Co. v. F.T.C.*, 192 F. 2d 535 (7th Cir. 1951). The same court in its more recent decision in the *Anchor Serum*⁵ case pointed out that the order in the *Reynolds* case was issued pursuant to the Federal Trade Commission Act and held that the order in a Clayton Act case was properly directed against officers, representatives, agents, and employees of a corporate respondent. We deem the same holding appropriate here. Respondent's exception on this point is denied.

Finally, respondent objects to the inclusion in the order of a definition of the term "price" stating that:

"The order is erroneous by reason of its definition of 'price' as meaning 'net price after all discounts, rebates or other allowances have been deducted.' In this industry, 'price' means the price before any deductions are made for regular discounts, rebates and other allowances, which are offered initially to all buyers."

The purpose of the definition included in the order is to make it indubitably clear that what is prohibited are discriminatory "net

⁴ *F. T. C. v. Morton Salt Co.*, 334 U. S. 37 (1948).

⁵ *Anchor Serum Company v. F. T. C.*, 217 F. 2d 867 (C. A. 7, 1954).

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prices" with the requisite competitive effect, not prices initially quoted to purchasers. It is the actual amount paid by the purchaser to the seller after taking into consideration all discounts, rebates, or other allowances with which we are concerned here. The fact that, in the fruit canning industry, price may mean "gross price" is not controlling here, where, for the purpose of inhibiting unlawful price discriminations the principal factors are the "net prices" and any differentials that might exist as between purchasers from respondent of commodities of like grade and quality. Respondent's objection to the order's definition of price is overruled.

We have fully considered the whole record herein including transcripts of hearings and oral argument before the Commission, as well as exhibits and briefs. It is our conclusion that the hearing examiner's initial decision is correct and that respondent's appeal therefrom should be, and it hereby is, denied, and the initial decision hereby is adopted as the decision of the Commission.

FINAL ORDER

Respondent, Fruitvale Canning Company, having filed its appeal from the hearing examiner's initial decision in this proceeding; and the matter having been heard upon the whole record including the briefs and oral argument of counsel; and the Commission having rendered its decision denying respondent's appeal and adopting the initial decision as the decision of the Commission:

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

Complaint

IN THE MATTER OF
CENU FIBRES, LTD., ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS*Docket 6512. Complaint, Feb. 17, 1956—Decision, June 16, 1956*

Consent order requiring a manufacturer in New York City to cease violating the Wool Products Labeling Act, through failing to attach to wool fabrics tags, labels, etc., bearing the information required by the Act.

Before *Mr. Abner E. Lipscomb*, hearing examiner.
Mr. John T. Walker for the Commission.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Cenu Fibres, Ltd., a corporation, and Philip Hausfeld, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under said Wool Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Cenu Fibres, Ltd., is a corporation organized and existing under and by virtue of the laws of the State of New York, with its office and principal place of business located at 868 Sixth Avenue, New York, New York.

The individual respondent, Philip Hausfeld, is president of the corporate respondent, Cenu Fibres, Ltd., and formulates, directs and controls the acts, policies and practices of said corporate respondent. Said individual respondent has his office and principal place of business at the same address as corporate respondent.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondents have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, and offered for sale in commerce, as "commerce" is defined in said Act, wool products, as "wool products" are defined therein.