

IN THE MATTER OF
BLACK MANUFACTURING CO.

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

Docket 6710. Complaint, Jan. 11, 1957—Decision, Mar. 20, 1958

Order requiring a manufacturer with principal place of business in Seattle, Wash.—a substantial factor in the work clothes and sportswear industry in the Pacific Northwest and Alaska—to cease discriminating in price in violation of section 2(d) of the Clayton Act by paying allowances for cooperative advertising to some, but not all, of its customers, which payments, additionally followed no particular pattern but were determined by personal negotiation; and

Dismissing charges of violation of section 2(a) of the Clayton Act for failure to sustain them.

Mr. John J. McNally for the Commission.

Jones & Grey, of Seattle, Wash., by *Mr. Hargrave Garrison*, for respondent.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is before the undersigned hearing examiner for final consideration upon the complaint, answer thereto, testimony and other evidence, proposed findings of fact and conclusions submitted by counsel supporting the complaint, opening brief of respondent, reply to opening brief filed by counsel supporting the complaint, and reply brief of respondent. The hearing examiner has given consideration to the proposed findings of fact and conclusions and briefs in support thereof submitted by all parties, and all findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded, are herewith rejected, and the hearing examiner, having considered the record herein and being now duly advised in the premises, makes the following findings of fact and conclusions drawn therefrom and order:

1. This proceeding involves alleged violations of sections 2(a) and 2(d) of the Clayton Act, as amended by the Robinson-Patman Act. Count I of the complaint charges that the respondent has discriminated in price in violation of section 2(a) of the Clayton Act: (1) Through the use of an annual volume user discount program under which the respondent granted a rebate equal to 5 percent of the purchase price to customers whose annual volume of purchases exceeded \$35,000; and (2) The payment of freight charges on shipments to

purchasers located at certain favored areas. Count II of the complaint charges that the respondent has violated the provisions of section 2(d) of the Clayton Act by making payments or allowances for cooperative advertising which were available to some, but not to all, customers competing in the resale of respondent's products.

2. Respondent Black Manufacturing Co. is a corporation organized under the laws of the State of Washington with its principal place of business located at 1130 Rainier Avenue, Seattle, Wash.

3. Respondent is now and for many years last past has been engaged in the manufacture and in the sale and distribution in interstate commerce of work clothes and sportswear, including jackets and trousers of whipcord and denim. A substantial portion of said work clothes and sportswear are sold under respondent's brand name "Black Bear." Respondent sells said products directly and through salesmen principally to retailers located in the States of Washington, Idaho, Montana, Oregon, and California. Many of such purchasers are in competition with each other in reselling respondent's products to the general public in the same competitive trade area. Respondent has been, and is now, in substantial competition in interstate commerce with corporations, individuals, and partnerships likewise engaged in the manufacture, sale and distribution of work clothes and sportswear.

4. The principal competitors of the respondent are Day's Tailor-d Clothing, Inc., of Tacoma, Wash. (hereinafter referred to as Day), and Men's Wear, Inc., of Seattle, Wash. It was estimated by the respondent that in the trading area where respondent sold and distributed its products, Day sells 50 percent of all types of whipcords, respondent 40 percent, and Men's Wear 10 percent.

5. During the years 1954 and 1955, the wholesale price of respondent's whipcord trousers was approximately \$1 below the wholesale price of Day and Men's Wear, and the retail price on such trousers during the same period was \$2 below that of Day and Men's Wear. The retail price of respondent's wool whipcord trousers was \$12.95 and its nylon whipcord was \$6.95.

6. In the distribution of its products, the respondent prepays freight to the cities of Spokane, Wash.; Portland, Oreg.; San Francisco, Calif.; and Los Angeles, Calif. To customers in the vicinity of such cities, except Portland, Oreg., the respondent prepays the freight to such cities and charges freight from said cities to point of destination. Respondent does not prepay charges on parcel post shipments. Respondent's competitors, Day and Men's Wear, do not prepay freight on purchases by customers except that Day, which has warehouses

in San Francisco and Los Angeles, charges 15 cents a pair extra for woolen and 10 cents for cotton over and above the charges made in Tacoma, Wash., to purchasers in said cities.

7. It was estimated that about 50 pairs of trousers made up a shipment of 100 pounds, and 25 cruisers made about 100 pounds. The weight of the jackets would be slightly heavier than the trousers. On a 100-pound shipment to Spokane the freight costs on wool whipcords would run approximately $\frac{3}{4}$ of 1 percent to 1 percent of the wholesale value. On the lower cost nylon blend, the percentage would run from $1\frac{1}{4}$ percent to $1\frac{1}{2}$ percent of the wholesale value. The other lines would run from $\frac{1}{2}$ percent to something under 2 percent. The percentages to Portland would be about 25 percent lower. The approximate freight cost for shipping to San Francisco is between \$1 and \$1.25 per hundredweight, as opposed to \$3 and \$3.25 per hundredweight to Spokane, or about one-third greater percentage than shipments from Seattle to Spokane. In considering the possible effect upon competition for the allowance of freight, particularly to San Francisco and Los Angeles, there must be taken into consideration warehouse charge by Day of 15 cents a pair for woolen and 10 cents for cotton trousers over and above the charges made in Tacoma.

8. For several years prior to 1954 and subsequent thereto, the respondent has used what has been termed an "annual volume user discount program" under which the respondent granted a rebate equal to 5 percent of the purchase price to customers whose annual volume of purchases exceeded \$35,000. As far as can be ascertained from the record, only two customers, The Bon Marche and Frederick & Nelson, department stores in Seattle, purchased in sufficient quantities to qualify for this 5-percent discount prior to 1954.

9. At the beginning of the year 1954, respondent instituted its work clothes discount, in lieu of cash discounts, which was in effect a retroactive volume discount based upon the volume of purchases during the course of a year. This work clothes discount applied to work clothes only, including rainwear, work hosiery, heavy socks, whipcords, work pants and shirts, and was made available to all customers who purchased the required quantities. The work clothes discount, or rebate, allowed in 1954 and 1955 was as follows:

<i>Year's Purchases</i>	
\$0-\$1,499	0%
\$1,500-\$2,999	1%
\$3,000-\$4,999	2%
\$5,000-\$7,499	3%
\$7,500-\$9,999	4%
\$10,000-and up	5%

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In December 1955 respondent eliminated rainwear, whipcords and work socks from their work clothes volume discount schedule and allowed the following discount or rebate, on work denims, bibs and coveralls, Chinos (Army twill pants and shirts), Klondike type 9 ounce sateen pants, and work shirts:

<i>Year's purchases</i>	<i>Year end discount</i>
\$0-\$999-----	-----
\$1,000-\$1,999-----	1%
\$2,000-\$2,999-----	2%
\$3,000-\$3,999-----	3%
\$4,000-\$4,999-----	4%
\$5,000-and up-----	5%

The charges of the complaint do not include the work clothes discount, and the legality of the discounts or rebates paid thereunder is not an issue in this proceeding.

10. In April 1954, the respondent entered into an agreement with M. Alexander, Inc., a department store having outlets in eight various towns in Idaho, which agreement was confirmed by respondent's letter of April 7, 1954 (CX 31A-B). By the terms of this agreement it was provided, among other things, that M. Alexander, Inc., would be eligible for respondent's volume work clothes discount of 5 percent on all work clothes purchased, if its purchases exceeded \$10,000, and if the total volume of all purchases exceeded \$35,000 in a fiscal year, M. Alexander, Inc., would be eligible for respondent's annual volume user discount of 5 percent of all items purchased other than the work clothes previously covered by the clothes discount. Excepted therefrom were items distributed by respondent for other manufacturers which were fair traded, such as specific underwear items.

11. During the remainder of 1954, the purchases of M. Alexander, Inc., from respondent amounted to \$21,237.75 upon which it received a 5-percent discount or rebate of \$1,061.89, although approximately \$2,000 of this amount covered items other than work clothes. In 1955, M. Alexander, Inc., purchased a total of \$35,223.44 of which \$28,831.73 was subject to the work clothes discount. As a result, M. Alexander, Inc., received a rebate of \$1,441.59 on work clothes and \$327.14 under the volume user discount.

12. In support of the charges of the complaint with reference to violations of section 2(d) of the Clayton Act contained in count II of said complaint, evidence was introduced concerning the practices of the respondent in connection with advertising allowances. The granting of advertising allowances by the respondent to its customers did not follow any particular pattern, but such allowances were made to

various customers on the basis of negotiation with respondent and its salesmen in soliciting business. Typical of such practices is the following:

(a) In 1954, respondent paid The Emporium, a department store in San Francisco, an advertising allowance of \$380.80 on the basis of 100 percent participation. In 1955, it granted The Emporium an advertising allowance of \$283.90, covering two advertisements at 100 percent participation, and one advertisement at 50 percent participation. There were customers of the respondent in the San Francisco trade area who were in competition with The Emporium who did not receive any advertising allowance during the years 1954 and 1955, or received an allowance less than that received by The Emporium.

(b) In the Sacramento trade area, the respondent gave an advertising allowance to Weinstock, Lubin & Co. of \$142.29 in 1954 on a 50 percent participation basis, and \$262.56 in 1955 on the basis of 100 percent cooperation on two advertisements and 50 percent cooperation on a third. There were other customers of the respondent located in the Sacramento trading area who were in competition with Weinstock, Lubin & Co. who did not receive any advertising allowance, or an allowance less than that received by Weinstock, Lubin & Co.

In other trading areas the respondent gave various advertising allowances to certain of its customers ranging from 100-percent participation to 2-percent allowance based upon volume purchased. In no trade area covered by the testimony in this proceeding did respondent give equal participation to competing customers in the particular trading area.

13. Count I of the complaint charged both primary and secondary injury resulting from respondent's price discriminations, but no evidence was introduced in this proceeding with reference to secondary injury involving competing customers of the respondent, and consideration of competitive injury on the basis of this record must be limited to such injury as may have been suffered by respondent's competitors. Two witnesses were called to testify as to injury—Mindy J. Slikas, director and treasurer of Day, and Paul R. Bergman, president of Men's Wear. Slikas testified to loss of business with The Bon Marche and Frederick & Nelson in Seattle; M. Alexander, Inc., in Boise, Idaho; and The Emporium in San Francisco. Bergman did not testify as to any injury resulting from respondent's practices in the State of Washington, but testified principally to loss of business in the State of Oregon, including the city of Portland. It was the testimony of Slikas that the loss of business by Day was

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Conclusion

due to respondent's aggressive package program of discounts, advertising allowances, freight and price. Bergman based loss of business upon the high-pressure selling conducted by respondent, including advertising allowances, discounts, trade allowances and consignments. Witness stated that the lower price of respondent's products had no effect upon competition.

CONCLUSION

1. The charges of the complaint in count I involving violations of section 2(a) of the Clayton Act are limited to the use of the annual volume users discount and freight allowances. The witness testifying on injury did not specify either one or both of these practices as causing the loss of business, but placed such loss generally on these and other practices of the respondent which are not at issue in this proceeding. So far as the testimony involves Frederick & Nelson and The Bon Marche, they claimed loss of business beginning sometime in 1953. It is impossible for the hearing examiner to disregard the lower price feature and say that a volume discount in existence for many years suddenly became oppressive in 1953. Furthermore, there is no evidence of any interstate shipments by the respondent or its two competitors to either Frederick & Nelson or The Bon Marche, and it must be concluded that the transactions with these two customers were in intrastate commerce with no effect on interstate commerce. The question of freight allowances is not involved as to these two customers as both the respondent and the customers are located in Seattle.

2. The third customer of the respondent who received the annual volume user discount was M. Alexander, Inc., of Boise, Idaho. The agreement entered into between respondent and M. Alexander, Inc., at the inception of their relationship provided that respondent would pay a work clothes discount of 5 percent on purchases over \$10,000, and in the event the purchases reached \$35,000, an additional 5 percent would be allowed upon all purchases of merchandise other than work clothes. Since the work clothes discount was not attacked in the complaint, it remains for determination whether or not the discount paid M. Alexander, Inc., on merchandise other than work clothes is sufficient to have an adverse effect upon competition. It is the opinion of the hearing examiner that the "annual volume user discount" in the amount of \$100 on purchases of \$21,237.75 in 1954, and \$327.14 on purchases of \$35, 223.44 in 1955 does not constitute a discount or rebate of sufficient amount to have any effect upon competition. In considering these discounts, it must be noted that both the work

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clothes discount and the "annual volume user discount" were given in lieu of a 1-percent and 2-percent cash discount previously allowed by the respondent. Immediately after taking on respondent's products there was a marked increase in sales of M. Alexander, Inc., of respondent's products as compared with the previous volume of sales of Day's products which was attributed by respondent to the lower retail price of respondent's products. It is impossible on the basis of this record to find that the cause of loss of business by competitors of respondent was due to the annual volume user discount and not due to the lower price of respondent's products or due to other factors not charged in the complaint.

3. On the issue as to whether price discriminations existed in sales to customers other than The Bon Marche, Frederick & Nelson, and M. Alexander, Inc., the annual volume user discount was not granted to purchasers in the other areas. As the work clothes discount is not an issue under the complaint, this leaves only freight allowances as a basis for discriminatory prices. The witness from Day testified that the competitive effect of a freight allowance is not due to the amount, which is small, but due to the fact that prepaid freight is preferred by the purchaser as it eliminates bookkeeping and other inconveniences involved in paying freight on shipments. This, in the opinion of the hearing examiner, might be an excellent argument for prepaying freight, but hardly serves as a basis for considering the small amount of freight allowed as having injurious effect upon competition such as to constitute a violation of section 2(a) of the Clayton Act.

4. The advertising allowances granted by the respondent to certain of its customers were made to such customers on the basis of negotiation and were not made available on proportionally equal terms to all other customers competing in the distribution of respondent's products. This practice of the respondent in making advertising allowances was in violation of section 2(d) of the Clayton Act as amended by the Robinson-Patman Act.

5. It is further concluded that on the basis of the record in this proceeding there has been a total failure to sustain the charges of the complaint set out in count I thereof.

ORDER

It is ordered, That respondent Black Manufacturing Co., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device in, or in connection with, the

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sale of work clothes and sportswear, including jackets and trousers of whipcord and denim, or any other similar products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Making or contracting to make, to or for the benefit of any customer, any payment of anything of value as compensation or in consideration for any advertising or other services or facilities furnished by or through such customer, in connection with the handling, offering for resale, or resale of products sold to him by respondent, or its successors and assigns, unless such payment is affirmatively offered or otherwise made available on proportionally equal terms to all other customers competing in the distribution or resale of such products.

It is further ordered, That the charges of the complaint set out in count I thereof be, and the same are hereby, dismissed.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to section 3.21 of the Commission's rules of practice, the initial decision of the hearing examiner shall, on the 20th day of March 1958, become the decision of the Commission; and, accordingly:

It is ordered, That the respondent herein 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 to cease and desist.

IN THE MATTER OF
EDWARD EARL MCGOWAN, JR., TRADING AS TRANSI-
MITE LABS, ETC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT

Docket 6735. Complaint, Feb. 28, 1957—Decision, Mar. 20, 1958

Order dismissing, for lack of evidence that he was still in business, complaint charging an individual operating in Virginia and North Carolina with false advertising in connection with the sale of miniature radio kits and parts therefor.

Mr. Edward F. Downs and Mr. Garland S. Ferguson supporting the complaint.

No appearance for respondent.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

On February 28, 1957, the Federal Commission issued a complaint in this proceeding alleging that Edward Earl McGowan, Jr., trading and doing business as Transi-Mite Labs, Transi-Mite Laboratories, Transi-Mite Radio Lab, Electronic Miniature Labs, and Electronic Miniatures, had violated the provisions of the Federal Trade Commission Act in the advertising and sale of miniature radio kits.

A copy of the complaint was mailed to respondent at his last known address by registered mail, but the envelope containing said complaint was returned by the postmaster undelivered. Subsequently, personal service of the complaint was effected on respondent but not until after the date specified in the complaint for the initial hearing. All attempts to serve respondent with orders rescheduling the initial hearing, both by mail and personal service, were unsuccessful.

On January 9, 1958, counsel supporting the complaint filed a motion with the hearing examiner in this proceeding setting out the matter recited above and the further circumstance that there is no indication that respondent is presently engaged in the business which led to the issuance of the complaint herein. Wherefore, counsel requested that the complaint be dismissed.

Upon consideration, the hearing examiner is of the opinion that the motion to dismiss should be granted. Accordingly,

It is ordered, That the complaint herein be, and it hereby is, dismissed, without prejudice to the right of the Federal Trade Com-