

Opinion

55 F.T.C.

IN THE MATTER OF
ROUX DISTRIBUTING CO., INC.

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

Docket 6636. Complaint, Sept. 14, 1956—Order, Mar. 4, 1959

Order dismissing for failure of proof, complaint charging a New York City distributor of beauty preparations for the hair with requiring its wholesale customers to restrict their sales to a limited class of accounts.

Before *Mr. J. Earl Cox*, hearing examiner.

Mr. Jerome Garfinkel and *Mr. Lewis F. Depro* for the Commission.

Mr. William J. Hayes, of New York City, for respondent.

OPINION OF THE COMMISSION

By ANDERSON, Commissioner:

This matter has come before the Commission upon the appeal of counsel in support of the complaint from the hearing examiner's initial decision dismissing the complaint for failure of proof. The complaint charges that respondent has required its wholesale customers to agree to restrict their sales to a limited class of accounts and that the practices involved are in violation of Section 5 of the Federal Trade Commission Act. The issue before us is whether the examiner properly dismissed for insufficiency of evidence.

The essential facts as to the method of distribution employed by respondent are not in dispute. Respondent, Roux Distributing Co., Inc. (sometimes hereinafter referred to as Roux), is now and has been engaged in the sale and distribution of beauty preparations for the hair in interstate commerce. Its customer accounts include direct retailers, beauty schools, drug wholesalers and beauty supply dealers.

On March 18, 1953, Roux notified all its wholesale accounts that a new discount schedule of 25% off trade price (it was then 35%) would be initiated April 1, 1953. The following classifications were set up:

1. Jobber—one who subjobs, sells to, trades or exchanges Roux products with drug wholesalers or beauty supply dealers or other jobbers.

2. Drug wholesaler—one who sells Roux products to drug stores, toilet goods counters of department stores and similar retailers only.

3. Beauty supply dealer—one who sells Roux products to beauty salons, beauty schools and beauty operators only.

The beauty supply dealer, under the new schedule, could receive an additional 10% (a total of 35%) in consideration for an agreement, among other things, to resell only to beauty shops, beauty schools and beauty operators and not to subjob, sell to, trade or exchange Roux products with drug wholesalers, jobbers or other beauty supply dealers.

On April 28, 1953, respondent sent its customers a further notice announcing it would henceforth sell its products only to those of its wholesale customers whose Roux sales unmistakably fall into but one of the three classifications defined by respondent ("drug wholesaler," "beauty supply dealer" or "jobber"). All wholesale customers were requested to sign and return the notice, signifying that they would operate exclusively within the classification they had chosen.

It is quite clear that the wholesale customers signing and returning either of the aforementioned notices, or both, agreed to confine their sales to particular customer classifications. Primarily what this meant was that drug wholesalers were limited to selling Roux products to drug stores and toilet goods counters of department stores and similar retailers; the beauty supply dealers were limited to selling Roux products to beauty salons, beauty schools and beauty operators. Many of respondent's customers signed and returned these notices.

The record shows that as a result of this method of selling, customers of Roux formerly selling in several classifications had to give up accounts outside their chosen classification. Respondent vigorously enforced its sales policy and discontinued customers which would not classify themselves or which sold outside of their classification.

The hearing examiner in his initial decision cites *United States v. Colgate & Company*, 250 U.S. 300 (1919), and other cases involving "refusal to sell," concluding, among other things, that none of the factors necessary to take this case out from under the general rule relating to freedom of a manufacturer to select its customers are shown to exist in this proceeding.

It should be clear, however, that this matter contains a more fundamental issue than whether or not the respondent may re-

Opinion

55 F.T.C.

fuse to deal with certain of its customers failing to comply with its conditions of sale; the issue here is whether the agreements with customers containing the restrictions as to resale of Roux products are lawful. If the agreements are lawful, then a refusal to sell for failure to comply with the terms of such agreements is not in violation of Section 5.

Certain restrictions as to the resale of a product may violate the Sherman Act as well as Section 5 of the Federal Trade Commission Act. For example, under some circumstances a distributor of a trademarked article may not lawfully limit by agreement the persons to whom its purchaser may resell, particularly where the agreement is tied in with a system of distribution which includes the unlawful fixing of resale prices. *United States v. Bausch & Lomb Co.*, 321 U.S. 707, 721 (1944). We do not believe, however, that a restriction or limitation as to whom a purchaser may resell is illegal *per se*. Cf. *Fosburgh v. California & Hawaiian Sugar Refining Co.*, 291 Fed. 29 (1923); *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F. 2d 1 (1949), cert. den. 338 U.S. 948 (1950).

The question here is whether respondent's practices constitute unfair methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act. It is well settled that practices violating this Act are not confined to those condemned by the Sherman Act. *Federal Trade Commission v. Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392 (1953). But, in a case of this kind, a violation of Section 5 is not shown unless the record contains some evidence of the competitive effect of the practices. This does not mean there must be a showing of some actual elimination or suppression of competition, but there at least should be some basis in the record for a finding that competition may be substantially lessened.

The complaint specifically alleges that respondent's practices have a dangerous tendency only to eliminate competition among respondent's customers in the sale and distribution of Roux products. Thus, all the evidence received concerning the alleged effects relates to the competition among respondent's customers. There is no evidence that competition otherwise has been lessened or of any other restraint on trade.

This evidence, however, concerning competition among respondent's customers and the alleged tendency to eliminate such competition is very inconclusive. It is true, as alleged by the complaint and admitted, that respondent, among its 1700 customers,

1386

Opinion

had approximately 550 drug wholesalers and 500 beauty supply dealers. It is also admitted that prior to April, 1953, each of respondent's wholesale customers competed freely with each other such customer selling in the same trade area. This alone, however, does not support a finding of competition between drug wholesalers on the one hand and beauty supply dealers on the other. The competition so admitted may have been only that among the customers within a class located in a given trade area. Trade areas are not defined and there is no development of the competition which existed in any particular locality. It is uncertain from this record that drug wholesalers and beauty supply dealers, the two principal classes of customers involved, were ever in substantial competition, since it is not shown that they engaged in business in the same trade areas.

There is evidence that respondent's practices caused some of its customers to lose sales (primarily beauty supply dealers losing drug store accounts) and caused certain customers or former customers to suffer reductions in profits. This, however, does not prove that any competition has been adversely affected. Merely to show a loss of sales or profits by individual customers has no necessary competitive significance in the circumstances. As heretofore indicated, it has not been shown clearly that competition existed between drug wholesalers and beauty supply dealers; consequently it cannot be determined to what extent competition has been or may be harmed by respondent's practices.

The position of counsel in support of the complaint appears to be that the limitations on resale imposed by respondent on its wholesale customers means that competition is necessarily diminished among such customers and that this is enough to violate Section 5. To accept such reasoning would be to consider resale restrictions of this nature "unfair methods of competition" in themselves, regardless of their effects on competition. We do not so view the law.

In the circumstances, we concur in the hearing examiner's holding that the charges in the complaint are not sustained by the record. Although normally the matter would be remanded to the hearing examiner to receive any proper evidence concerning the competitive effect of the practices, such action will not be taken in this instance. The Commission assumes that this evidence if available to counsel in support of the complaint would have been adduced into the record and, therefore, that upon a remand it would have to be originally obtained. Respondent,

Order

55 F.T.C.

however, has instituted a new program under which it sells two distinguishable lines of products. In connection with this program, operating since August, 1956, the beauty supply dealer is not precluded from selling to drug accounts. The discounts now follow the line of products rather than the customer classification. The evidence in question, since it would concern practices engaged in prior to the present program and more than two and one-half years ago, clearly would be difficult to develop at this late time. Under all the circumstances, we do not believe that it would best serve the public interest to remand the case to the hearing examiner.

The appeal of counsel in support of the complaint is denied. It is directed that an order be issued herewith dismissing the complaint in this proceeding without prejudice.

Chairman Gwynne concurred in the result.

ORDER DISMISSING COMPLAINT

This matter having come before the Commission upon the appeal of counsel in support of the complaint from the hearing examiner's initial decision dismissing the complaint; and

The Commission, for the reasons set forth in the accompanying opinion, having denied the aforesaid appeal, and having directed the issuance of an order dismissing the complaint without prejudice:

It is ordered, That the complaint in this proceeding be, and it hereby is, dismissed, without prejudice, however, to the right of the Commission to issue a new complaint or to take such further or other action against the respondent at any time in the future as may be warranted by the then existing circumstances.

Chairman Gwynne concurring in the result.

Complaint

IN THE MATTER OF
KEYSTONE MANUFACTURING COMPANY, INC., ET AL.

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

Docket 7118. Complaint, Apr. 10, 1958—Decision, Mar. 5, 1959

Consent order requiring manufacturers of home movie equipment, slide projectors, and related items, with sales in 1955 in excess of \$10,000,000, to cease paying special allowances to a large Pennsylvania jewelry chain for advertising their products while not making such allowances available on proportionally equal terms to competitors of the chain.

Count II of the complaint charging said jewelry chain with knowingly inducing and receiving the allowances in question was settled by a consent order on Dec. 18, 1958, p. 885, herein.

COMPLAINT

The Federal Trade Commission, having reason to believe that Keystone Manufacturing Company, Inc., a corporation, and Keystone Camera Company, Inc., a corporation, have violated and are now violating the provisions of subsection (d) of Section 2 of the Clayton Act (U.S.C., Title 15, Section 13), as amended by the Robinson-Patman Act, and the Commission having further reason to believe that Associated Barr Stores, Inc., a corporation, and Myer B. Barr, as an individual and as president of Associated Barr Stores, Inc., have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges with respect thereto as follows:

Count I

PARAGRAPH 1. Respondents Keystone Manufacturing Company, Inc., and Keystone Camera Company, Inc., hereinafter sometimes referred to as respondents Keystone Companies, are corporations organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Massachusetts with their principal offices and places of business located at Hallet Square, Boston 24, Mass.

PAR. 2. Respondent Keystone Manufacturing Company, Inc., is engaged in the business of manufacturing home movie equip-