

Decision

IN THE MATTER OF
SIMPLICITY PATTERN COMPANY, INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT AND SEC. 2(e) OF THE CLAYTON ACT

Docket 6221. Complaint, June 25, 1954—Decision, Mar. 13, 1957

Order requiring the largest manufacturer of dress patterns in the United States to cease violating Sec. 2(e) of the Clayton Act by giving favored customers special promotional services which it did not make available to all, specifically through supplying cabinets and other equipment for displaying and storing the patterns to larger customers free of charge while requiring smaller customers to rent or purchase the equipment; and Dismissing Count I of the Complaint, charging violation of the Federal Trade Commission Act, as unsustainable by the evidence.

Mr. William H. Smith for the Commission.

Mr. William Simon, of Washington, D.C., and *House, Grossman, Vorhaus & Hemley*, by *Mr. David Vorhaus*, of New York City, for respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this case charges the respondent, a manufacturer of dress patterns, with discriminating among its customers in the granting or supplying of certain services and facilities. The complaint is in two counts, Count I charging that certain alleged discriminations are violative of Section 5 of the Federal Trade Commission Act; and Count II charging that other alleged discriminations are violative of Section 2(e) of the Clayton Act, as amended by the Robinson-Patman Act. Upon the conclusion of the reception of evidence in support of the complaint, respondent filed a motion seeking dismissal of the complaint for failure of proof. After hearing oral argument on the motion, the hearing examiner granted the motion as to Count I and dismissed the complaint as to that count, but denied the motion as to Count II (Tr. 1020-1032).

2. Subsequently, at the request of counsel for respondent, a conference was held by the hearing examiner with counsel for both parties (Tr. 1040-1057). Upon ascertaining the views of the examiner with respect to the availability of cost justification as a defense to a proceeding under Section 2(e) of the Clayton Act, counsel for respondent elected to offer no evidence and rested their case insofar as Count II of the complaint was concerned, Count I having already been dismissed. As the case had been argued at length by counsel

on the motion to dismiss, and as the examiner had at that time expressed his views on the several issues, counsel for both parties elected not to submit proposed findings and conclusions. The case is now before the hearing examiner for final consideration.

3. Respondent is one of the largest manufacturers and distributors of dress patterns in the United States. It is a corporation organized under the laws of the State of New York, with its principal office and place of business at 200 Madison Avenue, New York, New York. There is no question as to the interstate character of its business; it sells its patterns throughout the United States. The patterns are in the low or medium price field, usually retailing at 25¢, 35¢ and 50¢. The company has been a pioneer in the distribution of patterns through the large 5 and 10 cent store chains, such as the F. W. Woolworth Company and the S. S. Kresge Company. The complaint charges discrimination by respondent in favor of its larger customers, primarily the large 5 and 10 cent store chains (for convenience frequently referred to hereinafter as "10¢ stores"), in that respondent supplies to the 10¢ stores services and facilities not available to respondent's smaller customers, usually fabric or "yard goods" shops. Prices as such are not involved; respondent sells to all customers at 60 percent of the labeled retail price. And the patterns usually are retailed both by the 10¢ stores and the smaller stores at the labeled prices.

4. The discriminations charged in Count I of the complaint as violative of the Federal Trade Commission Act are (for brevity some of the charges in the complaint have been consolidated):

(a) That respondent extends to the 10¢ stores the privilege of obtaining their stocks of patterns under an arrangement known as a "standing debit", while denying this privilege to the smaller stores. Under this arrangement the 10¢ stores do not pay for the original inventory; it remains the property of respondent. As to the smaller stores, the standing debit appears to be a matter of negotiation. While some of the smaller stores receive no standing debit, being required to pay for their inventories in full, others who do a more substantial volume of business do receive a standing debit covering a portion of the inventory, as for example, one-half or one-third. As indicated, the standing debit arrangement relates only to the original stock or inventory. It has nothing to do with reorders of patterns; all customers alike pay for these.

(b) That respondent requires its smaller customers to enter into contracts for the purchase of its patterns over a period of five years, while some of the larger customers are accorded contracts covering

771

Decision

a period of only one year; and that the two types of contracts differ in other respects (as to assignment, removal of goods to other premises, etc.) which are more favorable to the larger customer.

(c) That respondent's contracts with its smaller customers provide for the purchase by such customers of a designated number of respondent's "Monthly Previews", while no such requirement is made of the larger customers. These previews depict new styles, fabrics, etc. They may be imprinted with the store's name if desired. They are used by the stores for advertising purposes, being handed to the customer while she is in the store or inserted in packages containing purchases made at the store.

(d) That respondent pays transportation charges on shipments of patterns to certain of its larger customers, while requiring its smaller customers to pay such charges.

5. The discriminations charged in Count II of the complaint as violative of Section 2(e) of the Clayton Act are:

(a) That respondent supplies its monthly counter catalogs to its larger customers free, while charging its smaller customers for the catalogs. The price of the catalogs is \$1.65 or \$2.00 each, depending upon the type of binding. The catalog includes all of respondent's patterns and is essential to the retail sale of the patterns.

(b) That respondent supplies free to its larger customers cabinets and other equipment used in the storing and display of its patterns, while requiring its smaller customers to purchase or rent such equipment.

6. The record establishes that respondent's contracts with its customers do differ in substantially the respects referred to above. Respondent's principal defense to the proceeding is that there is an absence of competition between the 10¢ stores on the one hand and the smaller stores, such as yard goods stores, on the other. It is quite true that stores in the two groups approach the sale of patterns from widely different viewpoints, and that their methods of selling the patterns also differ substantially. With the 10¢ store, patterns are handled as any other item of merchandise; that is, patterns must stand on their own feet and show a profit, otherwise the store will not handle them. The patterns are usually kept in a cabinet under the counter, and about the only thing the prospective customer sees is the catalog, which is allowed a small space on the counter. No use is made of respondent's monthly fashion previews or any other advertising material.

7. The situation is quite different with the yard goods store. Usually it does not make any profit on patterns, nor does it expect

to do so. It handles patterns to promote the sale of fabrics and because its customers expect this service. The patterns, catalog, fashion previews and other advertising material are prominently displayed and the customer is invited to sit and browse through the material, all in order to promote fabric sales.

8. Despite these differences between the approach and methods of the two kinds of stores, it is concluded that the two are in competition in the sale of respondent's patterns. It is difficult to say that two stores in the same shopping area, possibly side by side, are not in competition when they are selling the same article at the same price to essentially the same segment of the public. Also rejected is respondent's contention that patterns are not a "commodity" within the meaning of Section 2(e) of the Clayton Act.

9. It therefore seems clear that a case had been established under Count II of the complaint. The catalogs supplied the two groups of stores are identical. While the cabinets differ materially in design and appearance, the fact remains that they serve essentially the same purpose—as a storage place for the patterns pending their sale to the public.

10. True, there is no showing of competitive injury. But this, as the examiner understands, is not required in a proceeding under Section 2(e). Given the element of jurisdiction, it appears that a *prima facie* case is established when it is shown that a seller is supplying to one customer facilities for use in the resale of the seller's products, and not supplying such facilities to the competitor of the favored customer on proportionally equal terms. In short, Section 2(e) appears to be a *per se* statute, requiring no proof of competitive injury.

11. The situation is quite different with respect to Count I of the complaint, which is based on the Federal Trade Commission Act. Here it is not sufficient to show discriminations among competing customers. Competitive injury must also be shown—not necessarily actual injury but at least facts which give rise to a reasonable inference of probable injury. In this respect the present count seems analagous to a proceeding under Section 2(a) of the Clayton Act. It is conceded by the Government that no competitive injury has been shown in the "primary" line, that is, competition between respondent and other pattern manufacturers. There remains then the question whether injury to competition among respondent's customers has been established.

12. If there is proof of such injury, it must be found in the testimony of six witnesses, practically all of whom are proprietors of small yard goods stores. Two of the witnesses operate or formerly

771

Appeal

operated stores in New Haven, Connecticut, while the remaining four operate stores in the Washington, D.C., Metropolitan Area. In substance, the attitude of the witnesses appears to be that while they would like to be on even terms with the 10¢ stores with respect to the several matters referred to in the complaint, they do not regard the matters as of any particular importance. They emphasize that they handle patterns only to sell fabrics and because their customers expect the service. None of the witnesses regards the competition of the 10¢ stores in the sale of patterns as of any real consequence. In fact, two of the witnesses did not regard themselves as being in competition with the 10¢ stores at all. While these two expressions of opinion are, of course, not conclusive on the fundamental question of the existence of competition, they serve to emphasize the apparent feeling of all of the witnesses that they are sustaining no substantial competitive injury as a result of the more favorable treatment accorded the 10¢ stores. The record seems clearly to be without any substantial evidence warranting a finding of injury to competition.

13. It is therefore concluded that Count I of the complaint has not been sustained. It is further concluded that Count II has been sustained and that the practices therein set forth are violative of Section 2(e) of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

It is ordered, That the respondent, Simplicity Pattern Company, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of dress patterns in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Contracting to furnish or furnishing to any of respondent's customers counter catalogs, cabinets or other equipment or facilities connected with the handling, sale or offering for sale of respondent's patterns, unless such catalogs, cabinets or other equipment or facilities are available on proportionally equal terms to all customers competing with such favored customers in the sale of respondent's patterns.

It is further ordered, That Count I of the complaint be, and it hereby is, dismissed.

ON CROSS-APPEALS FROM INITIAL DECISION

By ANDERSON, Commissioner:

This matter has come on for hearing upon the cross-appeals of counsel supporting the complaint and of respondent from the hearing

Appeal

53 F.T.C.

examiner's initial decision filed September 17, 1956. Counsel supporting the complaint appeals from the dismissal of Count I of the complaint, and respondent appeals in effect from the order to cease and desist contained in the initial decision prohibiting the practices alleged in Count II of the complaint.

Count I of the complaint charges in essence that certain acts and practices engaged in by the respondent are unfair methods of competition and constitute violations of Section 5 of the Federal Trade Commission Act. The acts and practices alleged involve the granting of various benefits to some customers, while not according the same benefits to other competing customers. Count II charges that other alleged differences in treatment among customers violate Section 2(e) of the Clayton Act, as amended by the Robinson-Patman Act.

Respondent, Simplicity Pattern Company, Inc., a corporation, is engaged in the manufacture and sale of patterns for use in the home making of women's and girls' clothing. It is one of the largest manufacturers and distributors of dress patterns in the United States. Respondent's manner of distribution is through retail stores. Its customers include large 5 and 10 cent store chains, such as the F. W. Woolworth Company and the S. S. Kresge Company (hereinafter referred to as 10¢ stores), department stores, mail order houses, and smaller customers which are classed as fabric or "yard goods" shops.

This matter in general is concerned with the granting or supplying by respondent of certain services, facilities and preferential terms to large 10¢ stores while not according the same treatment to smaller customers such as fabric shops. The favored 10¢ stores, however, sell patterns on a somewhat different basis than the fabric shops. In the 10¢ stores the pattern is just another item of merchandise which must be independently profitable, whereas in the fabric shop the pattern is sold as a service or accommodation even at a loss with the expectation of a fabric sale. Ten cent stores generally do not deal in fabrics. Both groups of stores, it appears, sell the patterns at the labeled retail prices which are usually 25¢, 35¢ and 50¢.

The principal differences in respondent's contracts with its customers as alleged in Count I might be summarized as follows:

(a) Respondent extends to some customers, including large 10¢ stores, the privilege of obtaining their stocks of patterns through an arrangement known as a "standing debit," under which they do not pay for original inventories, while denying this privilege in whole or in part to smaller customers.

(b) Respondent requires smaller customers to enter into a five-year

771

Appeal

contract for the purchase of patterns, as against a one-year contract accorded some larger customers.

(c) Smaller customers are required to purchase respondent's "Monthly Previews," used for advertising purposes, while no such requirement is made of larger customers such as 10¢ stores.

(d) Respondent pays transportation charges on shipments of patterns to certain larger customers, while requiring smaller customers to pay such charges.

The differences as alleged under Count II are substantially as follows:

(a) The supplying of monthly counter catalogs free to larger customers, principally 10¢ stores, while charging smaller customers for such catalogs.

(b) Supplying free to its larger customers cabinets and other equipment used in the storing and display of patterns, while requiring smaller customers to purchase or rent such equipment.

Appeal of Counsel Supporting the Complaint

The hearing examiner, on the conclusion of the reception of evidence in support of the complaint, dismissed, upon respondent's motion, Count I of the complaint for failure of proof. In his initial decision he concluded that the allegations in Count I had not been sustained and included an order dismissing the Count, stating that the record was without any substantial evidence warranting a finding of injury to competition. Counsel supporting the complaint does not take issue with the examiner's view as to the showing required in respect to injury to competition, that there must at least be facts which give rise to a reasonable inference of probable injury, but he does contend that there was error in the failure to find that the requirement on proof had been met. The substance of the argument made seems to be that the total values of the preferences granted to the 10¢ stores were of such substantial percentages of purchases that they create a presumption of adverse competitive effect. It is contended that the type of discrimination shown prevents the independent businessman from competing with the 10¢ stores on a fair basis, as established by the evidence that the favored customers made a profit in the sale of respondent's products while the independents, the fabric shops, lost money on such sales.

As appealing as this argument may be, it is clear that under the circumstances the mere showing of certain discriminations among customers is not enough. The fact that the 10¢ stores profited from pattern sales while fabric shops did not is not itself determinative

Appeal

53 F.T.C.

of the question, particularly in the absence of evidence that the desire or incentive of any fabric shop to compete with the 10¢ stores in the sale of patterns has been diminished or affected in any respect. While the contractual differences shown may be of such a nature as to enable 10¢ stores, if they should choose to do so, to lower their prices or to otherwise divert trade from the smaller stores, there is no indication in the record that this has happened or that it is likely to happen, and no other sufficient evidence to show an adverse competitive effect on respondent's competitors or among its customers. Under such circumstances we must conclude that the allegations in Count I have not been sustained and that the hearing examiner correctly disposed of this issue by dismissing the Count.

This conclusion is based on the failure of proof and nothing more. In so deciding the question, the Commission is not giving its stamp of approval to the practices involved. The record clearly shows that respondent's practices result in substantial discriminations between different classes of customers. Under many usual circumstances there would be no doubt about the unfairness of such a method of competition. Certainly injury could be found, for example, if the evidence were to show that discriminations between groups of customers resulted in, or would probably result in, diversion of trade to a favored group. The effect could be the same even though the customers discriminated against are large department stores or other large customers. We can render a decision in this matter, however, only on the basis of the facts before us, and since the record does not sustain the allegations, we must for that reason concur in the dismissal of Count I.

Respondent's Appeal

As above indicated, Count II of the complaint charges respondent with violating Section 2(e) of the Clayton Act, as amended. The hearing examiner having found that the allegations in the Count were sustained issued an order to cease and desist the practices set forth therein, from which respondent appeals.

Respondent argues principally that 2(e) should be read in conjunction with other subsections of Section 2 so as to permit the introduction of evidence relating to cost justification which is provided for in 2(a). We cannot concur in this argument. "Congress validly made the decision that conduct coming within the more definite standard of (e) was unlawful. We see no reason why the limitations contained in (a), or their equivalent, should be read into (e)." *Elizabeth Arden, Inc., et al. v. Federal Trade Commission*, 156 F. 2d 132.

Respondent also contends that the evidence compels the conclusion that there is no realistic or meaningful competition between the 10¢ stores and the smaller independent stores since the former sell patterns on their own for a profit, whereas the latter do not intend to make a profit on patterns but sell them as a necessary incident to the sale of fabrics. Considering the circumstances appearing in the record, this argument is not wholly without merit, but we agree with the examiner's conclusion that the two kinds of stores are in competition in the sale of respondent's patterns. An element of rivalry exists in spite of the fact that the fabric shops sell the product primarily as an accommodation. It appears that they may not profit dollar-wise in the sale of patterns alone, but they recognize the value of such business for attracting customers who may purchase other goods. The two kinds of stores are vying for the same particular markets whatever their motives may be. In our opinion this sufficiently discloses the presence of competition between them.

Respondent asserts, in addition, that the cabinets have no real relationship, as the statute provides, to the "handling, sale, or offering for sale of such" patterns, and that dress patterns are not a commodity within the meaning of Section 2(e). There appears to be no merit in either of these contentions or various other arguments made by respondent, and each is rejected.

The appeals of both counsel supporting the complaint and respondent are denied and the findings, conclusions and order contained in the initial decision are adopted as those of the Commission.

FINAL ORDER

This matter having come on for hearing upon the cross-appeals of counsel supporting the complaint and of respondent from the hearing examiner's initial decision and upon the briefs and oral argument of counsel in support thereof and in opposition thereto; and

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

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

IN THE MATTER OF
OTARION, INC., ET AL.

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

Docket 6624. Complaint, Sept. 11, 1956—Decision, Mar. 14, 1957

Consent order requiring a large manufacturer of hearing aid instruments at Dobbs Ferry, N.Y., with approximately 120 distributors located throughout the United States, to cease violating Sec. 3 of the Clayton Act by requiring its distributors not to handle competing products.

Mr. Edward S. Ragsdale and Mr. Kent P. Kratz for the Commission.

Benjamin, Galton & Robbins, by Mr. David S. Galton, of New York, N.Y., for respondents.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of Section 3 of an Act of Congress approved October 15, 1914, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for other Purposes," commonly known as the Clayton Act, the Federal Trade Commission, on September 11, 1956, issued and subsequently served its complaint in this proceeding against respondents Otation, Inc., and Leland E. Rosemond, individually and as officer of said corporation, with their office and principal place of business located at 185-7 Ashford Avenue, Dobbs Ferry, New York. Respondent's hearing aid instruments are nationally advertised, enjoy wide sales throughout the various states of the United States and respondent corporation is one of the large manufacturers and distributors of hearing aid instruments in the hearing aid industry.

On January 30, 1957, there was submitted to the undersigned hearing examiner an agreement between respondents and counsel supporting the complaint providing for the entry of a consent order. By the terms of said agreement, respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. By such agreement, respondents waive any further procedural steps before the hearing examiner and the Commission; waive the making of findings of fact and conclusions of law; and waive all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in