

IN THE MATTER OF
THE YALE AND TOWNE MANUFACTURING COMPANY

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

Docket 6232. Complaint, Sept. 16, 1954—Decision, June 28, 1956

Order dismissing, for lack of reliable evidence to support a desist order, complaint charging one of the nation's largest manufacturers of industrial trucks, with discriminating in price between customers through use of quantity discount plans.

Mr. William H. Smith and Mr. Brockman Horne for the Commission.

Milbank, Tweed, Hope & Hadley, of New York City, for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

GRANTING RESPONDENT'S MOTION TO DISMISS

The complaint here charges that by reason of respondent granting single order quantity discounts, and cumulative volume discounts, available to all, on the sale of its industrial lift trucks, respondent has diverted business to itself from competitors who do not grant such discounts, and that there is a reasonable probability that such discounts will so divert business whereby competition in respondent's line of commerce is or may be substantially lessened and hindered and that such discounts have a dangerous tendency to create a monopoly in respondent. Answer admitted the descriptive and jurisdictional facts, the respondent's acts and practices charged, in substance, but denied the effects thereof charged. At the close of proponent's evidence, respondent moved to dismiss for failure to adduce sufficient substantial, reliable, and probative evidence of the results and effects charged as to make out a prima facie case. After argument by contending counsel said motion was granted. Pursuant to the Commission's Rules of Practice and after consideration of proposed findings conclusions submitted by respondent's counsel, the hearing examiner therefor makes the following:

FINDINGS OF FACT

1. Respondent Yale & Towne Manufacturing Company is a corporation, organized, existing and doing business under the laws of Connecticut with its principal office located in the Chrysler Building, New York 17, New York.

2. Many years ago, respondent began the manufacture of materials handling equipment, or industrial trucks used in many industries to move merchandise from place to place on plant property, including warehouses, steel mills, foundries, railroad stations and airports. Some of the smaller models are operated by hand (hand lift trucks) while larger models of greater capacity are powered by gasoline, diesel or electric motors. This equipment is manufactured by respondent at two plants located at Philadelphia, Pennsylvania and Chicago, Illinois.

3. Respondent's industrial trucks are classified into four categories. Two of these are identified as Class "S" and Class "M". Class "S" identified respondent's handlift truck, which contains no motor and is the most inexpensive, that respondent manufactures. Respondent's Class "M" type of truck consists of its "Work Saver Trucks" and "Warehouser Electric Trucks." These are equipped with batteries which will move the truck at about 3 or 4 miles per hour. The other two classes of trucks made by respondent are known as Class "K" and Class "KG" trucks. Class "K" identified the trucks powered by batteries, and Class "KG" are those powered by gas, diesel, and propane.

4. Respondent's industrial trucks differ widely as to specifications and price. For example, respondent's small hand lift truck with a capacity of about 1000 pounds may be purchased for approximately \$300.00; whereas respondent's large electric models with capacities ranging up to 100,000 pounds are in a price range from \$4,000.00 to over \$61,000.00 each.

5. Respondent sells its industrial trucks for use and not for resale both through its branch office salesmen and through independent sales representatives to a large variety of purchasers, principally to large manufacturing plants, steel manufacturers, automobile makers, railroad companies, and other large concerns desiring equipment to move material or merchandise upon their own premises.

Respondent is one of the largest manufacturers of industrial trucks in the United States and has secured for itself a large portion of the total available market. Respondent's 1953 sales of industrial trucks from its Philadelphia, Pennsylvania factory were more than substantial and from the Chicago, Illinois factory of its wholly owned subsidiary, or division, were \$15,000,000.00.

6. In the course and conduct of its business, respondent engaged in commerce as "commerce" is defined in the Clayton Act having sold and shipped its products manufactured by it at its said factories located in the States of Pennsylvania and Illinois, and caused the same to be transported from said states to purchasers located in other States of the United States and in other places under the jurisdiction

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of the United States. Respondent also sold substantial quantities of its products to purchasers located in the States of Pennsylvania and Illinois.

7. On August 1, 1950, following its discontinuance during World War II, respondent resumed the practice of granting quantity discounts to its customers. Such discounts are now in effect and apply to purchases of respondent's Class "S," "M," "K," and "KG" industrial trucks.

Such quantity discounts granted by respondent are both single order (Schedule A) and cumulative (Schedule B). Single order quantity discounts are as follows, to wit:

Amount of discount	Applicable to a purchase of class "S" and/or class "M" equipment	Applicable to a purchase of class "K" and/or class "KG" equipment
Percent:		
0.....	Up to \$5,000.....	Up to \$5,000.....
1.....	\$5,000 to \$10,000.....	\$5,001 to \$10,000.....
2.....	\$10,001 to \$15,000.....	\$10,001 to \$20,000.....
3.....	\$15,001 to \$20,000.....	\$20,001 to \$30,000.....
4.....	\$20,001 to \$25,000.....	\$30,001 to \$40,000.....
5.....	Over \$25,000.....	Over \$40,000.....

In accordance with the above Schedule A, purchasers are entitled to quantity discounts based on the total price of all such classes or product (Classes "S" and "M") purchased on any order or group of orders bearing the same date and thereafter shipped, provided that the number and type of units and the dates for shipment, are specified on such order or group of orders. Such discounts are stated on the original invoices, and are deducted from the purchase price of all trucks actually shipped.

Quantity discounts under Schedule B in effect since 1950 apply to the cumulative total of the shipments of such classes of product upon orders received from the purchaser during each 12-month period (ending December 31st of each year, or on such other date as may be the end of the purchaser's regular contract year with the company), excluding, however, all shipments upon which Schedule A discounts shall have been allowed, as provided. Schedule B discounts do not appear on the original invoices, but are rebated in a lump sum after the close of such year. Under both Schedules A and B, purchases of Classes "S" and "M" trucks may be combined to secure maximum discounts. Purchasers are required to indicate on their purchase orders whether Class A or B discount applies.

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Respondent's cumulative quantity discounts are as follows:

Amount of discount	Applicable to purchases of class "S" and/or class "M" equipment	Applicable to purchases of class "K" and/or class "KG" equipment
Percent:		
-----	Up to \$5,000	Up to \$5,000.
1/2	\$5,000 to \$10,000	\$5,001 to \$10,000.
1	\$10,001 to \$15,000	\$10,001 to \$20,000.
2	\$15,001 to \$20,000	\$20,001 to \$30,000.
3	\$20,001 to \$25,000	\$30,001 to \$40,000.
4	\$25,001 to \$30,000	\$40,001 to \$50,000.
5	Over \$30,000	Over \$50,000.

With the exception that the percentages of discounts granted and amounts upon which computed as to purchases of Class "K" and Class "KG" trucks are in some respects different from the allowances applicable to Class "S" and Class "M" trucks, in all other respects the requirements and conditions for receiving them as hereinbefore stated as applicable to Class "S" and Class "M" trucks are the same.

8. The record abundantly shows that these discounts were granted, and that the rebates by separate credit memorandum made annually by respondent to those entitled thereto under Schedule B, *supra* were substantial in many instances, and necessarily resulted in a lower net acquisition cost to the purchaser than the cost to a purchaser buying in quantities not entitling him to any discount.

9. Although respondent in its answer has admitted that it is in competition with other manufacturers of industrial lift trucks, and the record so shows, nevertheless respondent's counsel in the cross-examination of the officials of five of these competitors has brought out that the various models of their trucks and its trucks are not identical, that their features differ in some respects, that the specifications and engineering differ. This however, does not conclusively establish that two given products do not compete for purchase. The best evidence of whether both strive for the same purchaser's dollar comes from the man with that dollar—if he is interested in both for a given job of work, if he weighs one against the other for its function, then they are competitive. Such evidence is not in this record but the fact that such evidence is the best evidence does not mean it is the only acceptable evidence. Here respondent's competitors have each designated certain models of theirs and certain models of respondent's which they testified were comparable in function and performance and therefore competitive. While this is of course opinion, it is nevertheless based on years of endeavoring to sell against respondent's equipment and is of sufficient weight at this stage of the case at least to warrant a finding, here made, that respondent's prod-

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ucts do directly compete with designated products of other manufacturers.

10. To sustain the charge of actual or potential diversion of trade and its effect, counsel offered evidence from five of respondent's competitors, a responsible official of each testifying plus a salesman of each two of them. Since this is the focal point of attack for insufficiency and the nub of this decision it is felt this testimony whose quality, weight and credibility are in direct dispute should be outlined.

11. George Raymond, 33, president of the Raymond Company, Greene, New York, with that company since 1946 as sales manager, then vice president, and recently president, testified that it began the manufacture and sale of hand lift trucks in 1930 and entered the electric truck field in 1950, was competitive with respondent on a limited number of models of the latter as well as with 15-18 other manufacturers of material moving equipment, that the Raymond Company ranks fourth out of 10 or 20 manufacturers of electrical trucks and sells between 5% and 10% in that field; entirely through independent manufacturers representatives, generally at list price without discounts, except single order quantity discounts, and for one year a cumulative volume discount to one customer of 1% on \$16,723.00 which he testified was necessary to get that business. He further testified that his selling agents had complained to him repeatedly over the fact that he did not give cumulative discounts and "it has been a considerable problem to us to keep the sales force satisfied for the past five years against facing a discount policy and not having one ourselves," and that respondent's discount policy makes a very difficult selling job to the Raymond Company. But he admitted that between January 1, 1950, and December 31, 1954, his business had increased 300%, 75% of which was in electric trucks in the sale of which he is most competitive with respondent. He gave as his opinion, nevertheless, that it is difficult for him to compete against respondent, and that the latter's cumulative discount policy tends to tie business to it. Although he said he knew of his own knowledge generally that he had lost sales to respondent, he admitted on cross-examination that he had likewise taken sales away from respondent, that it was a day to day occurrence to both lose and gain orders as against respondent as well as other competitors, that he had sold to purchasers who were using respondent's equipment, that his prices were generally higher than respondents' and generally higher than those of his other competitors, some of whom give cumulative discounts, and some of whom, do not. He also, admitted that his salesmen were chronic complainers, that they and he had frequently discussed putting in a discount policy, the last time being immediately

before this proceeding started, that if respondent were ordered to cease giving its cumulative discounts in this proceeding he would not adopt such a policy, otherwise he would. Further he admitted that he had had no trouble selling his equipment to large volume purchasers against respondent's competition, although his company does not make or offer the wide range of equipment which respondent does, but more or less specializes; that his equipment is not identical with respondent's, the differences therefrom being stressed as selling points, and that all other factors—engineering, quality, performance, service, parts, etc.—must be equal or nearly equal before price becomes the prime consideration in purchasing. Finally he said his salesmen were interested in a discount policy more as a selling argument rather than in any lower acquisition cost to the purchaser.

12. A salesman for national accounts of the Raymond Company testified that he had sold two Raymond trucks to Loblaw Groceterias, that when he went back to sell another one he was told by the warehouse manager that Raymond's product was better and he could have the business if he would meet the price of competition, and that he had never been able to sell Loblaw since; that respondent had a "much lower price than we were ever able to think about meeting if we had a discount schedule which we do not have." This was in the summer of 1953. The witness did not see Loblaw's purchasing agent, was unable to fix the times of subsequent visits or attempts to sell and was unable to point out in respondent's tremendous catalog the trucks which he indicated Loblaw bought in preference to Raymond's. Hence price comparisons are impossible as well as any other comparison of function, engineering, etc. which might have influenced or determined the purchase. Cross-examination also developed that Loblaw had complained about breakdowns and functional defects in the two Raymond trucks previously purchased and that considerable repair and adjustment had been necessary. Further, respondent's discounts could not have been a factor in the loss of sales, because he admitted Raymond could not have met the price, even with a discount schedule. This testimony is given but little weight by the hearing examiner, not only because of its vagueness on vital points but because the witness impressed the hearing examiner as carrying his selling onto the witness stand and seeking to make a point, rather than objectively telling the facts—all the facts.

13. O. M. Lund, Vice President and Secretary of Barrett Cravens Company, 21 years in the materials handling equipment business 15 of which were spent in connection with sales, testified that that company has manufactured hand lift trucks since 1914 and got into the electric truck business in 1951 through the acquisition in that year

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of the Crescent Truck Company; that his company sells exclusively through manufacturers' representatives on a national basis mostly to small volume purchasers without benefit of discounts; that his company was third in size in the hand lift truck business but being relatively new in the electric truck end was but a small factor in that branch of the industry and that the respondent was a competitor of his company on both hand lift and electric trucks. He gave it as his opinion that a large buyer would benefit more from a cumulative discount than a small purchaser, that such discounts did not bother his company until it got into the electrical equipment field; that such discounts do have a bearing on the placement of business as an additional incentive to the customer. "To get the order you have to offer the same thing"—cumulative discount. He stated that single order quantity discount is not difficult to compete with and had no effect on his company's business. It is not clear from the record whether or not his company gave them although some of his testimony seems to so indicate. He further testified that his salesmen tell him of loss of orders because of cumulative discounts offered by competitors; that purchasers switch to competitive equipment especially if buying in the fourth quarter of the year because they get additional discount from the same source even though the prices quoted may be the same.

14. On cross-examination he stated that his trucks are not identical with respondent's, that they are of different design and construction although they perform the same functions; that the majority of business in Chicago produce market went to his company up to five years ago and that Barrett Cravens had most of the bottling industry but lost it. Both losses were to power equipment rather than to hand lift competitors. He testified that purchasers buy his product on the basis of price without regard to quality but nevertheless gave as his opinion that if he were a purchasing agent quality would be his first consideration and price his second even though he also stated that if he were purchaser a cumulative discount would influence him in buying. He further testified on cross-examination that there is a tendency to replace electric equipment with trucks from the same manufacturer because of the parts and maintenance problem but that this tendency was not present in hand lift trucks and that the Crescent subsidiary has gone backwards since its acquisition in 1951 although the parent company's asset position has grown. This retrogression is principally due to moving and consolidating three plants into one and also partly due to the fact that Crescent trucks were too heavy for floor load which gave rise to a great many complaints and a good deal of difficulty, that engineering changes have been made but that these difficulties have not yet been overcome "by a long shot." Another reason

for the retrogression was that Barrett Cravens inherited a great many special orders that Crescent had when acquired, and that these have not as yet all been filled and that Barrett Cravens had made substantial changes which have not as yet produced results. As to what he had heard of the effect of cumulative discounts he could name but one salesman in Columbus, Ohio, who told him he lost the sale of an Elwell-Parker lifter to an unknown competitor because a cumulative discount offered by that competitor had a "bearing" on losing the sale. He stated he had such conversations with other salesmen but did not remember when, with whom, or what competitors were involved. He admitted that his company had sold large accounts such as Grand Union and Revere Electric Company in competition with respondent and with other competitors who give cumulative discount and still does so with fair regularity. He did not think that a \$300 price difference greater on his truck than on respondent's comparable product prevented competition between the two or that it was too hard to overcome because of other features present in his company's truck but he could not state what those features were. When Crescent was acquired it had a discount system which was subsequently discontinued but he did not know what sort of discount system it was. He stated that the industry is characterized by active, good and healthy competition and "we enjoy working against them and with them." He stated he had no quarrel with his competitors and the reason his salesmen concentrate on small purchasers is because there are not so many people to convince.

15. L. C. Daniels, Vice President, Buda Division of Allis Chalmers Manufacturing Company, testified that Buda was organized in 1881 to manufacture railroad equipment; in 1897 started making gas and gasoline engines in 1927 Diesel; in 1948 began making hand lift trucks for railway car loading; and in 1947-48 acquired two companies which were making small fork lift trucks. In 1950 he came to Buda from Towmotor where he was chief engineer; that at Buda he found a 2,000-pound fork lift truck and immediately began redesigning it and a new line of fork lift gas-powered trucks. Allis Chalmers acquired Buda as a division November 1, 1953, Buda sells to distributors who in turn resell to users on 20% margin and at a suggested resale price which Buda attempts to maintain by threats to revoke the distributorship. Buda makes neither hand lift nor electric equipment. He gave as his opinion that a schedule B discount "would certainly give you a very good leverage on the company to continue buying equipment over a period of years knowing that if you buy over \$50,000 worth of merchandise they would get a 5% discount" and the "only way we or anybody else could compete with

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this practice is to have an equivalent schedule or give the 5% to start with" or a lower list price, if the purchaser is buying on price only which they frequently do.

16. On cross-examination the witness admitted that Buda's business since he went with them in 1950 has shown a steady upward growth which was tremendous percentagewise and very "unusual" and that he could not point to any sale which Buda had lost to the respondent on a price basis; that quality and engineering are primary considerations rather than price, that his distributors may in effect give indirect discounts by reason of trade-in allowances and that they frequently do so, that his company's trucks are not identical with those of respondents or his other competitors and that the different features are selling points. He further stated that Buda has some accounts to which it sells exclusively, just as the respondent does, and that there are accounts that buy from both and that not infrequently Buda does sell to purchasers who also buy from the respondent in sufficient volume to entitle them to the respondent's cumulative discount and notwithstanding such discounts. He further stated that purchasing agents will tell you anything as to why they did not buy and that it is therefore impossible to say why business is lost. He further testified that he sold to many large purchasing firms who were respondent's customers in spite of respondent's cumulative discount; that the Ford Motor Company was one of respondent's customers for years but that he got into that company with his products and that he is continually making inroads into accounts which formerly bought either from respondent or from other competitors. He thinks this is because he makes a better product. Lastly, he stated that the competition in the industry is very active and very keen, that he saw no lessening of competition therein, that it is more active than in 1953 or prior years, that this may be due to current prosperity or it may be due to the fact that the motor lift truck industry is only 15 or 18 years in substantial volume and is constantly expanding.

17. P. K. McCullough, Vice President in charge of sales, Mercury Manufacturing Company, testified that that company had been manufacturing material handling equipment for 45 years, that he had been with the company 22 years, that they make battery electric fork lift industrial trucks as well as tractors and trailers, that the electric trucks account for 30% of its business and it is merely upon these that he competes through manufacturers' agents and directly through the company's sales organization with the respondent; that his electric truck business is about 4% of the entire industry; that his company has granted discounts to meet competition to offset transportation allowances and to match trade-in allowances; that Mercury had a cumulative

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discount system 20 years prior to 1940 and then discontinued until 1953 when it was reinstated with six customers only and on battery electric trucks only. These were national accounts and the schedule remained in effect for only one year, it being adopted to make sales because of competition and at the end of the year discontinued because of the accounting problems involved and because it had no effect on sales. It was replaced by order discounts wherever the company felt it necessary to do so; that there was no pattern to these discounts each one being a matter of individual negotiation, that the cumulative discount schedule of these six customers was identical with respondent's schedule B but that it was not given to meet any definite competition. "We had no definite feeling at that time that we were going to be written out of a customer's picture by virtue of not being allowed discount." He gave it as his opinion that a 5% cumulative discount is an influencing factor when all other factors have been considered. While the cumulative discount was in effect for the one year with these six customers his company neither gained nor lost business.

18. On cross-examination he stated that competition was keen in the industry, that respondent's discount schedules have no measurable effect on his business, that he did not believe that they had affected his company at all; he could not name a single sale which had been lost to respondent or any other competitor where the discount was the deciding factor; that quality, service, and delivery were the primary factors in influencing purchases, that the differing features of various trucks were their selling points; that his company's products were not identical with those of any other competitor, that he had no trouble in selling Alcoa from \$10,000 to \$15,000 a year's worth of business over a 10-year period without any discount granted whatsoever and he had no idea why they bought his products, and that one of the trucks they bought listed at \$6,600 whereas the respondent's comparable truck listed at \$6,110.

19. William E. Ripley, formerly Assistant Sales Manager, Towmotor Corporation, testified that his primary concern between 1951 and Oct. 1, 1954, was contacts with the national accounts likely to purchase trucks, a national account being a company with a number of plants throughout the country and home offices located either in New York or Chicago. Towmotor's major competitors were respondent and Clark Equipment Company and the decisive factors influencing the purchase of these trucks is the basic design of the equipment, the engineering, the utility, maintenance, service and price. The Towmotor Corporation built its first gasoline fork lift truck in 1943 and has been making them ever since. Price is a very prominent

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factor when purchase is by national accounts because the purchasing office is away from the plant and the purchasing officer does not have first hand contact with the equipment and is primarily interested in price and, in his opinion, respondent's discount schedule B definitely tends to divert business from Towmotor and his basis therefore was conversations he had either with the buyer or the purchasing agents of five very large purchasers. The buyer for Continental Can Corporation told him that Towmotor at one time received in excess of 80% of Continental Can's gasoline truck business but that they had decreased to less than 10% and that Towmotor had better get on the ball and join the band wagon and match this competitive deal if it expected to get back to the position it once held with Continental Can and that by competitive deal he meant a cumulative discount schedule. He further testified that he called upon the purchasing agent of American Car & Foundry for the purpose of selling them Towmotor trucks and was told that if Towmotor hadn't changed its policy the purchasing agent could not do anything for them, by which he meant that he was getting a cumulative quantity discount from a number of competitors, among them respondent, because he was shown some of these discount agreements, among them respondent's; that he was told that Towmotor could not hope to sell American Car & Foundry any equipment unless it met these competitive discount schedules. At the Robert Ghair Company he was told by a buyer in the purchasing office that the company had a discount agreement with the respondent, that they had lately received a rebate from them and as a result, the buyer was inclined to influence various plant managers to specify respondent's equipment in order to increase volume and thereby increase discount; that this company had formerly bought Towmotor trucks, that he was able thereafter to sell them some equipment but only in those instances where the local plant still insisted upon having Towmotor equipment. He further testified that the purchasing agent of United States Plywood Corporation stated that there was no reason why they should consider Towmotor equipment inasmuch as they were receiving the full 5% discount from respondent. This, however, was taken off the face of the invoices and was not a cumulative discount. As a result Towmotor could not sell United States Plywood any more equipment. He likewise spoke to the purchasing agent of the Union Carbide & Carbon Company and was told in effect that if Towmotor did not see fit to adopt a discount policy similar to that which was being offered to them by other manufacturers, including respondent, that Towmotor had very little hope of selling Union Carbide & Carbon but the witness did not know the circumstances. He further testified that all these companies had

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Towmotor trucks in considerable quantity in their service and that he never heard any complaint from them regarding their performance or specifications or otherwise.

20. On cross-examination this witness testified that since leaving Towmotor he has been vice president of Erie Equipment Company which is the Towmotor sales representative for the Cleveland territory and that his compensation as such is the same as all other representatives—12½% commission off list; that he made no written reports of his conversations with the purchasing officials of the five companies testified about; that Towmotor gave no discounts in 1953 or 1954 but its sales representatives gave trade-in allowances and Towmotor has on occasion absorbed freight; that trade-in allowances frequently exceed what competitors would allow but that this is strictly the profit or loss of the sales representative. He further testified that Continental Can Company was buying gas trucks from the respondent and Clark Equipment Company; that the man he talked to there did not mention either one but the witness assumed he meant them. Respondent and Clark Equipment Company were mentioned as his competitors by the American Car & Foundry purchasing agent; that that company did not buy from Towmotor in 1952, 1953, or 1954, Continental Company did in 1951-52-53-54, that he was shown discount agreements from five firms by the Continental Company purchasing official. Further he testified that the Ghair Company bought from Towmotor in 1951 through 1954 although they were using respondent's trucks and buying from them then also; that United States Plywood bought nothing from Towmotor during these years although he thought he had seen respondent's equipment being used at their Chicago plant; that he was sure that Union Carbide bought from his competitors but did not know from which one; that Towmotor sold to Union Carbide in 1951 but not to his knowledge in 1952 or 1953 and that he did not know about 1954. Further he testified that when these five separate conversations occurred he was not working on any order but was doing missionary work and called to see why Towmotor was not getting more business. He could not name a single order which Towmotor had lost to respondent because of the latter's discount and his cross-examination revealed that he had practically no knowledge of the engineering features of competitive equipment. Towmotor makes only gasoline equipment, no electric trucks, except one small insignificant model. He further testified that Towmotor placed business in 1953 against Buda, Hyster, Clark and respondent, that each of these all got business in competition with Towmotor and that Towmotor got business in competition with them in 1953 and 1954 that all of them with the exception of Buda gave

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cumulative quantity discounts; that 85% of Towmotor's sales were direct to the consumer, 15% being to its sales representatives, that on the latter he understood Towmotor gave discounts. He testified that he knew Towmotor was competitively priced but he did not know the competitive prices and had never reviewed them, the basis being what someone told him.

21. Robert Fairbanks, Sales Manager of Towmotor from 1951 to the time of testifying gave it as his opinion that "I believe that the cumulative discount plan of Yale very definitely tends to and does divert business from Towmotor and other competitors who do not have a similar policy." He further testified that the decisive factors in selling were quality of engineering, workmanship and material, service, sales contacts, design, price and safety factors; that Towmotor began the manufacture of fork lift trucks in 1933 and respondent began it in 1949. He further testified that Owens Illinois Glass Company had for many years been an important customer of Towmotor, that he got reports from sales representatives located where Owens Illinois plants were situated, that Towmotor was not going to remain a supplier of Owens very much longer unless it met the cumulative discount plan of respondent and that in January 1953 he went out with a Towmotor Vice President to visit the executive vice president of Owens at Toledo to see whether or not it really was a threat. The visitors were referred to the purchasing agent who told them that the fact that Towmotor did not have a cumulative discount program was very damaging and that Towmotor was not on Owens home office list for supplies but that if Owens' plant manager wanted particular equipment, the purchasing agent would not overrule them and he was shown respondent's agreement and schedule. He further added "we were put on guard by them that we were going to have a tough row to sell equipment into their plant unless we had a similar program." Towmotor has continued to sell Owens Illinois Glass but also buys from other competitors including respondent and he thought the reason that Towmotor had maintained the business so far was that its products had preference in the plants. He stated Towmotor's net sales in 1953 to be \$19,896,200 and in 1954 to be \$16,264,843 and further testified that his market position had dropped 25% in 1954 over 1953. This was an estimate based on total industry figures taken from the industrial truck associations' reports.

22. On cross-examination it developed, however, that these industrial figures did not include in some years certain competitors; that deductions were made for what was considered to be non-competitive products so that they cannot be said to be complete or accurate or comparable in some respects. The witness refused to give exact figures

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but stuck to percentages. He admitted competitors' sales also decreased in 1954 but how much is not shown. Towmotor's annual report to the stockholders shows net profit in 1954 of 4.9 of sales as against 4.0 of sales in 1953. Cross-examination further revealed that the witness did not know the engineering or performance features of his competitors' products such as drive front axle, trailing axle, engine capacity, engine feed, gas tank location, sliding channels or anticavitation valves in the tilt cylinders, nor did he know whether or not parts were interchangeable between gasoline and electric trucks made by the same manufacturer. He admitted that Towmotor's president had put out reports that Towmotor was gaining a more substantial place in the industry and further stated that competition was active in 1953 in the industry as a whole and presently, and that it was on the increase and that he knew no member in that industry who was obtaining a monopolistic position. He further admitted Towmotor has 95% of the business of several national accounts, 50% of the business of approximately 100 national accounts and he was unable to name a single instance where a respondent's truck was bought as against a Towmotor truck where the deciding factor was the discount schedule of respondent. His testimony that Towmotor's business declined in 1954 over 1953 or 1952 was not meant to state that it was declining now. On redirect examination he gave it as his opinion that respondent's cumulative discount has a tying effect on business in favor of respondent and he estimates that Owens Illinois Glass has 20 plants and that Towmotor had shipped to six or seven of them in 1953 and 1954. He further stated that the total units sold by Towmotor in 1953 was 3,737 and in 1954 was 2,685. He was unable to point to a single sale lost to respondent because of respondent's discounts. In 1954, Towmotor Corporation moved into a new larger plant with some dislocation of function resulting.

23. The cross-examination of the last two witnesses, in the greater detail as shown by the transcript, than above summarized, and their attitude under it, detracts greatly from its weight and raises a serious question of credibility on one or two points. Their opinions that respondent's cumulative discounts diverted or probably would divert business are seriously undermined by the striking ignorance which both displayed about engineering features of competitive trucks, when both admitted that quality of engineering, design, etc. were decisive factors in influencing purchases. Price alone cannot be pilloried as a sole cause, when ignorance of other admittedly determinative factors is so amply demonstrated. This testimony was far from being wholly dispassionate and objective—both men were obviously interested witnesses to the point of impressing the examiner that stopping respond-

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ent's cumulative discounts had become a private objective and policy of their employer, in strong contrast to the frank and disinterested attitude of the officials of Raymond Company, Buda or the Mercury Company, for example. Furthermore, there were frequent retreats behind "I don't remember" or "I don't have the basic figures" available when conclusions and sweeping statements made on direct examination were sought to be probed.

24. The above summarized evidence adduced to support the charge of actual or reasonably probable diversion of substantial business to respondent from its non-discount granting competitors, allegedly resulting in a substantial lessening of competition in respondent's line of commerce falls into two rough categories in the main—opinion and hearsay. The opinions have three principal facets—first, that if the witness were a purchaser, respondent's cumulative discount plan would influence him to buy from the grantor, if all other considerations were equal, second, that that respondent's discounts tend to tie business to the grantor by offering a progressively lower net cost of acquisition for centralizing volume in respondent, and third, that such a discount makes it difficult to compete with respondent without offering a similar cumulative volume discount. The latter was expressed in variant ways "difficult to keep the sales force satisfied," giving a "leverage" to respondent's sales efforts, having a "bearing" on the placement of business, "tend to and does divert business" to respondent.

25. Opinions, or "informed business judgments" of necessity depend for their validity or weight, upon the record facts from which they are deduced, and cannot prevail if these facts lead irresistibly or more reasonably to an opposite conclusion. In the first group above, salesmen speculated as to the effect on them, if they were purchasers, of respondent's cumulative discount, with no showing of any prior experience by them of purchasing functions, either generally or specifically. Their conclusion that they would be affirmatively influenced thereby to buy from respondent, is considerably diluted by the qualification "when all other factors have been considered" in view of the testimony of most of these competitors of respondent, that engineering, design, and performance are major considerations and price secondary; and the record's reflection that rarely if at all in this industry, are all other factors equal. No purchaser or purchasing agent was called as a witness to give evidence on this point from the best and most authoritative source. These speculations are further invalidated by the preponderant evidence from the same witnesses that they have never lost a specified sale to respondent where respondent's cumulative discount was the deciding factor and by other evi-

dence of the steady and even luxuriant sales growth of their employers.

26. The second phase of this opinion evidence—the tying effect of a cumulative discount, is, of course, inferable from its very nature, but the facts in this industry, at this time at least, are contradictory. These competitors of respondent admitted that it is a day to day occurrence for them to sell against respondent to large volume purchasers who had bought and were buying from respondent, under its discount plan, and, in the case of national accounts, even though the home office purchasing department might want to channel purchases for cumulation, the plant managers prevailed in their choice of other equipment, again demonstrating that price is secondary or even tertiary to performance and engineering. There is further credible evidence that some of respondent's competitors, giving no discounts, have broken into large volume buyers, such as Ford Motor Company, where respondent, or some other discount granting manufacturer, had been previously established as its supplier.

27. The last class of opinions—competitive handicap—are likewise invalidated, in this examiner's opinion—by the record facts of this highly specialized industry. Two of these five competitors of respondent were new entrants into the field—Raymond Company into the electric truck field in 1950, Buda with a line of gasoline fork lift tractors of entirely new design and "starting from scratch" therewith in the same year. In the four succeeding years, Raymond's sales increased 300%, 75% of which increase was on electric trucks with which it is most competitive with respondent. Buda's increase was a steady and most unusual growth—a "tremendous percentage." The examiner is unable to believe, as asserted by counsel for the complaint, that inflation, "Eisenhower prosperity," or boom times does or can account for more than a minor portion of such a precipitous gain. In fact, Raymond's president denied that as a cause. Such dramatic performances do not bespeak stagnant or withering competition but rather what every witness, who was asked, testified to, that competition was keen, active, and vigorous and increasing. Neither of these firms had any trouble selling large volume purchasers, and had made substantial inroads and entrees into accounts, where respondent or other manufacturers with similar cumulative discount plans to respondent's, had been firmly established for years. Both also sold to other accounts—to purchasers who buy in sufficient volume to entitle them to respondent's discounts, some of them buying exclusively, or nearly exclusively from these two firms.

28. One of respondent's smallest competitors—Mercury Manufacturing Company—could see no measurable effect on its business by respondent's discounts, and did not believe they affected Mercury at

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all. A fourth competitor, Barrett-Cravens Company, got into the electric truck business 1951 through the acquisition of a subsidiary, which subsidiary had lost sales ground since then, but this retrogression was principally due to moving and consolidating three plants into one, engineering difficulties and redesigning, and other reasons unconnected with respondent's discount policy. Its vice president characterized competition in the industry as active, good and healthy and "we enjoy working against them and with them."

29. The opinions of the former and present sales officials of the fifth competitor testimonially represented in this proceeding—Towmotor Corporation—are the only ones directly supported, in part at least, by factual, as distinguished from hearsay evidence, discussed below—Towmotor's sales dollarwise declined from 19 million in 1953 to 16 million in 1954 and unitwise from 3,737 to 2,685. There is no showing, however, as to where this business went. The sales of many others in this business went down also in these years but to what extent is not shown. The estimate of market position decline of 25% was based on unknown totals, deductions and comparisons, shown by cross-examination to be too uncertain to be relied on. On the other hand the sales manager was of the opinion that competition in the industry was active and on the increase and stated that he knew of no member thereof who was obtaining a monopolistic position therein. He was unable to name any sale lost to respondent where the latter's discount decided the sale. The ex-salesman likewise admitted that Towmotor secured business from discount givers as well as from non-grantors—how much not being shown.

30. This brings us to the question of hearsay evidence—the opinion of the last two witnesses being largely based on their relation of what they had been told by the purchasing officials of six large volume purchasers—namely, that without a cumulative discount schedule such as respondent's, Towmotor could not hope for future orders. With three of these Towmotor was thereafter unable to sell to the best of the witnesses' knowledge. In the case of the other three, sales continued but in what volume is not shown. There is also hearsay from Raymond's salesmen as to the reason for his losing the sale of three Raymond trucks to respondent, although he was unable to identify what trucks.

31. The hearing examiner is bound by statute [5 U.S. 1007 (c)], as is the Commission, to decide this proceeding only upon reliable, substantial, and probative evidence. The former does not believe this hearsay meets that test for several reasons. The record here shows that purchasing officials will, and do, tell salesmen anything, as to why they did not buy and it is therefore impossible to say why business is lost. The record further shows that salesmen in this industry

are chronic complainers and give alibis for lost sales as a matter of course. Furthermore, cross-examination seriously detracted from the general weight (as distinguished from the fact, that it is hearsay) to be accorded the testimony of these two witnesses and the credibility of the first two, as hereinabove pointed out. Moreover, not a single purchasing official was called as a witness although obviously his testimony would be the best evidence and no explanation appears of record for this failure, except the reply of counsel in support of the complaint to an inquiry from the examiner on this point. It was his statement that no purchaser wanted this discount stopped because of self interest from which the examiner can only infer that either they would not testify or else would give adverse evidence. Whether this is simply surmise or a deduction on counsel's part or whether it is based on actual experience or knowledge, counsel did not state. Nor is there any showing of the non-availability of the men whose purported statements were related, except the death of one. The fact remains that "the absence of the primary evidence raises a presumption, that if produced, it would give a complexion to the case at least unfavorable, if not directly adverse."¹ "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse."² Commission counsel in many other cases³ under the same section of the law for many years past have consistently, vociferously and successfully objected to salesmen of a respondent relating what they were told by purchasing officials about being able to buy more cheaply from named competitors, in support of the "meeting competition defense." There is no basic difference between the one type of hearsay and the other—in both the source is the same, the relator is the same type of employee and the witness in each situation interested in the outcome of the case. What is sauce for the goose should be sauce for the gander and the Bureau of Litigation of this Commission cannot blow both hot and cold on the same subject.

32. The record shows the list prices on products of Raymond, Barrett-Cravens, Mercury, and Towmotor compared with list prices on respondent's comparable products—or at least those testified to be comparable and competitive by officials of these companies. Many of them are considerably greater or less per unit than the maximum 5% which respondent allows on purchases of \$50,000.00 yet sales are constantly being made thereof. Furthermore, the testimony is that the differential between \$4,200.00 for a competitive truck as against \$3,815.00 for respondent's truck "is not too bad to overcome." Other differentials run as high as \$500.00 in favor of respondent's products.

¹ *Clifton v. U. S.*, 4 How 242.

² *Interstate Circuit v. U. S.*, 306 U. S. 208.

³ The most recent of these D. 5770, *E. Edelman Co.*, and D. 5768, *C. E. Niehoff Co.*

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33. There is no evidence whatever that respondent's single order discount (Schedule A) had any of the effects alleged or that it was reasonably probable or possible that it would, in fact the only evidence as to it was that it had no effect whatever and was not a competitive factor.

34. The outstanding and largely determinative factor in this price discrimination proceeding is that in this industry price is not the prime nor determinative factor in the great majority of sales.

Finally, applying to this situation various tests or criteria suggested by writers, or economists and in some instances recognized in court decisions, this record affirmatively shows that in this industry in the years in question there has been ease of entry, opportunity for survival, growth, and profit, excellent consumer choice of alternative products, efficiency in production and an active race for improvement of product, redesigning and the introduction of new types with supplier preference by purchasers fluidly responsive thereto, technological advances, and a fluidity and flexibility of market and of competition therein. The evidence is unanimous that competition in this industry in respondent's line of commerce is active, keen, healthy and increasing, and the fact is so found.

It is believed that the underlying theory and principles of *Minneapolis-Honeywell Regulator Co. v. F.T.C.*, 191 F.2d 786; the Spark-plug decisions—Dockets 3977, 5624, and 5620; the General Foods dismissal, Docket 5675; the Purex Corporation, Docket 6008 support the above conclusions.

35. Although not so stating in so many words, counsel in support of the complaint, in his oral argument on this motion to dismiss, seemed to contend that a cumulative volume discount conclusively presumes the alleged tendency to divert business, substantial lessening of competition and tendency toward monopoly. Looking at such a discount plan in a vacuum, without regard to any particular industry such a presumption is easily inferable but the commercial facts of life revealed by the record as to this industry show the fallacy and the danger of such a mechanistic interpretation. There may be industries or even lines of commerce, perhaps in fungible goods, for example where such a conclusive presumption may safely be indulged in to the public good but this is not one of them. The law does not so provide, although it would have been easy for Congress to have flatly and unequivocally forbid cumulative volume discounts, nor does the legislative history of the law hint at such a legislative intention. No case so holds, either court or Commission. Indeed, recent opinions of the Commission indicate a rejection of such an automatic disposition of this type of proceeding. If this be counsel's position, it is rejected.

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CONCLUSIONS

There is insufficient reliable, substantial and probative evidence to show that "respondent's discriminations in price * * * in many instances in the past, have been enough to divert, and have diverted substantial business from respondent's competitors to respondent, and are enough to divert substantial business from respondent's competitors in the future; and, therefor * * * there is a reasonable probability that the effect of * * * may be substantially to lessen competition in the lines of commerce in which respondent is engaged" or that "said practices of respondent also have a dangerous tendency unduly to hinder competition and create a monopoly respecting effects not only as to respondent's existing competitors, but also as to respondent's potential competitors."

ORDER

It is ordered, That the complaint herein be, and the same hereby is, dismissed.

OPINION OF THE COMMISSION

By ANDERSON, Commissioner:

After the reception of evidence in support of the case-in-chief was closed, the hearing examiner filed an initial decision granting the respondent's motion to dismiss the complaint under which this proceeding was instituted. That decision holds that the evidence has failed to establish that the differing prices under which respondent has sold its industrial trucks to users have constituted price discriminations within the category of those rendered unlawful under subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. The decision below, accordingly, provides for dismissal of this proceeding and counsel supporting the complaint has appealed.

The respondent is one of this country's largest manufacturers of industrial trucks, which is the term used in the hearings to designate equipment for moving materials and merchandise from place to place in and about plants, warehouses, mills and railroad stations. They range from small models operated by hand up to large capacity trucks powered by batteries, gas or other means, and vary in price from approximately \$300 each up to \$61,000. The company's equipment is sold through its branch office salesmen and through independent sales representatives. The manufacturing plants and other concerns which are respondent's customers do not buy the trucks for resale but for their own use.

Respondent's equipment is offered at list prices and its purchasers have been accorded applicable discounts or rebates provided under two

discount plans designated Schedule A and Schedule B. The first schedule is limited to purchases made under a single order or a group of orders bearing the same date. For purchasers receiving this form of allowance, the quantity discount is reflected on the invoice and ranges from 1% on purchases of a minimum of \$5,000 up to 5% for the largest quantity brackets. The cumulative volume discounts afforded under Schedule B have been granted in the form of annual rebates and computed on the aggregate volume of customer's purchases during each twelve-month period. Respondent's counsel reported in the course of his oral argument that the Schedule B discounts were discontinued shortly after the hearings were concluded in this case. In figuring discounts to be allowed customers under Schedule B, respondent has excluded any shipments on which said customers had been allowed quantity discounts under Schedule A.

In addition to alleging that the differing prices at which the respondent sold its merchandise under each of the aforementioned schedules constituted discriminations in price, the complaint further charged they have had or may have the adverse effects on competition which are proscribed under the statute and accordingly were unlawful. In this connection, the complaint alleged that the discriminations have diverted and will continue to divert substantial business from the respondent's competitors to it, that there is a reasonable probability that the effect of the discriminations may be substantially to lessen competition and that they have a dangerous tendency unduly to hinder competition and to create a monopoly in the respondent.

The following are among the facts in the record which are not in dispute: (1) That discounts and rebates were granted by the respondent to its customers under Schedule A and Schedule B; (2) that in many instances these discounts and rebates represented substantial amounts; and (3) that the said discounts and rebates resulted in lower net acquisition costs to some purchasers than to others whose purchases of respondent's products were in such amounts that they were either not entitled to any discounts or rebates at all or they were entitled to discounts and rebates which were less than the highest percentage quantity brackets of the said schedules.

Appellant did not challenge the hearing officer's finding that there is no record support for conclusions that the adverse competitive effects alleged in the complaint may result from the price differentials granted by the respondent under Schedule A applicable to single orders or group orders of the same date. Since this finding and the ruling thereon in the initial decision have sound record basis, we proceed on to a consideration of evidentiary matters relied upon by appellant in his contention that the hearing officer erred in reaching

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similar conclusions with respect to the price discriminations inherent in the respondent's Schedule B which provided for cumulative volume discounts. That schedule was as follows:

Amount of discount	Applicable to purchases of class "S" and/or class "M" equipment	Applicable to purchases of class "K" and/or class "KG" equipment
Percent:		
0.....	Up to \$5,000.....	Up to \$5,000.
1/2.....	\$5,000 to \$10,000.....	\$5,001 to \$10,000.
1.....	\$10,001 to \$15,000.....	\$10,001 to \$20,000.
2.....	\$15,001 to \$20,000.....	\$20,001 to \$30,000.
3.....	\$20,001 to \$25,000.....	\$30,001 to \$40,000.
4.....	\$25,001 to \$30,000.....	\$40,001 to \$50,000.
5.....	Over \$30,000.....	Over \$50,000.

A wide and variable range of the products involved in this matter is available for selection and purchase from the numerous companies which are engaged in their production. Some of these companies offer a long line of equipment and others specialize in trucks for designated purposes and capacities. There is great diversity between competing products in respect to engineering specifications, performance, service and parts, and this holds true even on specialized equipment offered for generally similar purposes or jobs. On some of the comparable items of equipment, price variations between the respondent and its competitors approximated 5%; but, on many others, the differences were small.

Officials of five competing manufacturers of industrial trucks and salesmen identified with two of them appeared as witnesses in this proceeding. In essence, they expressed views that respondent's cumulative discount plan would be influential in diverting business in situations where other factors were equal; that this program tended to or served to tie business to respondent; and that it has constituted a competitive handicap. Counsel supporting the complaint contends that the hearing examiner should have concluded that substantial evidence was presented supporting inferences that price is a prime and determinative factor in large volume users operating through branches whose buying is carried on through a centralized purchasing office. In support of this contention counsel directs attention to the views expressed by certain witnesses that price is frequently the paramount factor in influencing sales. No representative of a national account or other concern which was a user of the industry's products was called as a witness in the proceedings.

The hearing examiner found that in the majority of cases, instead of price, the controlling factors in inducing sales of these products were performance, engineering specifications, and related attributes,

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including adaptability to the customers' individual requirements. This is supported by the preferences of customers' plant managers which are based on such factors and have prevailed over the inclinations of said customers' home purchasing departments to cumulate their purchases for larger discounts under Schedule B. In further corroboration of the hearing examiner's finding, there is other evidence indicating that certain of respondent's competitors who gave no discounts have established themselves with large volume buyers in situations where respondent previously was the established supplier for those accounts. On this basis, we reject the appellant's contentions that the record supports conclusions that the effects of the respondent's pricing practices may have been substantially to lessen or hinder competition or tend to monopoly.

The following excerpt from the initial decision which is a partial summary of existing conditions in the lift truck industry supports our view on this phase of the matter at hand and serves to evaluate any future competitive effects which may result from respondent's pricing practices:

"* * * this record affirmatively shows that in this industry in the years in question there has been ease of entry, opportunity for survival, growth, and profit, excellent consumer choice of alternative products, efficiency in production and an active race for improvement of product, redesigning and the introduction of new types with supplier preference by purchasers fluidly responsive thereto, technological advances, and a fluidity and flexibility of market and of competition therein. The evidence is unanimous that competition in this industry in respondent's line of commerce is active, keen, healthy and increasing, * * *."

These conclusions have ample record support. The appeal does not seriously challenge their basic accuracy as descriptive of the industry in general. However, appellant contends that they are not mandatory guides in determining the legal validity of the respondent's price discriminations. In maintaining that continuance of the respondent's cumulative volume discounts would represent a substantial future threat to competition, counsel in support of the complaint states that there is no way for competing manufacturers to meet the respondent's pricing plan except by offering similar programs. While it may be inferred from the record that some of the respondent's rivals have adopted volume discount programs, it is clear that others have not. Among those in the latter category are firms who have markedly increased their business and improved their competitive positions.

Counsel supporting the complaint also contends that it is inevitable that manufacturers in this industry who offer only a limited line of

products will be injured in the future, because, appellant argues, volume buyers who desire to pool their purchases of all types of lift trucks with one full line manufacturer for the purpose of cumulating discounts will not be interested in any of their similar discount programs. As previously noted, engineering design, performance, and service are of paramount importance to the producer in preserving his competitive position in this industry wherein wide diversity among competing products is traditional. There can be no doubt but that the flexibility of market factors to which the initial decision refers has included pricing matters. Illustrative of this is the initial decision's quotation from the testimony indicating that the differential between \$4,200 for a competitive truck and \$3,815 for the respondent's comparable unit "is not too bad to overcome." It is evident, therefore, that many counterbalancing forces are operative in the line of commerce in which the respondent engages.

We find that the record fails to support inferences that competing producers will not be able to meet the problems posed by respondent's pricing program without impairment of service or efficiency, or that they will be unable to protect their competitive positions in the face of lower prices of the pattern which the record shows the respondent has afforded to some of its customers. As previously indicated, the appeal has not challenged the finding in the initial decision that the 5% and lesser differentials provided in the respondent's single unit quantity discount program (Schedule A) present no past or future threat to competition. This absence of injurious effects from the lower prices afforded in single unit sales of large quantity orders (Schedule A) suggests, in and of itself, that similar competitive factors may be largely operative with respect to the comparable rebate differentials applicable to orders to which the cumulative discount is applied (Schedule B). We therefore reject the contentions of counsel supporting the complaint that the record supports the inference that a continuance of the challenged pricing practices of the respondent will probably result in the adverse effects upon competition which are proscribed by the statute.

Although it was found in the initial decision that the role which is played by prices in this industry in inducing sales had been comparatively subordinate in a majority of cases, that conclusion does not necessarily mean that price has not influenced the placing of business in individual competitive situations. In contending that the initial decision is based on an erroneous construction of the Act, the appellant argues that a showing that a seller's discriminations are sufficient to divert business from his competitors suffices to establish a *prima facie* case of law violation and that, even assuming that the evidence fails

to show actual diversion of business to respondent, such circumstance does not render the record deficient. In support of this proposition of law, the appellant relies on the fact that the statute does not require a showing that price discriminations have, in fact, injured competition, but requires only a showing that there is a reasonable probability that they may have that effect.

This latter concept, which is sound, does not support the proposition, however, that conclusive inferences may be drawn from isolated evidentiary facets of the case without consideration of those which may be drawn from the entire record. If the particular circumstances attending the discriminations refute conclusions that the proscribed adverse effects may result, the statutory requirements of proof of injury have not been met. The proponent of the complaint has the burden of meeting these standards in proving competitive injury; and, where the burden has not been sustained in the course of the case-in-chief by counsel supporting the complaint, the proceeding should be dismissed. The Administrative Procedure Act provides that "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof." [5 U.S.C.A., Sec. 1006(c).] Also see *Norment v. Hobby*, 124 F. Supp. 489; *National Labor Relations Board v. Haddock-Engineers, Limited*, 215 F. 2d 734, 737; *McKiver v. Theo. Hamm Brewing Co.*, 297 N.W. 445, 447; *Turner v. Central Mut. Ins. Assn.*, 183 S.W. 2d 347, 348; *Rupp v. Guardian Life Ins. Co. of America*, 170 S.W. 2d 123, 128; *State v. Pressler*, 92 P. 806, 808; *Walker v. Carpenter*, 57 S.E. 461; *Willett v. Rich*, 7 N.E. 776. Sec. 2 (b) of the Clayton Act, as amended [5 U.S.C.A. 13 (b)] provides affirmatively that the initial burden is on counsel supporting the complaint.

Another alleged ground of error relates to whether the hearing examiner, when considering the motion to dismiss, failed to view the evidence and draw inferences therefrom most favorable to the complaint in a manner consonant with criteria approved for such determinations in the interlocutory stages of cases under the Commission's decisions in the matter of *Vulcanized Rubber and Plastics Company*, Docket No. 6222 (issued November 29, 1955). The initial decision was filed herein on November 18, 1955. The two basic principles of law which the Commission has deemed controlling in its rulings on the merits of counsel's appeal are (1) that proof of tendency or capacity of a seller's price discriminations to divert business to him from his competitors is not in every situation proof per se of unlawful injury to competition with the seller, and (2) that in determining the merits of motions to dismiss, inferences by hearing officers respecting the

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probable future effects of a seller's price discriminations on his competition should be those reasonably to be drawn from the entire record. We deem the inferences drawn by the hearing examiner on the salient points of the case to be reasonable and proper inferences. Hence, no useful purpose would be served by a detailed evaluation of the extent to which the hearing examiner's appraisals of evidentiary matters relating to each of the various issues in the proceeding may or may not have been predicted on inferences most favorable to the complaint. Because we think that the record lacks reliable evidence which, when considered in connection with inferences reasonably to be drawn therefrom, would support an order to cease and desist, this aspect of the appeal is likewise denied.

The testimony of two witnesses connected with a competitor of the respondent pertained to their conversations with purchasing officials of six large volume buyers in which the witnesses assertedly were informed that their company could not hope for future orders or would experience reduced business unless they adopted a cumulative discount plan comparable to the respondent's. The hearing examiner referred to this testimony as hearsay evidence and stated in effect that testimony by the purchasing agents themselves, had it been offered, would have greater probative value in determining the attitudes of respondent's customers toward its cumulative volume discounts. In further commenting on this testimony, the hearing officer cited matters which he believed detracted from its weight and raised serious questions as to candor and credibility. Appellant argues that such testimony alone warranted denial of the motion to dismiss.

This testimony was properly received into the record and came within one of the recognized exceptions to the hearsay rule. However, the hearing officer apparently was not persuaded that purchasing officials are completely free at all times from motives of self-interest when conversing with representatives of present or former suppliers, and none of the matters cited in the appeal is persuasive that his evaluations on matters of credibility were essentially inaccurate. For these reasons and others previously noted as controlling to our decision here, the exceptions relating to this aspect of the appeal are likewise denied.

Having determined that the appeal is without merit, the initial decision is adopted as the decision of the Commission.

FINAL ORDER

Counsel supporting the complaint having filed an appeal from the hearing examiner's initial decision granting the motion to dismiss

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filed by the respondent at the close of the case in chief; and this 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 said appeal and adopting the initial decision as the decision of the Commission:

It is ordered, That the complaint herein be, and it hereby is, dismissed.

Appearances

IN THE MATTER OF
H. J. HEINZ CO., ET AL.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 5994. Complaint, May 21, 1952—Decision, June 29, 1956

Order requiring eleven corporate canners of raw tomatoes and their trade association to cease boycotting a cooperative association of tomato growers and its members in the "Ohio tomato area," in carrying out which boycott they destroyed the tomato market for members of the co-op by refusing to purchase tomatoes from them, attempted to destroy the co-op by refusing to recognize or negotiate with it as the marketing agent of its grower members, and effectuated the boycott by holding meetings to agree upon ways and means for maintaining a united front to combat and destroy the co-op.

Mr. Leslie S. Miller, Mr. William J. Boyd, Mr. Floyd O. Collins and Mr. Wilmer L. Tinley for the Commission.

Covington & Burling, of Washington, D. C., for H. J. Heinz Co., and various other corporations, and their officers thereof, and along with—

Reed, Smith, Shaw & McClay, of Pittsburgh, Pa., for H. J. Heinz Co., Joseph J. Wilson, Howard E. McKinley, Everitt E. Richard and Cyril P. Roberts;

Marshall, Melhorn, Block & Belt, of Toledo, Ohio, for Campbell Soup Co., Joseph Campbell Co., Walter A. Scheid, Edgar W. Montell and Harold R. Collard;

Mr. G. Lincoln Lewis and Barnes, Hickam, Pantzer & Boyd, of Indianapolis, Ind., for Stokely Van-Camp, Inc., Herbert F. Krimendahl and A. A. Ehrman;

Holloway, Peppers & Romanoff, of Toledo, Ohio, for Foster Canning, Inc.;

Mr. Joseph R. Harmon, of Fullerton, Calif., for Hunt Foods of Ohio, Inc.;

True & Meyer, of Port Clinton, Ohio, for Lake Erie Canning Co. of Sandusky, J. Weller Co. and George Wenger;

Mr. Carl C. Leist, of Circleville, Ohio, and *Ham & Ham* of Wauseon, Ohio, for Winorr Canning Co.

Marchal & Marchal, of Greenville, Ohio, for Beckman & Gast Co., Inc., Greenville Canning Co., Inc., St. Mary's Packing Co., Inc., Robert H. Timmer, Thomas G. Timmer, Luke F. Beckman and Charles F. Stemley.