

Findings

IN THE MATTER OF
HENRY ROSENFELD, INC., ET AL.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (d) OF
THE CLAYTON ACT*Docket 6212. Complaint, June 14, 1954—Decision, June 21, 1956*

Order requiring a New York City distributor of women's suits and dresses to retailers throughout the United States, with annual sales exceeding \$10,000,000 in 1949-1951, to cease discriminating in price in violation of Sec. 2(d) of the Clayton Act, by making to some of its customers promotional allowances amounting to 50% of the retailer's local advertising costs up to \$1.00 per garment in connection with the resale of its dresses, while not making such credits or payments available to all other competing customers.

Mr. Peter J. Dias for the Commission.

Marshall, Bratter, Klein, Greene & Option, of New York City, for respondents.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Complaint herein was issued June 14, 1954, charging respondents with making promotional payments to aid in the resale of respondents' dresses to some of their customers but not making such payments available on proportionally equal terms to all of respondents' customers competing in the distribution of respondents' products in violation of Section 2 (d) of the Clayton Act (U.S.C., Title 15, Sec. 13). Respondents' answer admitted jurisdictional and descriptive facts alleged, denied violation and pleaded meeting competition in good faith as an affirmative defense.

After five hearings in New York, Philadelphia and Washington, counsel for proponent rested and counsel for respondents moved to dismiss, asserting insufficiency of the record to constitute a prima facie case of the violation charged, which motion, after briefing, was denied by the hearing examiner. Thereafter, four more hearings in New York City completed respondents' defense and proof taking was closed on June 30, 1955. Thereafter, Proposed Findings of Fact and Conclusions were filed by all counsel and the case closed on August 24, 1955. Upon consideration of the entire record herein and from his observation of the witnesses, the hearing examiner makes the following:

FINDINGS OF FACTS

1. Respondent, Henry Rosenfeld, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the

Findings

52 F. T. C.

State of New York with its warehouse, office and principal place of business located at 498 Seventh Avenue, New York City.

2. Respondent, Henry Rosenfeld, is an individual with his principal office and place of business located at 498 Seventh Avenue, New York City and is now and, since its organization in 1942, has been president of Henry Rosenfeld, Inc., and, as such, controls, directs and is responsible for the acts and practices of respondent, Henry Rosenfeld, Inc. Because of this unity, both respondents are hereinafter treated jointly.

3. Respondent, Henry Rosenfeld, Inc., is now and has, for many years past, been engaged in the merchandising of women's suits and dresses under the registered trade name of Henry Rosenfeld to retail outlets such as department stores and women's specialty shops and dress shops in ten million dollar volume for resale to wearers. Such suits and dresses are widely advertised and otherwise publicized and are widely and favorably known to such resale outlets and to their customers.

4. Corporate respondent's distribution of its ready-to-wear is in commerce, as "commerce" is defined in the aforesaid Clayton Act throughout the United States.

5. Respondents sell mainly through their New York City showrooms to which buyers for retail outlets come for inspection, selection and purchase, but they also maintain an average of eight traveling salesmen who visit and solicit retailers throughout the country.

6. Dress manufacturers traditionally and customarily price their products wholesale in brackets of \$5.75, \$6.75, \$8.75, etc., on which the retailers' markup to the consumer is customarily 40%. Respondents' prices range from \$5.75 to \$10.75 uniform to all purchasers, without discounts of any kind, except for cash. Respondents' dresses are not "fair-traded."

During the period from 1949 through 1951 and from 1951 through 1954, respondent Henry Rosenfeld, Inc. had five seasonal lines of its merchandise per year; and each line consisted of from 60 to approximately 100 dress styles, making an approximate total of from 300 to 500 different styles per year during each of the years aforesaid.

7. To promote both the sale and resale of their dresses, respondents engaged in cooperative localized advertising, stressing the name of Henry Rosenfeld and over the name of the customer. Respondents pay 50% of the cost of the advertisement up to \$1.00 per garment, regardless of the size of the purchase, the size or character of the customer, the present or past purchase volume of that customer and without any requirement that the customer purchase any minimum number of garments before qualifying for the contribution.

1535

Findings

The mechanics involve the store placing the advertisement over its name in a local newspaper and paying therefor, then submitting the receipted bill with a tear sheet of the advertisement to respondents, with reimbursement up to 50% of the cost being made by the latter to the former, either by deduction from respondents' invoice for the garments sold or by respondents' separate reimbursement check to the customer.

8. These contributions by respondents, however, are only on three categories of garments:

- (1) Those where respondents' profit margin is "huge."
- (2) Slow sellers, or unpopular styles.
- (3) Those made from leftover or excess piece goods which respondents are anxious to get rid of.

9. It was respondents' practice to advise its salesmen, in its showrooms and in the field, which garments carried advertising allowances and, further, to hang on the display model thereof a tag marked "M—," signifying "Mat." Respondents' salesmen were instructed to advise prospective purchasers which garments carried advertising allowances. Individual respondent testified he always did so, believed his salesmen did, and pointed out it was to the salesmen's interest to do so as it furthered the sale.

10. Respondents, however, did not formally announce, publicize or circularize the policy set out above and the terms and conditions under which retailers could secure advertising allowances were never brought to their attention by respondents in printed form. Obviously the policy could not have been thus formalized because it was highly flexible, subject to constant change and was decided upon solely by the individual respondent "when, as and if." Although the "huge mark-up" numbers could be determined prior to or at the beginning of the season's offering, slow moving numbers and left-over piece goods numbers could not be ascertained until sales effort had progressed far enough to evaluate results. The question of which style numbers would carry the allowance was, in the nature of things, in a constant state of flux, with a particular model carrying no allowance for weeks and then suddenly being promoted with one.

There is, of course, no requirement in the law that a seller give advertising allowances on all his products if he gives it on one—the requirement is that, if he gives it on one or more, he make the same allowance available on proportionally equal terms to all buyers of that product or products.

11. To sustain the complaint charge that these advertising allowances were not made available on proportionally equal terms by respondents to all their customers competing in the resale of respond-

Findings

52 F. T. C.

ents' dresses, there was offered a tabulation from respondents' records of its net annual sales for 1950, 1951, 1952, 1953, and 1954 and amounts of advertising allowances paid in each of these years by respondents to all purchasers in Baltimore, Philadelphia, Newark and Boston. Without setting out here unnecessary detail, such tabulation shows that respondents paid advertising allowances to some of its customers in each city but not to others. Some of these advertising allowances were in substantial sums, others insignificant. Some of the non-recipients purchased in very substantial amounts from respondents. There was, as testified, no mathematical relationship between amount of purchases and amount of allowances paid.

12. During the years 1950-54, respondents sold to two department stores in Newark, New Jersey—L. Bamberger & Co. and Hahne & Company—giving advertising allowances in each year to the former but not to the latter and the buyers for each so testified, the buyers for Hahne & Co. stating that with one exception they were never offered any advertising allowance although one of them went to respondents' showroom twice a month, the other three or four times in two years. They testified there were only style tags on the dresses, nothing else to show whether or not the dresses carried an advertising allowance; that they were never told about such allowances except on one occasion. Neither of them ever asked for an allowance. One of them had heard that such allowances were given by dress manufacturers.

13. The buyers for Bamberger's in Newark, which competes with Hahne & Co. on the resale of respondents' dresses, testified on the contrary that they were always told what models carried advertising allowances; that they were affirmatively offered them and received them; that they knew that dress manufacturers offer such allowances; that they had asked for them and been refused on certain dress or suit numbers; and that all the buyers for other stores whom they knew were well aware of the practice among dress manufacturers of giving advertising allowances.

14. Substantially the same situation was developed in Philadelphia. There, John Wanamaker, Bonwit Teller, Strawbridge & Clothier and others received advertising allowances from respondents, whereas Snellenberg & Co. did not. The buyers for the latter store covering 1950 through part of 1954 all testified that they bought dresses from respondents at the latter's showroom, were neither offered nor given any advertising allowance, although, on several occasions, the purchase was for a special promotion; that Snellenberg's on one or more occasion advertised the dresses at its own cost; that the same dresses were locally advertised by one of its competitors. Two of the three

1535

Findings

buyers did not ask for any advertising allowance from respondents; the third did and was refused but without explanation as to any terms, conditions or restrictions on their grant. All of them knew that dress manufacturers did give advertising allowances and had obtained them from some, but two of them did not know that respondents gave them. On the other hand, the buyers for department stores and dress shops in Philadelphia, who received allowances from respondents on purchases which they resold in competition with Snellenberg's, testified they asked for such allowances—at times received them and at other times were refused without explanation. They had all received allowances from other dress manufacturers at times and knew of course that respondents did grant them because they asked for such allowances. Apparently the terms of 50% of the advertisement or \$1.00 per garment were not mentioned with one exception. It was a case of individual negotiation between the buyer and respondents' salesman in each instance as to the selection by the former as to which garment the buyer wanted to advertise. All but one of these buyers did not know whether an allowance was available or on what terms until asking. The buyer for Bonwit Teller's was affirmatively offered advertising allowances on certain garments; she did not have to ask for them.

15. This testimony (pp. 12 and 14, *supra*) was denied, categorically in part, by implication as to the remainder by the individual respondent, Henry Rosenfeld, who asserted he had never refused these stores (Hahne's and Snellenberg's) on advertising allowances, had never given orders to do so, nor to his knowledge had his salesmen done so. He stated that when he sold personally he always advised prospective purchasers on what dresses such allowances were available, that he always instructed his salesmen to do likewise and that he believed they did and that he believed these buyers who visited his showrooms knew such allowances were available. These testifying buyers of Hahne's and Snellenberg's did not deal with Henry Rosenfeld but with his salesmen and their testimony is positive and unequivocal as opposed to the belief of what happened given by the individual respondent. The preponderance is clearly with that of the buyers. Full credibility is given to all this testimony—it is a question of weight, decided as indicated, *supra*.

16. From this evidence it is found as a fact that respondents did not affirmatively offer to pay advertising allowances to all of its customers who bought for resale in competition with one another; that respondents did not publicize the terms and conditions on which these allowances were granted in such manner that all of its customers were aware thereof in advance of purchase; that the terms themselves

vary so constantly from garment to garment and from time to time solely at the direction of Henry Rosenfeld that they can hardly be said to be terms at all—certainly not any reliable standard by which to judge proportionality and that generally the requirements of the statute under which the charge is made have not been met.

17. Counsel for respondents stressed, during cross-examination of adverse buyer witnesses, that their purchases from respondents were small in amount. Since respondents' advertising allowances are neither based on, geared to, nor conditioned by, the amount of purchases, this is immaterial. The purchases of nonrecipients were certainly not de minimis. Equally immaterial on this record is the point that these buyers who were neither offered nor paid these allowances did not attend the "opening" showing of respondents' seasonal lines because respondents do not restrict, according to Rosenfeld's own testimony, advertising allowances to any season, any time or any particular line.

18. Respondents' counsel have consistently insisted throughout this case that if a buyer knows there are such things as advertising allowances in the dress manufacturing industry, the burden is upon such buyer to inquire as to each dress in which he may be interested or which he may be shown as to whether or not he can secure an advertising allowance thereon, if he purchases it, from each manufacturer with whom he deals. Reliance for this position is put on the admission by most of the witnesses that they knew various dress manufacturers do give advertising allowances and by some of them that they knew these respondents gave them. Counsel supporting the complaint, on the contrary, contends that there is an affirmative burden on the grantor to advise his customers generally of the availability thereof and the terms of grant. The Commission has definitely ruled in favor of the latter contention in the matter of Kay Windsor Frocks, Inc., in Docket No. 5735. The conclusion here is accordingly the same.

19. As an affirmative defense, respondents assert, and offered evidence from their competitors to prove, that respondents' advertising allowances were granted to meet competition. At the outset of this defense, and since, counsel in support of the complaint has objected to such evidence contending that the provisions of Sec. 2 (b), limited as they are to "discriminations in price or services or facilities," obviously apply only to Sections 2 (a), 2 (e) and 2 (f) of the Clayton Act and not to Sections 2 (c) or 2 (d). This same contention was made to, and sustained by, the hearing examiner (then, a pristine issue) in Docket No. 5482, Carpel Frosted Foods, Inc. On appeal (the Commission then entertained case-end and case-wide appeals),

the Commission held the tendered evidence "material and revelant for consideration by the Commission without regard to the question as to whether or not such evidence constitutes a substantive defense to charges brought under Section 2 (d) of the Clayton Act." Since such evidence can obviously not have any materiality except defensive, and since it was so offered and argued, the hearing examiner in that case treated it as a defense and there was no reversal of such treatment. Hence, the objections of counsel in support of the complaint in this proceeding were overruled and are again overruled and the evidence of respondents on this point is hereinafter considered as a substantive defense. That evidence comes from five competitors of respondents, all of substantial size and all selling nationally, one of them doing in excess of twenty million a year.

20. Margo-Walters, Inc., organized in 1950, selling casuals competitive with respondents in the \$5.75, \$6.75 and \$8.75 wholesale price brackets, paid Strawbridge & Clothier \$7,725.00 as an advertising allowance in 1954 on purchases of \$72,905.25; \$7,008.13 on purchases of \$58,158.50; \$4,450.00 on purchases of \$92,951.50 in 1952 but no allowance in 1951 on purchases of \$10,142.00. The basis was one-half the cost of the advertisement with no ceiling or no minimum amount of purchase to qualify. The primary purpose of the allowance was to sell and Margo-Walters, Inc. neither knew nor cared what was done by their competitors about advertising allowances.

21. Puritan Dress Company, organized in 1913, a competitor of respondents on wholesale price line brackets of \$5.75 through \$10.75, gave advertising allowances since 1950 in unknown amounts on unknown purchase volumes to L. Bamberger & Co. of Newark; Strawbridge & Clothier and John Wanamaker of Philadelphia for the purpose of getting business. The basis was 50% of the cost of advertising with a ceiling that varied from 25-50¢ per dress and without minimum amount of purchase. All of the recipient firms advertised Puritan dresses at times without receiving advertising allowances.

22. Jerry Gilden Specialties, Inc., is competitive nationally with respondents on wholesale price line brackets of \$5.75 through \$14.75, and gave advertising allowances to Strawbridge & Clothier in June 1950 and January 1954; to John Wanamaker on occasions between July 1949 to April 1954; L. Bamberger & Co. on five occasions from April 1953 to July 1954, the basis being from 50% to 100% of the cost of the advertisement with a ceiling of 50¢ a dress, and to Bonwit-Teller in substantial amounts on five occasions from June 1951 to February 1954.

It was stipulated between counsel that Majestic Specialties, Inc. would testify substantially the same with reference to sales and

Findings

52 F. T. C.

advertising allowances in the four stores mentioned as did the officials of Puritan Dress Co. and Jerry Gilden Specialties, Inc.

23. Likewise, McKettrick-Williams, Inc., organized in 1938 and selling casual dresses nationally at \$5.75 through \$10.75 in competition with respondents, gave a single advertising allowance of \$1,000 to Wanamaker in Philadelphia on \$38,564.51 of sales; a single advertising allowance of \$2600 in 1953 to the same store on \$49,183.16 of sales and four advertising allowances totaling \$2680 in 1954 on sales of \$69,416.43. This was simply a contribution of 50% of the cost of the advertising which was sometimes less, and apparently personally negotiated between the inquiring buyer and the firm. No minimum purchase was required and this firm had no general policy or over-all formula.

24. In each of the above instances, the advertising allowance was given only after it was asked for—no effort was made to advise buyers of its availability. There was no ceiling per garment fixed or allowed in some instances. From the evidence, the practice of these five competitors of respondents was typical and general throughout the dress manufacturing industry. All of these dress manufacturers made the selection of the garments on which advertising allowances would be awarded, which selection would shift or change from time to time and be affected by the size of the account and insistence of the demand. There was not shown specifically what style, type or price bracket any particular advertising allowance was granted upon.

25. In addition to this, the individual respondent, Henry Rosenfeld, testified he had been selling dresses for 26 years; that his contacts with buyers and competitors were frequent; that the five above-named firms were direct competitors of his, as well as a number of others, and that advertising allowances were common in the industry since his advent therein; that they were indispensable to sales and volume; that if he did not give them he would lose both; that he offers them to buyers whether his competitors do or not; that he knows the firms to whom he gave advertising allowances, namely, Bamberger's, Wanamaker's, Bonwit Teller's and Strawbridge and Clothier's, did get and could get such allowances from his competitors because their buyers frequently told him so, although he did not know on what garments, nor when, nor in what amounts except that the general basis is 50% of the cost of the advertisement. He also testified, however, that if a buyer wants an advertising allowance on some low profit garment or on one which, for some other reason, he is not pushing, stating that she can get such an allowance from a competitor on a substantially similar garment, that he will refuse to give it because he would lose money. He was unable to cite an instance

where a buyer refused to buy because he was refused an advertising allowance thereon, stating that he always is able to sell buyers what he wants them to buy. He stated categorically that in giving these allowances he was meeting competition generally, not specifically, obtaining or maintaining volume in an industry where, without high volume, there is little or no profit. He denied that he had refused, or directed any refusal, of allowances to those stores who received none.

26. It is thus evident that advertising allowances are rampant in the dress manufacturing industry; that they are granted on a shifting, individual and unpublicized basis, in some instances on a wholly arbitrary basis; that they generally must be asked for and must be separately negotiated for; that they are customary with respondents' competitors; that they are, in the main, aggressive rather than purely defensive implements used to obtain business; that they are allowed on unknown numbers or styles whose selection is entirely at the constantly changing whim of the grantor's chief official; that they are an integral part of the grantor's pricing policy. It is equally obvious that respondents do not grant an advertising allowance to meet exactly the same allowance on a closely similar garment by a particular competitor in the same amount and for the same duration. In short, respondents are here claiming to meet competition generally, rather than specifically, meeting a practice rather than a price—a defense which has been frequently made and as frequently rejected,¹ the latest ruling thereon being that in Docket No. 5768, C. E. Niehoff & Co., where the facts in support of such defense were far more persuasive than those shown by this record. Lastly, respondents' advertising allowances were aggressive rather than defensive merchandising weapons. Accordingly, the conclusion is that respondents' defense of meeting competition in good faith is not made out.

27. Respondents have contended throughout this proceeding that to proceed against them alone for a practice which is rampant, traditional and customary in their industry, leaving their competitors free to continue giving allowances on just as arbitrary or hit or miss basis as theirs, is unfair. Of course "everybody's doing it" is no defense and the hearing examiner has neither responsibility for, nor authority over, administrative selection for prosecution. But the record, sketchy as it is on the point, nevertheless sustains respondents' claims on this score and presents a sorry picture of an industry-wide practice apparently as repugnant to Sec. 2 (d) of the Clayton Act as anything found herein against respondents. In only two other cases² has the Commission proceeded, as here, against dress

¹ *F. T. C. v. A. E. Staley Mfg. Co.*, 324 U. S. 746.

² Docket No. 5735, *Kay Windsor Frocks, Inc., et al.* Docket No. 6215, *Jonathan Logan, Inc., et al.*

Order

52 F. T. C.

manufacturers. Dozens of others are apparently left free to continue and the rationale of this selectivity does not appear. That is, as it must be, a matter solely for Commission attention or inquiry and the hearing examiner has neither authority nor discretion to suspend this case for possible Commission action on an industry-wide basis. Such a plea must be addressed to the Commission.

Counsel for respondents has most vigorously and ably presented this asserted defense, as indeed he has the rest of the case, and has impressed the hearing examiner with his sincerity and the situation in which this leaves his clients, but the hearing examiner is not only bound by precedent but is limited in the exercise of both power and discretion.

CONCLUSION

1. Respondents have granted, and are now granting, advertising allowances to promote the sale of their dresses to some customers and not to others; hence, not on proportionately equal terms to all their customers competing among themselves in the resale of respondents' dresses.

2. The preponderance of the evidence indicates that respondents have not advised all of their customers or prospective customers of the availability of such advertising allowances and hence have not made them available to all customers competing in the resale thereof as the law requires.

3. The defense of meeting competition in good faith provided by Sec. 2 (b) of the Clayton Act is not sustained where the claimant meets an industry practice rather than an individual and specific allowance situation.

4. The acts and practices of respondents as found above violate subsection (d) of Sec. 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Sec. 13).

ORDER

It is ordered, That respondents, Henry Rosenfeld, Inc., a corporation, its officers, employees, agents and representatives, and Henry Rosenfeld, individually and as president of Henry Rosenfeld, Inc., directly or through any corporate or other device, in or in connection with the sale of women's clothing in commerce, as commerce is defined in the aforesaid Clayton Act, as amended, do forthwith cease and desist from:

Making or contracting to make, to or for the benefit of any customer, any payment of anything of value as compensation or in consideration for any advertising or other services or facilities furnished by or

1535

Opinion

through such customer, in connection with the handling, offering for resale, or resale of products sold to him by respondents, unless such payment is affirmatively offered or otherwise made available to all competing customers in amounts determined by the same percentage of the same measurable base.

OPINION OF THE COMMISSION

By SECREST, Commissioner:

The initial decision filed by the hearing examiner held that the respondents, when granting advertising allowances to certain of their customers, had not made such allowances available to others who were competing in the resale of the respondents' dresses with those recipients, and that the respondents' acts and practices in that respect have been in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. The order to cease and desist contained in the initial decision, in effect, forbids the respondents from compensating customers for facilities or services furnished by them in connection with the resale of respondents' apparel unless payments on proportionally equal terms are affirmatively offered or otherwise made available to all others competing with those afforded allowances. The respondents have appealed and request that we reverse the initial decision.

The respondent, Henry Rosenfeld, Inc., engages in the sale and distribution of women's dresses to retailers located in many cities, including department stores and specialty and dress shops. Mr. Henry Rosenfeld, also a party respondent in this proceeding, directs and controls its policies and is its president. A very substantial portion of respondents' garments are sold through their show room located in New York City. The evidence received related primarily to sales practices pertaining to dresses on which respondents' wholesale prices ranged from \$5.75 to \$10.75.

In promoting sales of the dresses, cooperative advertising has been engaged in stressing the name of Henry Rosenfeld and the name of the particular retailer sponsoring the advertising. Respondents, when they participate, pay 50% of the cost of local advertising engaged in by the retailer up to \$1.00 per garment. Their policy has contemplated, however, that such promotional compensation to retailers be limited to purchases of three categories of dresses, namely, those carrying larger profit margins for respondents, garments which are slow sellers, and those made from leftover or excess piece goods. The law imposes no requirements that a seller give advertising allowances on all his products if he elects to accord them on one or more articles. When granting any promotional payments, however, the law requires

that he make them available on proportionally equal terms to other resellers of that article or articles who compete with recipients of the compensation.

Respondents contend at the outset in their appeal that the only evidence which may be properly considered in determining the merits of this proceeding is that relating to the availability of respondents' promotional allowances in the years 1949, 1950, and 1951, which are the years expressly mentioned in Paragraph 7 of the complaint. Such interpretation of the complaint is unduly restrictive, however; and it is reasonable instead to construe the instances of alleged violations particularized in that paragraph, as to those years, in the light of the complaint's preceding allegations identifying those acts as illustrative of practices followed by the respondents when compensating customers for services and facilities furnished by them. Some of the evidence received related to 1950, but the testimony revealing detailed information on respondents' transactions and dealings with their accounts pertains to a period beginning in 1951 and continuing into 1954. This evidence was properly received into the record and indicates that respondents' policies in respect to promotional allowances did not differ materially in 1951 from those followed in succeeding years.

With bearing also on this aspect of the appeal is the fact that, throughout the hearings, respondents had notice that the hearing officer deemed the evidence relating to activities subsequent to 1951 and up to issuance of the complaint to be relevant and material to the issues presented in the proceeding. The hearings were held at intervals and respondents were afforded full opportunity to cross examine adverse witnesses and present their own case. That their rights of due process were fully observed is clear from the record, and there is no valid basis for the appeal's contentions that our decision on the merits of this case be restricted solely to record matters pertaining to activities by respondents prior to 1952.

Before proceeding to consideration of other aspects of the appeal, brief reference to various additional evidentiary matters is warranted. The record includes a tabulation showing respondents' net annual sales for various years from 1950 into 1954 to all customers in the areas of Baltimore, Boston, Newark and Philadelphia, together with the amounts of advertising allowances accorded by respondents to those purchasers. It attests that respondents paid promotional allowances to some of their customers in each of those cities but not to others. Buyers and other personnel identified with both of respondents' retail store accounts in Newark and certain of its customers in Philadelphia also appeared as witnesses and testified as to their visits

1535

Opinion

and dealings at respondents' show room at various times from 1951 into 1954. Of the two Newark department stores, one received allowances in each of the years noted above; but the other received none and its buyers testified that, except in one instance, no allowance was ever offered in the course of their various visits to the New York show room. According to the testimony of the buyer representative for a competing Newark store receiving respondents' promotional allowances, she was informed and guided as to what styles carried advertising allowances and affirmatively offered them. The testimony relating to respondents' dealings with their Philadelphia customers, while not identical, was substantially similar in vein.

The appeal argues that the evidence establishes that the failure of the foregoing customers to secure promotional payments was due in fact to their lack of satisfaction with garments carrying advertising allowances or interest in conducting advertising promotions for the Rosenfeld line. The initial decision's conclusions to a contrary effect have adequate support in the record, however. One of the unfavored stores inserted newspaper advertisements featuring the Rosenfeld name on at least two occasions, and another, also at its own expense, advertised them during at least one promotion. Nor is there merit in the appeal's contentions that the record supports conclusions that respondents' failure to afford promotional compensation to some stores was due to the inadvertence of respondents' employees and presents a *de minimis* situation warranting dismissal of the proceeding. On one or more occasions, it was the vice-president of the corporate respondent with whom the buyer for a store receiving no allowances conducted her dealings. This store's purchases were substantial and in no sense *de minimis*.

The appeal brief emphasizes, too, that buyers for non-favored stores did not regularly attend the seasonal openings at respondents' show room when optimum opportunity assertedly existed for buyers to obtain advertising allowances. This circumstance is nowise controlling, however. As found in the initial decision, respondents' terms varied so constantly from garment to garment and from time to time, solely at the direction of the respondent, Henry Rosenfeld, that they could scarcely be regarded as terms at all. Testimony presented by respondents indicates that their customary practice was to allocate two higher profit items in each category of dresses for advertising allowances and, in instances when merchandising conditions warranted, to include all garments in an entire group or category for promotional purposes. It is clear that respondents' flexible policies with respect to promotional garments insured the presence of varying but substantial numbers of them on the show room line throughout

Opinion

52 F. T. C.

the season and rejected are the appeal's contentions as to the record being deficient in this respect.

The hearing officer concluded that the respondents did not affirmatively offer to pay advertising allowances to all their customers buying for resale competitively with others and that the respondents did not publicize the terms on which allowances were available in such manner that all of its customers were aware of them in advance of purchase. In our view, the hearing examiner's interpretation of the testimony of the buyer representatives was accurate and his appraisals of the credibility of the various witnesses and the evidentiary weight properly to be accorded to their testimony were justified and sound.

The respondents' advertising allowances have not been granted by them on proportionally equal terms to their competing customers; and there is clear record showing that their failure to inform all accounts as to the terms under which allowances were being accorded has deprived those so disfavored of equal competitive opportunities in reselling the dresses. It follows, therefore, that respondents' promotional allowances were unavailable, as a matter of law, among competing customers. Under the Act, an allowance cannot be deemed "available" to a reseller, and a denial of opportunity to share therein occurs, when a seller fails to inform or otherwise offer promotional allowances to a customer while granting such payments for similar services to the reseller's rivals. *In the Matter of Kay Windsor Frocks, Inc., et al.*, Docket No. 5735.

The appeal further contends that the hearing examiner erred in failing to find that respondents fully proved their defense that the allowances were granted for the purpose of meeting competition in good faith and were thus excluded from the proscriptions of the Act. This evidence included the testimony of officials connected with five competing distributors of dresses. It appears that the granting of promotional allowances on shifting, individual and unpublicized bases and, in many instances on wholly arbitrary bases, is widespread in the industry. It is apparent, too, that respondents' program is not limited to granting allowances in individual situations where promotional assistance has been offered to a customer by a competitor on a closely similar garment. As held in the initial decision, respondents' allowances are aggressive merchandising weapons designed for securing business and forming an integral part of respondent's pricing policy. Hence, respondents are essentially claiming to meet competition generally rather than specifically and they, in effect, are adopting and perpetuating the discriminatory patterns which they claim exist in the industry.

Analogizing our rulings in Docket 5768, *C. E. Niehoff & Company* to the instant proceeding the examiner correctly held that respondents had failed to make out a defense of meeting competition in good faith through their practices of meeting competition generally rather than specifically, meeting a practice rather than a price, aggressive rather than defensive merchandising methods. However, the defense of good faith meeting of competition is not available to respondents in this proceeding which charges only violation of Section 2 (d) of the amended Clayton Act, as distinguished from the *Niehoff* case which involved charges of discriminations in price in violation of subsection (a) of the amended Clayton Act.

During the course of the proceedings, respondents asserted as an affirmative defense and offered evidence from their competitors to prove that their advertising allowances were granted in good faith to meet the services and facilities furnished by their competitors. At the outset, counsel in support of the complaint objected to the introduction of such evidence, contending that the provisions of Section 2 (b), limited as they are to "discrimination in price or services or facilities" obviously applied only to Sections 2 (a), 2 (e) and 2 (f) of the Clayton Act and not to Sections 2 (c) or 2 (d). The hearing examiner observed that this same contention had been made to and sustained by him (then a pristine issue) in Docket 5482, *Carpel Frosted Foods, Inc.*; that the Commission had overruled his findings therein and had held that the tendered evidence was "material and relevant for consideration by the Commission, without regard to the question as to whether or not such evidence constitutes a substantive defense to charges brought under Section 2 (d) of the Clayton Act." The examiner stated that he subsequently treated such evidence as a defense in the *Carpel* case, since it was so offered and argued and could "obviously not have any materiality except defensive." The Commission did not decide the issue disposing of it by the finding that:

"the respondent Carpel Frosted Foods, Inc., has not rebutted the prima facie case made against it by showing that the said contracts were entered into by it in good faith to meet a competitive offer by a competitor."³

The hearing examiner, in this proceeding, overruled the objections of counsel in support of the complaint and considered as a substantive defense respondent's evidence of the practices of five of its competitors in offering similar advertising allowances. We deem this to be error as it is our decision that Section 2 (b) cannot be plead defensive-

³ Findings as to the Facts and Conclusions, Page 10, Docket 5482, *Carpel Frosted Foods, et al.*

ly in this proceeding which involves only charges of unlawfully granting promotional allowances.

Subsections (c), (d) and (e) of Section 2 of the amended Clayton Act are directed against specific forms of discriminatory concessions to favored buyers. The Commission's Chain Store Investigation Report found that some buyers were securing price advantages concealed as brokerage, advertising allowances and services, and Congress in enacting these subsections directed specific provisions against such practices. Section 2 (d) of the Act was directed against payment of advertising allowances as distinguished from the furnishing of services of facilities specified under Section 2 (e). Therefore, Section 2 (d) applies only to payments for the benefit of the customer by or through whom the services are furnished as distinguished from the sellers actually furnishing the service or facility which is proscribed under Section 2 (e).

Judicial interpretation of these subsequent subsections has failed to integrate violations thereof with the standards applicable to the price discrimination provision of the Act.⁴ For example, the Third Circuit Court in the *Great Atlantic & Pacific Tea Company v. F.T.C.*, 106 F. 2d 667, held that there was no reason to read into sections (c), (d) and (e) the limitations contained in Section 2 (a). The court went on to state that:

"In other words, paragraph (c) constitutes a specific prohibition of a specific act and the acts committed by the petitioner are within such prohibition. To read the words of paragraph (a) into paragraph (c) destroys the Congressional intent. *For example the language of paragraph (b) relates to proceedings brought pursuant to the provisions of paragraphs (a) and (e) but are not applicable to proceedings instituted under paragraph (c) or (d).* Thus viewed, the provisions of all the paragraphs of Section 2 are consistent and deal logically with their respective subjects. The respective paragraphs must be read with due regard for the provisions of each."

The legislative history lends little support to the examiner's treatment of the tendered evidence as a substantive defense. H. R. 8442, as introduced in the House on June 11, 1935 contained in Section 2 (c) (1) the provision which ultimately became Section 2 (d) of the amended Clayton Act. The provision achieved its final textual form as Section 2 (d) of the Bill when reported by the House Judiciary Committee (H. Rep. No. 2287, 74th Cong., 2d sess.). The original Patman bill, as reported by the House Judiciary Committee, then contained a section numbered 2 (e) which is identical with the

⁴ *Biddle Purchasing Co. v. F. T. C.*, 96 F. 2d 687 (2d Cir. 1938), *Cert. den.*, 305 U. S. 364; *Elizabeth Arden, Inc., v. F. T. C.*, 156 F. 2d 306 (2 Cir. 1946) *Cert. den.*, 331 U. S. 806.

present section 2 (b) except it referred only to price and did not contain a reference to a sellers furnishing of services or facilities. Prior to the passage of the Bill, however, an amendment was offered on the floor of the House extending the application of the section to proceedings involving the furnishing of services or facilities as well as to proceedings involving charges of discrimination in price. Mr. McLaughlin, in reciting the purpose of the amendment stated that: "It simply allows a seller to meet not only competition in price of other competitors but also competition for services and facilities furnished (80 Cong. Rec. 8225)." A similar amendment was offered on the floor of the Senate by Senator Moore (80 Cong. Rec. 6435) but the colloquy which followed the offering of the amendment did not explain its purpose.⁵ Aside from the two cited instances there is nothing further in the hearings, debates or committee reports to explicate the meaning of the added language. To the contrary, the discussion of the proviso in both the House and Senate appears to be limited to situations involving price discriminations. This is to be expected, however, since neither the Robinson nor Patman bills, as originally introduced, provided for the defense of good faith meeting of competition and the proponents of the defense, in offering their amendments, limited its application only to price. The addition of the language relating the defense to services and facilities apparently was not considered a significant change, nor for that fact was the defense itself so considered, as it was interpreted by many as providing only a procedural as distinguished from a substantive defense.⁶ Despite this, the additional language has enlarged and broadened the scope of Section 2 (b), and as indicated by Congressman McLaughlin, the language is now broad enough to cover not only discriminations in price but also services and facilities furnished.

Faced with this exiguous legislative history, we are forced to the "bare-bones" language of the statute which provides:

"that nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price *or the*

⁵ "Senator MOORE. * * * The milk producers in New Jersey feel that unless this amendment is adopted all of their work for all these years will mean nothing; that they will go back again to where they were. The amendment merely provides that if they charge more to one person than to another, or are accused of discrimination, they shall have a right to prove justification. *I think the amendment goes just a little farther than the Borah-Van Nuys amendment or the amendment of the Senator from Oregon (Mr. McNary).*"

"Mr. ROBINSON. Mr. President, the amendment of the Senator from New Jersey appears to be consistent with the McNary amendment and other amendments which have theretofore been agreed to. There is one feature of the amendment about which I am in doubt; and little opportunity is afforded to study the proposition, as I have not seen the amendment before it was brought forward here. I see no objection to its incorporation in the bill, so that the conferees may consider it along with the McNary and Austin amendments which have theretofore been agreed to."

⁶ H. R. Conf. Rep. 2951, p. 7, 74th Cong., 2d sess.

Order

52 F. T. C.

furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

It is our conclusion that advertising allowances are not within the ambit of the statutory language and that Section 2 (b) cannot constitute a substantive defense to a charge of violation of Section 2 (d) of the amended Clayton Act. To this extent the examiner's findings are overruled and the initial decision modified insofar as it reflects a contrary conclusion.

We also have considered the appeal's request that our decision of this case be suspended pending institution of trade practice conference proceedings in the respondents' industry and promulgation of appropriate rules. Trade practice rules, however, are in the nature of advisory interpretations for the guidance of businessmen. Such rules look to elimination of unfair practices by voluntary and cooperative means and do not have the force and effect of law. Even though rules were ultimately promulgated by the Commission, respondents would be under no legal injunction to refrain from the unfair practices which the evidence shows were engaged in by them. It being our duty under the statute to insure cessation of the practices which it proscribes, the request for suspension is not being granted.

With the exception noted, we find that the hearing examiner's rulings are correct and free from substantial error. Respondents' appeal is accordingly denied, and, as modified by this opinion, the initial decision is adopted as the Commission's decision.

Chairman Gwynne concurs in the result.

FINAL ORDER

The respondents having filed an appeal from the hearing examiner's initial decision in this proceeding; and the matter having come on to be heard upon the record, including the briefs and oral arguments of counsel, and the Commission having rendered its decision denying the appeal and adopting the initial decision as the decision of the Commission except as modified by its opinion:

It is ordered, That the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in the aforesaid initial decision.

Chairman Gwynne concurring in the result.

Decision

IN THE MATTER OF
OUTBOARD, MARINE & MANUFACTURING COMPANYORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 3
OF THE CLAYTON ACT*Docket 5882. Complaint, May 23, 1951—Decision, June 27, 1956*

Order requiring a manufacturer of outboard motors for boats and parts and accessories therefor, with factories and offices at Milwaukee, Wis., and Galesburg, and Waukegan, Ill., accounting for one-third to one-half of the total sales of outboard motors in the United States, to cease exacting assurances from its distributors and dealers that they would not deal in its competitors' outboard motors or parts.

Mr. Paul R. Dixon for the Commission.

Butzel, Levin, Winston & Quint, of Detroit, Mich., and *Cleary, Gottlieb, Friendly & Ball*, of Washington, D. C., for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

THE PROCEEDINGS

Complaint herein was issued May 23, 1951 and charged respondent with selling or contracting to sell its outboard motors or fixing the sales price thereof on the condition, agreement, or understanding that the purchasers thereof would not use or deal in the merchandise of competitors of respondent in violation of Section 3 of the Clayton Act (15 U.S.C.A. 14). After service and answer, seven hearings were held resulting in 578 pages of transcript, 79 Exhibits for proponent and 22 Exhibits for respondent. The proceeding was closed by the hearing examiner on December 16, 1952 and initial decision filed by him December 29, 1952. The case was tried and decided on the theory of, and the quantitative tests applied by, the court in the so-called *Standard Stations* case¹ and others of like import; namely, that the statutory requirement of "where the effect of such lease, sale or contract for sale of such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce" is satisfied, if it be shown that respondent's sales accounted for a major or substantial share of the available market for the product involved. This showing was that, in 1949, respondent sold almost as many units as all its competitors combined and did more business dollarwise than the rest of the industry;

¹ *Standard Oil of California v. U. S.*, 337 U. S. 293 (1949). *International Salt Company v. U. S.*, 332 U. S. 392.