

IN THE MATTER OF
THOMPSON PRODUCTS, INC.

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

Docket 5872. Complaint, Apr. 17, 1951—Decision, Feb. 19, 1959

Order requiring a manufacturer in Cleveland, Ohio, to cease violating Sec. 2(a) of the Clayton Act by selling its automotive products and supplies at higher and less favorable prices to numerous small businessmen than to various larger purchasers competing with them and with purchasers from its competitors.

Mr. Eldon P. Schrup and Mr. Robert E. Vaughan for the Commission.

Jones, Day, Cockley & Reavis, of Cleveland, Ohio, by *Mr. Curtis C. Williams, Jr.*, and *Mr. Thomas O. Nevison*, 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, and brief in support thereof filed by counsel for respondent, proposed findings of fact and conclusions filed by counsel supporting the complaint, and reply brief filed by counsel for respondent. The hearing examiner has given consideration to the proposed findings of fact and conclusions submitted by both parties and briefs in support thereof, 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 fully advised in the premises makes the following findings as to the facts, conclusions drawn therefrom and order:

I. In General

1. Respondent Thompson Products, Inc., is a corporation organized under the laws of the State of Ohio. It is now, and during the times mentioned herein has been, engaged in the manufacture and in the sale and distribution in interstate commerce of diversified products for use or resale in three principal markets within the United States. During the year 1955 such sales were as follows:

1252

Decision

To manufacturers of automotive, marine and industrial products	\$ 84,603,000
To jobbers and others principally for automotive replacement use	29,425,000
To manufacturers and users of aircraft and aircraft engines	172,201,000
Total	\$286,229,000

2. This proceeding involves automotive parts manufactured and sold by respondent for replacement purposes under both the "Thompson" and "Toledo" lines. These parts consist of certain automotive engine and chassis parts including valves and tie rods, tie rod sockets or ends and other front-end steering and suspension parts. In addition, respondent distributes automotive engine and chassis parts, including friction type bearings, which it purchases from other manufacturers. In the sale and distribution of its automotive parts, respondent is in active and substantial competition with other corporations and firms selling and distributing comparable automotive products and supplies in interstate commerce.

3. Respondent Thompson Products, Inc., began the manufacture of automotive parts, consisting of engine valves, in 1904, exclusively for the use of original equipment manufacturers. In 1924, the respondent, in addition to sales to original equipment manufacturers, began the distribution and sale of a line of engine and chassis replacement parts to independent distributors located throughout the United States. In 1935, respondent acquired the Toledo Steel Products Company, another company engaged in the manufacture and distribution of a line of valves to independent distributors. As of December 31, 1951, the marketing activities of Toledo Steel Products Company were transferred to the Replacement Division of the respondent. That Division now carries on respondent's activities with respect to the marketing, distribution and sale of the "Thompson" and "Toledo" lines of automotive replacement parts to independent distributors.

II. Price Differences Arising Under the Purchase Bonus Provision of the Thompson Distributor Franchise Agreements

4. The respondent enters into franchise agreements with certain independent wholesalers who are designated as Thompson distributors. With the consent of the respondent, the distributor may designate as a Thompson jobber a jobber who executes a

Decision

55 F.T.C.

Thompson Jobbers Franchise, which franchise has been accepted in writing by the respondent. Both the Thompson distributor and the Thompson jobber resell respondent's automotive replacement parts at wholesale. The Thompson jobber accounts are not sold directly by the respondent. Each such account deals primarily with the Thompson distributor with whom it has the Thompson Jobbers Franchise Agreement. The Thompson jobber account is billed by the distributor, who in turn is billed by the respondent. A redistribution allowance is paid by respondent to each distributor in an amount equal to 10 percent of the distributor's cost of parts resold by it to Thompson jobber accounts. No purchase bonus or rebate is paid by respondent to Thompson jobber accounts on the annual volume of business done by them. Sales by Thompson distributors to Thompson jobber accounts are normally at distributor's list prices.

5. In the course and conduct of its business, respondent has sold and sells its automotive replacement parts of like grade and quality, including valves, front-end parts and bearings, at varying prices (a) among Thompson distributors and (b) between Thompson distributors and Thompson jobbers. These varying prices have resulted from the varying rebates granted to Thompson distributors under the purchase bonus provision of the Thompson distributor franchise agreements. In general, Thompson distributors and Thompson jobbers compete in the resale of such products.

6. For many years the franchise agreement between respondent and its distributors has provided for a purchase bonus to be paid by respondent to its distributor based upon the distributor's annual volume of purchases of parts subject to the plan. The purchase bonus provision in respondent's 1951 distributor's franchise was applicable to the distributor's purchases of all parts in the franchised line and provided for the following nonretroactive schedule of rebate payments:

NON-RETROACTIVE

<i>Annual Purchases</i>	<i>Purchase Bonus %</i>
Up to \$10,000	None
\$10,001 to \$25,000	1½
\$25,001 to \$40,000	3
\$40,001 to \$60,000	4½
\$60,001 to \$80,000	6
\$80,001 to \$100,000	7½
Over \$100,000	8

7. The discount was nonretroactive in that the percentage of discount set out in the schedule with respect to a particular bracket of purchases was applicable only to the purchases falling within the specified range and not to the purchases within lesser volume ranges, these latter purchases carrying only the lesser discounts set out in the lower brackets of the schedule.

8. In 1953, respondent modified the purchase bonus provision of its distributor franchise by changing the percentages of discount and the quantities required for the various discount brackets. A separate purchase bonus schedule was provided with respect to bearings, connecting rods and shims. The other products in the line remained subject to the principal bonus schedule. The discount schedules set out in respondent's 1953 full line distributor's franchises were identical for distributors handling either the "Thompson Products" or "Toledo Steel Products" brand of the company's replacement parts, and were as follows:

CONNECTING RODS, ENGINE BEARINGS AND SHIMS
NONRETROACTIVE

<i>Annual Purchases</i>	<i>Purchase Bonus %</i>
\$0 - \$750	0
\$750 - \$2,000	3 1/2
\$2,000 - \$5,000	5
\$5,000 - \$10,000	7 1/2
Over \$10,000	10

ALL OTHER PRODUCTS NONRETROACTIVE

<i>Annual Purchases</i>	<i>Purchase Bonus %</i>
\$0 - \$5,000	0
\$5,000 - \$7,000	2
\$7,000 - \$12,000	3
\$12,000 - \$18,000	4
\$18,000 - \$24,000	5
\$24,000 - \$30,000	6
\$30,000 - \$36,000	7
\$36,000 - \$48,000	8
\$48,000 - \$60,000	9
Over \$60,000	10

9. The respondent offered in evidence a cost study made by a firm of certified public accountants for the purpose of showing that the different prices paid by respondent's distributors as a result of the nonretroactive purchase bonus plan were cost justified in that they made due allowance for differences in cost of manufacture, sale and delivery resulting from the differing meth-

ods or quantities in which such commodities were sold and delivered to such distributors. The assistant chief accountant for the Federal Trade Commission was called as witness and testified that he had checked the cost study offered by the respondent and that in his opinion the fact that the cost study did not show complete arithmetical justification in some instances does not necessarily mean that there was a failure of cost justification and that in some instances the failure of cost justification is not significant in terms of percentages of sales or of rebate differentials. In the absence of evidence to the contrary, the hearing examiner must accept the cost justification offered as correct, and conclude that the differing prices at which respondent sold its distributors resulting from the nonretroactive purchase bonus plan have been cost justified.

III. Price Differences Arising from Sale of Common Parts to Original Equipment Manufacturers and to Thompson Distributors

10. In 1955 the respondent sold automotive parts consisting of certain valves and front-end parts to 26 automotive vehicle manufacturers for use in the original production of the vehicle and for repair or so-called replacement use. The prices at which respondent sold such automotive parts to vehicle manufacturers were lower than the prices at which respondent sold automotive parts of like grade and quality to its distributors. Replacement part sales have constituted a substantial part of the business of the automotive vehicle manufacturers. During 1955, the replacement parts sales of General Motors (Buick, Oldsmobile, Pontiac) were \$139,000,000; Chrysler sold \$100,000,000 and Ford sold \$200,000,000. Included in these sales were substantial dollar amounts of various replacement parts manufactured by the respondent but sold under the trade name of General Motors, Chrysler and Ford.

11. Automotive vehicle manufacturers who purchase replacement parts from Thompson, including General Motors, Chrysler and Ford, are competitively engaged with Thompson distributors and jobbers in the sale of said replacement parts to their respective franchised new-car dealers. It is the general practice of the vehicle manufacturers to allow wholesale compensation to their car dealers for replacement parts sold at wholesale to other dealers, garages, etc. In making such sales, the car dealer is in

competition with Thompson distributors and jobbers. During 1955, Buick paid out \$4,500,000; Oldsmobile, \$3,500,000; and Pontiac, \$3,000,000 in wholesale compensation to their franchised new-car dealers.

12. The automotive vehicle manufacturer buying parts from outside manufacturing sources for production use, uniformly also selects these particular sources for the purchase of these same parts for replacement use. Such vehicle manufacturers in buying these so-called "common parts" for replacement use also attempt to purchase at a price sufficiently low to enable their resale to the franchised new-car dealer at a dealer net price, which after payment of all intervening packaging, warehousing, distributing, sales promotion and advertising expenses, will place the car dealer in what they term a "competitive" position. This means that a buying price is being obtained from the independent parts manufacturers such as respondent that is so low it will allow not only for all the foregoing concurrent sale and promotional expenditures and enable the automotive vehicle manufacturer to set a new-car dealer price on the part which the Thompson wholesaler cannot profitably meet or compete with as against the franchised new-car dealer, but also that such buying price is so low that it still further provides for the payment of a wholesale compensation by the automotive vehicle manufacturer to the car dealer, for competing with the Thompson wholesaler for the latter's replacement parts wholesale business.

13. The favorable price advantages granted to the vehicle manufacturers by respondent gave a substantial competitive advantage to these favored vehicle manufacturers and their franchised new-car dealer customers. This price advantage thus gained from Thompson not only in large part contributed to the foreclosure by the vehicle manufacturer of the franchised new-car dealer as a replacement parts customer of the Thompson distributor and jobber, but further set up the franchised new-car dealer as a powerful wholesaler competitor on these parts in the place of a former actual or potential customer. Originally, parts could be obtained at a cheaper price from the jobber, but subsequent to the use of the wholesale plan, the car dealer now sells at the same or lower price. The wholesale sales of the car dealer are not inconsequential or sporadic. Among the car dealers called as witnesses in this case were—

Decision

55 F.T.C.

A. Buick dealers who gave the following comparison of their wholesale versus retail parts sales during 1955:

(a) Wholesale sales of \$76,825, representing 92.3 percent of sales;

(b) Wholesale sales of \$142,440, representing 82.1 percent of sales; and

(c) Wholesale sales of \$29,901, representing 33.7 percent of sales.

B. Four Oldsmobile dealer witnesses who testified to figures as follows:

(a) Wholesale sales of \$90,081, representing 89.0 percent of sales;

(b) Wholesale sales of \$39,470, representing 42.3 percent of sales;

(c) Wholesale sales of \$21,592, representing 37.8 percent of sales; and

(d) Wholesale sales of \$105,493 the percentage of which to the total is not available because the record fails to disclose total retail sales of this dealer.

C. With regard to the five Pontiac dealer witnesses, the figures were:

(a) Wholesale sales of \$54,489, representing 31.8 percent of sales;

(b) Wholesale sales of \$30,734, representing 26.1 percent of sales;

(c) Wholesale sales of \$47,301, representing 25.7 percent of sales;

(d) Wholesale sales of \$17,534, representing 22.0 percent of sales; and

(e) Wholesale sales of \$11,918, representing 17.3 percent of sales.

D. With regard to the six Ford dealer witnesses, the figures were:

(a) Wholesale sales of \$500,336, representing 81.8 percent of sales;

(b) Wholesale sales of \$218,749, representing 64.9 percent of sales;

(c) Wholesale sales of \$242,570, representing 56.2 percent of sales;

(d) Wholesale sales of \$195,596, representing 54.2 percent of sales;

1252

Decision

(e) Wholesale sales of \$196,225, representing 53.7 percent of sales; and

(f) Wholesale sales of \$117,902, representing 40.3 percent of sales.

14. Thompson distributors in the sample trade areas of Washington, D.C., Baltimore, Md., Norfolk, Va., and Richmond, Va., when called as witnesses in this proceeding, uniformly testified regarding the competitive disadvantages they encountered both in attempting to sell Thompson replacement parts to new-car dealers as well as when competing with such car dealers acting as wholesalers of these parts.

15. Respondent provides its distributors and jobbers with suggested resale prices in their attempts to sell Thompson replacement parts to new-car dealers as well as to others in the retail repair trade. The Thompson suggested new-car dealer price is a lower price than the wholesale price suggested for others in the retail repair trade. These witnesses testified to the effect that they could not profitably sell to the new-car dealer on the basis of the Thompson suggested new-car dealer price and could profitably do so only on the basis of the Thompson suggested wholesale price, at which latter and higher price the new-car dealer would not buy. The new-car dealer in turn, when acting as a wholesaler, was also selling in many instances to other potential and actual customers of the Thompson distributor on a price basis the same as the suggested Thompson new-car dealer price. This competition could only be met by the Thompson distributor at a profit loss, and when done, the sale was made only to keep the customer because of accompanying sales of more profitable items. In many instances, however, the Thompson distributor was unable to meet or refused to meet this nonprofit situation.

16. The competitive effect of the disparity in prices paid by the original equipment manufacturer and prices paid by Thompson distributors can be readily recognized when compared with the distributors net margin of profit and the competitive effect of the amount represented by the 2 percent cash discount. Distributors of respondent who testified in this proceeding stated that they invariably took advantage of the 2 percent cash discount as being essential in the conduct of their respective businesses, and that such discount reduced the cost of acquisition of respondent's replacement parts. Several of the distributors and jobbers of respondent testified that the overall net profit of their companies after taxes ran from 1 to 4 percent. By the

Decision

55 F.T.C.

very nature of the businesses operated by the various distributors of respondent, their profit was necessarily based upon an accumulation of small margins of profit on many items. Practically all of respondent's distributors extend the same cash discount they receive to their customers, however, on a markup of acquisition cost, the discount actually given by such distributor to its purchaser on resale will be greater than the 2 percent cash discount.

17. In connection with the differing prices as between original equipment manufacturers and Thompson distributors on automotive parts for replacement, the respondents offered a defense of cost justification.

18. In order to determine if the price differences exceed any allowable cost differences, a standard of comparison was established wherein the goods can be stated to be of like grade and quality within the statutory meaning, and in comparable amounts in quantities purchased. The procedure for the establishment of this standard of comparison was developed and agreed upon by the accounting staff of the Commission and the accountants for respondent.

19. A list of "common parts" sold both to the original equipment manufacturer and to respondent's distributors was agreed upon by the accountants. All replacement parts were eliminated from further consideration by the accounting studies as not being so-called "common parts" of like grade and quality, for cost and sales price comparison, where there was a manufacturing cost difference to respondent in excess of 10 percent as between any such parts, even though such parts might have a possible common replacement use. Where the manufacturing cost difference was 10 percent or less, adjustments were made in the accounting studies to reflect the necessary cost differences in order that the comparable actual gross price differences in the sale of such like grade and quality replacement parts by respondent could be established.

20. In order to determine the comparable quantity in amount of purchases of such like grade and quality replacement parts, the actual quantity amounts of such parts which were sold by respondent to its distributors was compared with like amounts, only, of the greater quantity of such parts which were sold by respondent to original equipment manufacturers. Finally to establish the existing net price differences, the negotiated price to each different manufacturer which was subject to no further

1252

Decision

discount, was compared against the net price of respondent to its distributors for the respective common parts, which distributor price was obtained after crediting the necessary payment by respondent of the 8 percent Federal excise tax, the granting of the normal 2 percent cash discount for prompt payment, and the allowance of the so-called average volume rebate of 3.37 percent on total sales as determined in the accounting studies.

21. The following tabulation based upon Commission Exhibit Nos. 33 A-B and 42 shows the result of the foregoing procedures (including failures of cost justification hereinafter explained) to be as follows:

O.E.M. ¹ customers not cost justified	No. of common replacement parts	Sales Value		Price diff. favoring O.E.M. ¹	Percent of price diff. favoring O.E.M. ¹
		Distributor	Original equip. manufacturer		
Allis-Chalmers.....	19	\$ 22,461	\$ 11,322	\$ 11,139	49.59
American Motors.....	7	23,410	13,088	10,322	44.09
Briggs & Stratton.....	13	960	375	585	60.94
J. I. Case.....	3	5,966	3,346	2,620	43.92
Caterpillar.....	1	1,503	918	885	49.08
Chrysler.....	44	310,127	170,379	139,748	45.06
Continental.....	33	138,727	77,387	61,340	44.22
Ford.....	32	297,191	170,074	127,117	42.77
General Motors.....	40	284,497	167,232	117,265	41.22
Kaiser-Willys.....	7	62,493	38,028	24,465	39.15
Massey-Harris.....	1	70	36	34	48.57
Rockwell.....	15	18,065	10,417	7,648	42.34
Studebaker.....	2	6,126	3,667	2,459	40.14
Waukesha.....	10	16,083	9,633	6,450	40.10
Total.....	227	1,187,979	675,902	512,077	43.10

O.E.M. ¹ customers cost justified	No. of common replacement parts	Sales Value		Price diff. favoring O.E.M. ¹	Percent of price diff. favoring O.E.M. ¹
		Distributor	Original equip. manufacturer		
Diamond T.....	4	54,201	46,276	7,925	14.62
Diveco.....	2	564	700	² 136	² 24.11
International Harvester.....	58	284,523	195,258	89,265	31.37
Le Roi.....	3	470	301	169	35.96
Mack.....	2	540	559	² 19	² 3.52
Oliver.....	1	644	555	89	13.82
Twin Coach.....	2	5,170	3,735	1,435	27.76
White Motors.....	13	31,919	27,646	4,273	13.39
Total.....	85	378,031	275,030	103,001	27.25
Overall total.....	312	1,566,010	950,932	615,078	
Not cost justified.....	227	1,187,979	675,902	512,077	
Cost justified.....	85	378,031	275,030	103,001	

¹ Original equipment manufacturer.

² Denotes deduction.

Decision

55 F.T.C.

22. In order to ascertain the extent of any cost justification for the foregoing pricing by the respondent, it was necessary to ascertain the operating cost differential applicable to sales by respondent to its distributors. The Thompson Service Division handled all warehousing, packaging, sales and deliveries to respondent's distributors. In order to obtain an operating cost differential the gross and net sales were determined for the year 1955. Next, the total allowances and expenses were determined, finally arriving at an operating cost differential of 38.15 percent. Respondent's accountants following the same procedure made substantially the same computation, arriving at an operating cost differential of 38.87 percent. This difference, .72 percent, was due to allocation of engineering expense previously excluded by the hearing examiner. This expense consisted of engineering research and development projects primarily concerning non-automotive products or with experimental and research work on products not currently sold by respondent. This .72 percent difference does not reflect any actual sales cost attributable to 1955 sales costs alone. The computations to arrive at the operating cost differential are set out as follows:

Thompson Service Division—1955

	Amount	Percent of net sales
Gross Sales	\$12,325,060	
Less:		
2% cash discount	246,501	
8% Federal excise tax	894,708	
Purchase bonus rebate	415,946	
Net sales	10,767,905	100.00
Sales allowances and deductions:		
Franchise discount	286,758	2.66
Transportation allowed	124,819	1.16
Special allowances	110,588	1.03
Transportation to warehouses	173,300	1.61
Total allowances and deductions	695,465	6.46
Expenses:		
Warehouse	2,140,269	19.88
Selling	715,510	6.64
Catalog and advertising	231,187	2.15
General and administrative	337,035	3.13
Total expenses	3,424,001	31.80
Total allowances and expenses	4,119,466	38.26
Add:		
Factory billing and sales expense applicable to Thompson Service Division		.05
Total expenses applicable to distributors		38.31
Less:		
Selling expenses applicable to sales to original equipment manufacturers		.16
Operating cost differential		38.15

1252

Decision

23. For the purpose of determining the extent of cost justification of the lower prices for replacement parts allowed original equipment manufacturers, the operating cost differential of 38.15 percent was applied to the percent of price difference with the following results:

Original Equipment Manufacturer	Percent of price difference	Operating cost differential	Extent of cost justification	
			Over	Under
		38.15 Percent	Percent	Percent
Allis-Chalmers	49.59	.....	.....	11.44
American Motors	44.09	.....	.....	5.94
Briggs & Stratton	60.94	.....	.....	22.79
J. I. Case	43.92	.....	.....	5.77
Caterpillar	49.08	.....	.....	10.93
Chrysler	45.06	.....	.....	6.91
Continental Motors	44.22	.....	.....	6.07
Ford Motor Co.	42.77	.....	.....	4.62
General Motors:				
Buck Division	52.97	.....	.....	14.82
Chevrolet Division	13.90	.....	42.05	.....
G.M.C. Truck & Coach Div.	30.17	.....	7.98	.....
Oldsmobile Division	31.51	.....	6.64	.....
Pontiac Division	30.10	.....	.....	0.95
	41.22	.....	.....	3.07
Kaiser-Willys	39.15	.....	.....	1.00
Massey-Harris	48.57	.....	.....	10.42
Rockwell	42.34	.....	.....	4.19
Studebaker	40.14	.....	.....	1.99
Waukesha	40.10	.....	.....	1.95
Diamond T.	14.62	.....	23.53	.....
Divco	24.11	.....	62.26	.....
International Harvester	31.37	.....	6.78	.....
Le Roi	35.96	.....	2.19	.....
Mack Mfg. Co.	13.52	.....	41.67	.....
Oliver	13.82	.....	24.33	.....
Twin Coach	27.76	.....	10.39	.....
White Motors	13.39	.....	24.76	.....

1 Denotes red figure.

24. The accounting studies of the Commission and the accounting studies of respondent while agreeing on the mathematical correctness of each, do conflict, however, with regard to certain cost allocations proposed by respondent which, if found acceptable, would negate in full or further lessen respondent's failures of cost justification in this proceeding. These allocations by respondent involve:

(a) A claimed allowance of the right to "average" the costs of serving all the manufacturers herein concerned, notwithstanding the significant competitive realities involved in the marketing of these replacement parts.

(b) A claimed allowance of a so-called "return on investment" as a cost to be included in respondent's sales to the jobbing trade, notwithstanding it is to be computed on a comparable profit

Decision

55 F.T.C.

basis with that occurring in unrelated matters such as respondent's aircraft, industrial products, export, and various other sales.

25. The averaging of the costs of serving all the manufacturers is not an element of cost analysis acceptable under Section 2(a) of the Clayton Act. It has been contended by respondent that the right to so average is authorized by the proceeding before the Commission in the matter of *Sylvania Electric Products, Inc.*, Docket No. 5728. The price discrimination involved in that proceeding was the sale of tubes by Sylvania to its distributors at prices higher than it charged Philco which was in competition with said distributors in the sale and distribution of replacement tubes. In making a cost justification, Sylvania compared the aggregate price difference on the entire complement of tubes with the aggregate cost difference. Only one area of competition was involved, namely, competition between Sylvania distributors and Philco.

26. In the present case, during the year 1955, the respondent sold automotive parts to 26 original equipment manufacturers for both original equipment and for resale as replacement parts. Instead of one, there were approximately 26 areas of competition. Respondent's distributors, for example, must compete with the Thompson manufactured General Motors part against General Motors and the General Motors franchised new-car dealer, not against the Ford or Chrysler organizations with regard to these particular replacement parts. Similarly, on Thompson manufactured Ford and Chrysler parts, respondent's distributors would be in competition with the Ford or Chrysler organizations and their franchised new-car dealers and not against other original equipment manufacturers with regard to these particular replacement parts.

27. The Robinson-Patman Act was designed to prohibit price discrimination between favored and nonfavored buyers, having an adverse effect on competition. The tabulation hereinbefore set out shows that Chrysler had a price advantage of 45.06 percent over the Thompson distributor; Ford, 42.77 percent; and General Motors, 41.22 percent. These lower prices can be justified only to the extent of the 38.15 percent or the operating cost differential. Permitting the averaging of the costs of all 26 customers and using the 11 customers whose prices were overjustified would result in permitting the respondent to continue to sell certain vehicle manufacturers, including Chrysler, Ford and

1252

Decision

General Motors, at discriminating prices to the detriment and injury of respondent's distributors. In effect such procedure would permit the use of higher prices charged nonfavored customers to cost justify the lower prices granted the favored customers with the net result in certain instances of nullifying the provisions of Section 2(a) of the Clayton Act and defeat the purpose for which it was intended.

28. The attempt by the respondent to use "return on investment" as an element of cost is so far removed from the sphere of actual cost differences that it cannot be accepted as applicable to a cost justification defense. In order to arrive at this "return on investment," the respondent has determined that the rate of return or profit, before Federal income taxes, for the company's total business operations was 20.8 percent for 1955. This rate of return included income from all activities of the company operations which would embrace aircraft, marine, and industrial products, as well as automotive products, in addition to the Replacement Division's sales of automotive replacement parts.

29. The respondent claims that in 1955 it had an average investment of \$8,810,912.00 in its Domestic Replacement Division facilities which are used only in the sale and distribution of its products to its distributors. It claims that since these facilities do not contribute in any way to its business with original equipment manufacturers, it is entitled to include as a cost differential between the two classes of business the return on investment in these facilities. Respondent would compute and arrive at its so-called "return on investment" in its Replacement Division as follows:

Investment in Replacement Division.....	\$ 8,810,912
Return on investment in company as a whole.....	20.8%
Return on investment in Replacement Division	\$ 1,832,670
Net sales of Replacement Division.....	\$17,219,194
Return on investment in Replacement Division	10.64%

This percentage of 10.64 was then applied to the Replacement Division net sales value of common parts in 1955 to arrive at \$166,623.00 which the respondent used as a cost differential, but which, in fact, was an allocated portion of the total profits of the company from all sources, including export sales, defense contract sales and sales of parts that were not common to original equipment manufacturers or distributors.

Order

55 F.T.C.

30. The cost justification must be limited to the differential in price between sales of common automotive replacement parts sold to original equipment manufacturers and to respondent's wholesaler customers. This so-called "return on investment" claimed by respondent was calculated on the basis of the net profit before deduction of Federal income taxes from its total operations as shown above. In other words, respondent claims that the difference between its price to wholesaler customers and its price to original equipment manufacturer customers should be sufficiently large to cover not only the actual additional distribution expenses, but should also include a conjectural but nonetheless equal profit of 20.8 percent on the investment in its Replacement Division distribution facilities as well.

31. This whole concept of return on investment is contrary to the legislative intent of the Congress. The Senate Committee of the Judiciary in reporting on the Robinson-Patman Act (S. Rept. No. 1502—74th Cong., 2d Sess.) stated that the phraseology of the Act, "* * * resulting from differing methods or quantities in which such commodities are to such purchasers sold or delivered" precluded "differentials based on allocated or imputed, as distinguished from actual differences in cost." Similarly, the Committee of the Judiciary of the House of Representatives (Rept. No. 2287—74th Cong., 2d Sess.) stated that the Act "limits the use of quantity price differentials to the sphere of actual cost differences."

32. For the reasons above stated, the hearing examiner finds that there has been a failure by the respondent to cost justify the lower prices for automotive replacement parts granted to certain original equipment manufacturers, including General Motors, Chrysler and Ford.

CONCLUSION

Respondent's discriminations in price in the interstate sale of replacement parts of like grade and quality between automotive vehicle and other manufacturer purchasers and respondent's distributor and wholesaler purchasers of said parts for competitive resale as hereinbefore found are in violation of Section 2(a) of the Clayton Act, as amended.

ORDER

It is ordered, That the respondent Thompson Products, Inc., a corporation, and its officers, representatives, agents and em-

1252

Opinion

ployees, directly or through any corporate or other device, in connection with the sale for replacement purposes of automotive replacement parts in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating in the price of such products of like grade and quality:

By selling said replacement parts to any manufacturer of automotive vehicles or any other original equipment manufacturer at net prices which are lower than the net prices paid by any other direct or indirect purchaser who, in fact, competes with said manufacturer in the resale and distribution of such replacement parts; *provided, however*, that nothing herein shall prohibit the respondent from showing as a defense in any proceeding instituted for enforcement of this order that its differing prices make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such products are sold or delivered.

OPINION OF THE COMMISSION

By ANDERSON, Commissioner:

In the initial decision filed after the hearings were concluded, the hearing examiner found that respondent Thompson Products, Inc., had discriminated in price between purchasers of its automotive parts in violation of Section 2(a) of the Clayton Act, as amended.¹ The respondent has appealed from that decision including its order which would require cessation of the practices held unlawful.

The respondent manufacturers and purchases from others equipment parts which are distributed to over 4,000 franchised independent distributors and jobbers for resale for replacement purposes. The distributors are automotive parts wholesalers who annually execute distributor franchise agreements for purchases of respondent's merchandise. The distributors are served through the replacement division of respondent where the parts are packed

¹ " * * * it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *"

Opinion

55 F.T.C.

in boxes suitable for resale. The Thompson jobbers are wholesalers signing respondent's jobber franchise agreements who thereby agree to maintain an average inventory of \$1,000 on certain lines of Thompson merchandise. Parties to the jobber agreements are the respondent, the jobber, and the distributor who recommends him and from whom the jobber is to purchase his requirements of Thompson products. The distributors and jobbers engaging in the resale of respondent's products are collectively referred to hereafter as Thompson wholesalers.

In 1955 and for many years prior, the respondent was selling parts to various vehicle manufacturers for production use and also for replacement purposes. As found by the hearing examiner, the objective of the automotive manufacturer is to obtain a buying price on bulk purchases of parts low enough to bear packaging, distributive and other promotional expense and permit resale of the parts to garages and others in the repair trade by the car manufacturers' dealer or distributor affiliates. In the case of Chrysler Corporation, approximately 90% of the parts manufactured by it for replacement purposes or purchased from others, including the respondent, are sold to franchised Mopar distributors. There are approximately 135 Mopar distributorships. Some of them also operate as franchised dealers for Chrysler's cars and maintain repair garages or are owned by interests holding such car franchises. The remaining 10% of the replacement parts distributed by Chrysler Corporation are sold direct to franchised car dealers.* The Mopar distributors resell to car dealers, franchised by Chrysler Corporation and to dealers selling other makes of cars, independent garages, filling stations and fleet owners. The repair parts distributed by the various divisions of General Motors are sold to their respective franchised car dealers. On sales of parts by a franchised car dealer to a qualified wholesale customer, the dealer becomes eligible to receive a wholesale allowance or compensation from General Motors. This approximates 25% on many items. Ford Motor Company's distributional program in selling to its franchised dealers, including payments of wholesale allowances, is broadly similar to that used by General Motors. The replacement parts sold by the vehicle manufacturers are branded under their respective names. The parts sold by respondent's wholesalers carry respondent's brand names, Thompson or Toledo.

* Published as modified by Commission order of July 7, 1959.

There is no dispute in this proceeding that the prices at which the respondent sold its parts to various vehicle manufacturers, including Chrysler, General Motors and Ford, were substantially lower than those received by it for parts of like grade and quality purchased by the respondent's independent distributors and jobbers. The hearing examiner concluded that such lower prices constituted discriminations in price having the adverse competitive effects proscribed in the statute. Having additionally determined that the differing prices in instances were not fully justified by differences in costs of sale or delivery or otherwise within the contemplation of the statute's cost proviso ², the hearing examiner found that the respondent's pricing practices accordingly were violative of law.

The respondent contends that the record does not show competitive injury, actual or potential, to Thompson distributors resulting from its lower prices to original equipment manufacturers. One of the arguments relied on in this connection is that findings of competitive injury are entirely refuted by the fact that Thompson distributors purchase parts at less than the prices paid their respective car makers by Chrysler's Mopar distributors and Ford and General Motors franchised car dealers reselling as wholesalers. This comparison primarily relates to Thompson distributors purchasing in certain volume brackets and eligible for rebates or bonuses which reduce their net prices for merchandise. In 1955, Thompson had 2,439 franchised distributors and 2,002 jobbers, and a rebate program similar to that which was in effect in 1953. In 1953, 57.87% of the distributors did not receive any rebates; and the franchised jobbers were ineligible for any rebates whatsoever.³ Hence, approximately three-fourths

² See note 1, *supra*.

³ As previously noted, the parties to the jobber franchise agreements are the jobber, the respondent, and the distributor from whom the jobber is to purchase his requirements of Thompson merchandise. The jobbers normally buy at the distributor's price and a redistribution allowance of 10% is paid by respondent on such sales. Distributors make out a monthly report form respecting their sales to such "approved customers". Although purchasing indirectly through distributors, the jobbers under respondent's merchandising program must be deemed "purchasers" from it within the meaning of the Act.

Additional issues with which the hearings were concerned pertained to the respondent's sales of its replacement parts at varying prices (a) among Thompson distributors, and (b) between Thompson distributors and Thompson franchised jobbers. Such differing prices resulted from varying rebates granted to Thompson distributors under respondent's purchase bonus programs. These noncumulative discounts ranged in 1953 from 2% up to 10% and were accorded to distributors whose annual purchases exceeded specified amounts and attained the volume brackets prescribed under the schedules. Based on the testimony received relating to an accounting study introduced by the respondent concerning cost of sales to distributors, the hearing examiner

Opinion

55 F.T.C.

of the Thompson wholesalers have not shared in the lower prices paid by some independent distributors.

Furthermore, tabulated comparisons appended to the brief of counsel supporting the complaint relating to the net prices paid in 1955 by Thompson wholesalers purchasing at distributor net prices and receiving no rebates and those paid by Chrysler's Mopar distributors to Chrysler indicate that Chrysler's prices were lower on 29 of the 30 common parts there tabulated. These variations ranged from small up to more substantial percentages. General Motors' net prices to wholesaling new-car dealers (redistribution net prices) were lower on 17 common parts and higher on 4 than the comparable net prices paid by such Thompson wholesalers; and as to 26 Ford common parts, its net prices to wholesaling car dealers were lower on 11, equal on 9 and higher on 6. It would be erroneous to conclude, therefore, that Thompson's wholesalers have purchased at prices generally lower than the net amounts paid for like parts by distributor and wholesaling dealer affiliates of the automobile manufacturers to their respective car producers.⁴

Respondent also argues that even if it were true that Chrysler's Mopar distributors and General Motors' and Ford's wholesaling parts' dealers resell their parts at prices below those which Thompson distributors can profitably resell them, such circumstance is irrelevant and nowise supports inferences of actual or potential injury to competition. This contention appears to assume that violation of the Act cannot occur in any competitive situation unless the favored buyer passes on the discriminations by reselling the wares to his dealers at prices lower than those charged competing dealers by the person granting the discrimination. It is not necessary, however, that a price advantage be used to lower the resale price and thereby attract customers away

³ Continued

reached conclusions that the differing prices at which the respondent sold its merchandise between and among distributors were cost justified. His views in that regard have not been challenged by counsel supporting the complaint and no further consideration of this aspect of the proceeding appears warranted. However, the findings contained in the initial decision include none evaluating record matters specifically addressed to the legal status of the differing prices between distributors and jobbers. We have duly considered the record and deem the record insufficient for informed decision on the charges insofar as they relate to the differing prices paid by respondent's franchised jobber purchasers and certain of its distributors.

⁴ It should be noted in this connection also that the principal volume of purchases by Thompson wholesalers is shown by the record to be in the category of parts for which they paid the higher comparative prices. On the Ford lines of parts, for example, Thompson wholesalers purchased 225,186 units of the higher priced parts, 15,528 of the equally priced parts, and only 3,559 of the lower priced parts.

from disfavored competitors. *E. Edelmann & Co. v. Federal Trade Commission*, 239 F.2d 152 (C.A. 7, 1956). That a discriminatory price enables a buyer to resell the merchandise at prices sufficiently low to force his disfavored competitors to sell the seller's wares at prices reflecting abnormally low profit levels or to refrain from selling is a relevant and material factor in determining whether such discrimination constitutes a substantial threat to competition. *Corn Products Refining Co. v. Federal Trade Commission*, 324 U.S. 726 (1945).

The respondent further states (1) that new-car dealers are not a potential market for Thompson wholesalers for parts usable on the cars which they are franchised to sell and hence no injury to competition between respondent's wholesalers and vehicle manufacturers in that area can result, and (2) that the record additionally shows that Thompson distributors compete on favorable terms with automobile manufacturers and their affiliated distributors and dealers in selling repair parts to other retailing segments of the repair trade.

As to the first contention, it is, of course, true that there are various commercial considerations encouraging the franchised dealer to regard his car manufacturer as a preferential source for parts. These include the fact that such parts bear the car manufacturer's name and are advertised as genuine parts and that dealer protection against obsolescence of parts may be increased. While these factors may tend to handicap the independent parts distributor in varying degrees in individual competitive situations, they nowise signify that new-car dealers were not formerly and do not now represent a potential market for the independent distributor as to parts designed for use on the dealer's make of car. It is clear that franchised car dealers both use and resell automotive parts and their franchise agreements do not stipulate that they purchase their requirements for repair parts exclusively from the car manufacturer. The various versions of the so-called "wholesale plan," including those whereby dealers may earn redistribution commissions on sales to other dealers and Chrysler's distributional program through Mopar representatives and volume discounts to dealers, implicitly recognized the potential market for the independent parts distributor represented by the franchised dealerships. In the light of the foregoing, we reject the contentions that the new-car dealer is not a poten-

Opinion

55 F.T.C.

tial customer for independent parts distributors selling parts of merchantable quality for franchised dealers' makes of cars.⁵

Also rejected is the respondent's previously mentioned companion argument, namely, that the respondent's distributors compete on favorable terms with distributors and franchise dealers engaged in wholesaling the parts of their respective car manufacturers. The respondent provides its distributors and jobbers with suggested resale prices. The Thompson suggested new-car dealer prices, also referred to in the course of the proceedings as "pink sheet" prices, are lower than the wholesale prices suggested for use in selling others in the repair trade. The sale of automotive replacement parts is a keenly competitive field. There can be no doubt but that the respondent's wholesalers frequently must offer their parts in competition with others whose regular resale prices are equivalent to respondent's pink sheet or lowest recommended resale prices. Respondent states that in such situations its distributors have a gross profit margin of 27.5% and that this materially exceeds the industry's nationwide average operating costs of 24.4% of sales and the 25.3% average sales costs for certain of the Thompson distributors who testified in this proceeding respecting costs in that regard. On respondent's parts for use on certain General Motors cars and the Ford and Chrysler lines, however, the pink sheet margins afforded on certain common parts to wholesalers who pay respondent's distributor net prices and receive no rebates average approximately 24.9%. As the hearing examiner in effect found, sales by respondent's wholesalers at Thompson's lowest recommended prices when duly reextending the customary 2% cash discount to purchasers constitute sales at or below cost for those lines, that is, merchandising costs plus operating costs. The profits of automotive parts wholesalers necessarily are based on an accumulation of small margins of profit. Wholesalers uniformly try to take advantage of the 2% cash discount accorded by their suppliers, their cost of merchandise is reduced thereby, and the

⁵ Although one of the Thompson distributors testified to the effect that new-car dealers have never been customers for Thompson's so-called hard parts, other evidence fully supports informed determinations of competition between car makers and independent wholesalers in selling parts to franchised dealers. For example, a Thompson dealer witness testified that he formerly regarded the new-car dealer as one of his best customers; and another stated that the factory differential precluded him from selling Ford dealers. The testimony of a dealer who stated that he adhered to the respondent's higher suggested wholesale price list for the repair trade in lieu of the Thompson lower list suggested for use in selling new-car dealers additionally shows that he had some business, albeit a negligible volume, with car dealers on parts manufactured for the cars which they were franchised to handle.

material effect of that discount on profit margins is clearly evident from the record. We think the hearing examiner's findings respecting the reduced margins resulting to Thompson wholesalers had sound record basis.

Certain cost studies for the year 1955 were received into the record concerning the respondent's sales of parts of like grade and quality or so-called common parts to its wholesalers and 22 original equipment manufacturers. Thompson catalogues approximately 20,000 parts but a standard was established and agreed upon by the accountant witnesses for determining whether parts having a common replacement use were of like grade and quality. Thus, 312 parts sold in 1955 by Thompson's replacement division and purchased by the original equipment manufacturers from respondent's manufacturing divisions comprise and have been treated in the studies as the common parts or parts of like grade and quality. As to Chrysler, Ford and General Motors, the record showed an average percentage of price differences favoring Chrysler of 45.06%, Ford 42.77% and General Motors 41.22%. In the cases of Chrysler, Ford and General Motors, the nonjustified differentials, respectively, represented 6.91%, 4.62% and 3.07%.⁶ Assuming but not conceding the correctness of these percentages, respondent argues that the excess or unjustified amounts of the price differences are *de minimis* and, therefore, should be disregarded. In other words, it is the respondent's position that for all practical purposes the price differences shown by the record have been fully justified. In support of this argument, the respondent refers to the Commission's decision in *United States Rubber Co.*, 46 F.T.C. 998. In that case we were considering excess price differentials over cost differences ranging from 0.0047 to 0.0480 per dollar of gross sales, and held that the differentials in the amounts of 0.0064, 0.0047 and 0.0092 per dollar of gross sales would be considered *de minimis*. We further held, however, that the other amounts by which the differences in cost failed to justify the price differences were substantial. As noted above the nonjustified differentials on common parts included in those here considered amount to 3.07%

⁶ The hearing examiner found that the operating cost differential applicable to sales by respondent to the independent distributors through its replacement division and to the sales of like replacement parts to the original equipment manufacturers represented 38.15%. This was the figure applied by him to the respective percentages of price difference for each equipment manufacturer in determining the extent of cost justification for each. As discussed hereafter, the respondent excepts to the figure of 38.15% as the actual operating cost differential and claims it improperly excludes certain costs allocable to its replacement division.

Opinion

55 F.T.C.

in the case of General Motors, 4.62% in the case of Ford, and 6.91% in the case of Chrysler. In this industry where competition is unusually keen, where margins of profit on individual items are exceedingly small, and where even the 2% cash discount allowed by the respondent is so important to its distributor customers, these unjustified price differences obviously are not *de minimis* in character.

The business of the independent wholesalers is not limited to the resale of common parts purchased from the respondent. Respondent's wholesalers must sell competitively the balance of the parts in the Thompson lines and other lines of automotive products against their counterparts in the vehicle manufacturers' replacement lines irrespective of whether the balance is supplied the car manufacturers by the respondent or other replacement parts manufacturers. Competitive handicaps on the handling of one merchandise category have no legal sanction by reason of the fact that the disfavored competitors sell other wares. As stated by the Supreme Court in the *Morton Salt* case, *supra*:

There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect a merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery store consists of many comparatively small articles, there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store.

The contended insignificance of the unjustified differentials notwithstanding, purchases for competitive resale of the common parts here involved have been very substantial. With respect to 77 common parts for the Chrysler and Ford lines and certain General Motors cars, Thompson distributors in 1955 purchased 1,172,639 units for which they paid \$835,756. The comparable price, had such purchases been made by the respective car manufacturers, would have been \$455,029.00, a difference of \$380,727. The three car makers paid \$1,511,480 for the respective common parts purchased by them. Their cost to Thompson distributors would have been \$2,756,105, a difference of \$1,244,625.

In that year, aggregate sales of all automotive replacement parts by Chrysler and Ford were \$100,000,000 and \$200,000,000, respectively. Total sales by General Motors on Buick, Oldsmobile and Pontiac parts represented \$139,000,000. Included in such sales were substantial dollar amounts of various replacement parts manufactured by the respondent. The granting of redistribution or wholesale allowances to car dealers on replacement parts sold at wholesale to other dealers was widespread. Buick paid out four and one-half million dollars, Oldsmobile three and one-half million dollars and Pontiac three million dollars in wholesale compensation to their franchised car dealers. Everything considered, it is evident that the discriminations accorded by respondent to the vehicle manufacturers not only have contributed to foreclosure of the franchised car dealer as a replacement parts' customer for the respondent's wholesalers, but additionally contributed to setting up the car dealer as a powerful wholesale competitor in place of a former actual or potential customer. We think there is sound record basis for the initial decision's holding that the respondent's discriminations represent substantial threats to competition. This aspect of the appeal is denied.

The respondent further excepts to the hearing examiner's action in rejecting certain elements of cost justification which it requested be recognized in the operating cost differential. The first of these concerns an accounting allocation to the replacement division of .72% for staff engineering expense. This company outlay consisted of engineering research and development projects primarily concerning nonautomotive products or related to experimental or research work on products not being sold in 1955. We have considered the arguments advanced by the respondent on this aspect but find no error in the hearing examiner's ruling declining to recognize this item as an element of cost differential.

A second exception urges error through the hearing examiner's failure to include as a differential cost a "return on investment" factor on sales to the jobbing trade on a comparable profit basis to that realized by the respondent on sales of other company products. The respondent states that, in 1955, it had an average investment of \$8,810,912 in its domestic replacement division facilities used solely in selling to distributors. It further states that rate of return or profit (before federal income taxes) for total company operations was 20.8%. Respondent computes its

Opinion

55 F.T.C.

claimed "return on investment" for the replacement division as follows:

Return on investment in replacement division	
(20.8% x \$8,810,912).....	\$ 1,832,670
Net sales of replacement division.....	17,219,194
Percentage of return on investment in replacement division to net sales	10.64%

The respondent would apply the percentage of 10.64 to the division's net sales value of common parts to wholesalers to arrive at \$166,623 which the respondent argues should be recognized as a proper cost differential. This amount is essentially an allocated portion of the total profits of the company from all sources including export sales, defense contract sales and sales of automotive parts. The Act's pertinent proviso is limited to permitting cost differentials making only due allowances for differences in cost of manufacture, sale and delivery resulting from the different methods or quantities in which the commodities are sold or delivered to purchasers. The return rate factor or element here claimed is thus entirely outside the sphere of actual cost differences. Respondent's request for recognition of such return rate factor was properly denied by the hearing examiner.

The sales to the original equipment manufacturers of replacement parts for their respective makes of vehicles were negotiated by the manufacturing divisions of the respondent with the vehicle makers individually and prices have varied greatly. The percentage differences between the prices paid by the independent wholesalers and the different vehicle manufacturers similarly have varied. The respondent contended that the prices of all common parts sold to equipment manufacturers should be averaged to thereby afford a weighted average price differential to be cost justified. The hearing examiner in effect held that such proposed balancing of overjustification as to some equipment manufacturers against underjustification in cases of others was not a valid procedure. The respondent contends error and argues that the hearing examiner's ruling contravenes principles controlling in the Commission's decision in *Sylvania Electric Products, Inc.*, Docket 5728 (decided September 23, 1954). In that proceeding, a radio tube manufacturer was charged with discriminating in price between its disfavored distributors and a radio set manufacturer purchasing tubes for resale nationally to the replacement trade. That case dealt with comparisons of ag-

gregate price differences with aggregate cost differences on the entire complement of tubes sold and presented a competitive situation entirely dissimilar to the instant one. As we noted there, the particular tube types on which the price differences favoring the national reseller were larger, were those in least demand. Here, the price differentials relate to replacement parts having marked demand including common parts for the cars sold by General Motors, Ford and Chrysler Corporation. Furthermore, the respondent's distributors and jobbers must compete in as many areas of competition with vehicle manufacturers as there are manufacturers buying the common parts and not with a single hypothetical original equipment manufacturer. We conclude that the respondent's contentions that it has justified the differences in price between Thompson wholesalers and the original equipment manufacturers lack sound basis.

We also have considered the objections, raised by the respondent under Part III of the brief, together with the exceptions set forth in the brief's appendix. The hearing examiner's rejection of various of respondent's requested findings appears sound and free from substantial error. Error is claimed also in the brief respecting other rulings including those whereby the hearing examiner, in instances, received evidence over respondent's objections and, in others, excluded evidence offered by the respondent. The great majority of those rulings related to matters calling for exercise of the hearing examiner's sound discretion. No showing has been made by the respondent of abuses in that respect. Based on our study of these exceptions, we find no prejudice under those rulings to respondent's right to full and fair hearing.

As a result of our review here, we additionally have determined that the order to cease and desist contained in the initial decision should be modified to more clearly extend its bans to discriminations between original equipment manufacturers and disfavored indirect jobber customers who, like respondent's direct buying distributors, are purchasers within the meaning of the Act. In the light of the facts of this case, we approve in principle the hearing examiner's recognition of the availability to the respondent of the statutory cost defense in circumstances envisioned by the Act. In this connection, however, we feel that the language of the order should be revised to more clearly relate this to any future proceedings instituted for judicial enforcement.

Order

55 F.T.C.

The appeal of the respondent is denied. With the order to cease and desist modified in respects noted in the preceding paragraph, our order issuing herewith adopts the initial decision as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon the respondent's appeal from the initial decision of the hearing examiner and upon the briefs filed in support of and in opposition to the appeal; and the Commission having rendered its decision denying the appeal and having determined, for reasons stated in the accompanying opinion, that the order to cease and desist should be modified:

It is ordered, That the following order be, and it hereby is, substituted for the order contained in the initial decision:

It is ordered, That the respondent Thompson Products, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale for replacement purposes of automotive replacement parts in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating in the price of such products of like grade and quality:

By selling said replacement parts to any manufacturer of automotive vehicles or any other original equipment manufacturer at net prices which are lower than the net prices paid by any other direct or indirect purchaser who, in fact, competes with said manufacturer in the resale and distribution of such replacement parts; *provided, however*, that nothing herein shall prohibit the respondent from showing as a defense in any proceeding instituted for enforcement of this order that its differing prices make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such products are sold or delivered.

It is further ordered, That the respondent 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.

It is further ordered, That the initial decision, as modified herein, be, and it hereby is, adopted as the decision of the Commission.

Decision

IN THE MATTER OF
D & N AUTO PARTS COMPANY, INC., ET AL. AND
BORDEN-AICKLEN AUTO SUPPLY CO., INC., ET AL.

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

Dockets 5767 and 5766. Complaints, May 1, 1950—Decision, Feb. 24, 1959

Order requiring two group buying organizations—in Memphis, Tenn., and Andalusia, Ala., respectively—and their 25 jobber members, to cease violating Sec. 2(f) of the Clayton Act by soliciting and accepting illegal price advantages from suppliers of automotive parts and supplies consisting of discounts ranging up to 20% based on the aggregate purchases of all members of each group in the preceding year.

Mr. Eldon P. Schrup for the Commission.

Mr. Frank J. Tipler, Jr., of Andalusia, Ala., for D & N Auto Parts Company, Inc., et al.

Taylor, Costen & Taylor, of Memphis, Tenn., by *Mr. Hillsman Taylor*, for Borden-Aicklen Auto Supply Co., Inc., et al.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

In the above proceedings Mid-South Distributors, a corporation, and its officers, directors and members named as respondents in Docket No. 5766; and Cotton States, Incorporated, a corporation, and its officers, directors and members named as respondents in Docket No. 5767, were charged with violation of subsection (f) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. During the course of the hearings, it was agreed by all parties that these two proceedings be tried concurrently and considered as one case; that the testimony and other evidence introduced in each of these cases be considered as applying to the respondents in both cases; and that the hearing examiner issue one initial decision covering both cases.

These proceedings are now before the undersigned hearing examiner for final consideration, upon the complaints, answers thereto, testimony and other evidence, proposed findings of fact and conclusions submitted by counsel, and oral argument thereon. The hearing examiner has given consideration to the proposed findings of fact and conclusions submitted by all parties and oral argument thereon, and all findings of fact and conclusions of law proposed by the parties respectively, not hereinafter