

IN THE MATTER OF
AMERICAN MOTOR SPECIALTIES CO., INC., ET AL.

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

Docket 5724. Complaint, Dec. 20, 1949—Decision, Mar. 12, 1959

Order requiring 17 jobbers of automotive parts and supplies and their buying association in the New York City area to cease violating Sec. 2(f) of the Clayton Act by inducing or accepting discriminatory prices from their suppliers, such as rebates up to 19% higher than those received by their competitors; and requiring said jobbers to cease maintaining said buying association as an instrumentality to induce or receive discriminatory prices.

Mr. Eldon P. Schrup for the Commission.

Mr. B. F. Lerch, of New York, N.Y., for respondents.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is now before the undersigned hearing examiner for final consideration upon the complaint, answer thereto, testimony and other evidence, and proposed findings of fact and conclusions submitted by counsel. The hearing examiner has given consideration to the proposed findings of fact and conclusions submitted by both 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 fully advised in the premises, makes the following findings as to the facts, conclusions drawn therefrom and order:

1. Respondent Metropolitan Automotive Wholesalers Cooperative, Inc., is a membership corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 11 Park Place, New York, N.Y. At the time of the issuance of the complaint in this proceeding the members of said respondent Metropolitan Automotive Wholesalers Cooperative, Inc., were as follows:

(1) Respondent American Motor Specialties Co., Inc., a New Jersey corporation, with its principal office and place of business located at 53 Lock Street, Newark, N.J.

(2) Respondent Bronx Gear & Bearing Co., Inc., a New York

corporation, with its principal office and place of business located at 221 East 149th Street, New York, N.Y.

(3) Respondent Clinton Square Auto Parts Corp., a New Jersey corporation, with its principal office and place of business located at 22 Elizabeth Avenue, Newark, N.J.

(4) Respondents George Boelger, Mrs. Anna Marian Boelger, Julius N. Cohen, and Mrs. Cherrie Cohen, copartners trading as Eveready Automotive Company, a partnership with their principal office and place of business located at 67 Richmond Avenue, Port Richmond, Long Island, N.Y.

(5) Respondent Green's Auto Gear & Parts Co., Inc., a New York corporation, with its principal office and place of business located at 110 West 145th Street, New York, N.Y.

(6) Respondent Howell Treiber, Inc., a New York corporation, with its principal office and place of business located at 1077 Atlantic Avenue, Brooklyn, N.Y.

(7) Respondent M & G Auto Supplies, Inc., a New Jersey corporation, with its principal office and place of business located at 504 Bergen Avenue, Jersey City, N.J.

(8) Respondent Miller Auto Supply & Equipment Co., Inc., is a New York corporation, with its principal office and place of business located at 205 East 9th Street, New York, N.Y.

(9) Respondent North Shore Auto Parts Co. of Flushing, Inc., is a New York corporation, with its principal office and place of business located at 137-40 Northern Boulevard, Flushing, Long Island, N.Y.

(10) Respondent S & R Auto Parts, Inc., is a New York corporation, with its principal office and place of business located at 28 Seventh Avenue, South, New York, N.Y.

(11) Respondent Sanders & Ruskin, Inc., a New York corporation, with its principal office and place of business located at 412 Lafayette Street, New York, N.Y.

(12) Respondent South Shore Motor Parts Co., Inc., a New York corporation, with its principal office and place of business located at 225 Merrick Road, Lynbrook, Long Island, N.Y.

(13) Respondent Arthur Schwartz, doing business as Cypress Auto Parts Company, with his principal office and place of business located at 70-20 60th Lane, Brooklyn, N.Y.

(14) Respondent A. Jacoby & Sons, Inc., a New York corporation, with its principal office and place of business located at 8620 18th Avenue, Brooklyn, N.Y.

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(15) Respondent K & G Auto Parts, Inc., a New York corporation, with its principal office and place of business located at 397 Empire Boulevard, Brooklyn, N.Y.

(16) Respondent Norwood Distributors, Inc., a New Jersey corporation, with its principal office and place of business located at 624 Broadway, Long Branch, N.J.

(17) Respondents Chester Klein and Mrs. Isabell Klein, co-partners trading as Republic Auto Parts, with their principal office and place of business located at 260 West 52nd Street, New York, N.Y.

2. The above respondents, who have been named as members of Metropolitan Automotive Wholesalers Cooperative, Inc., are independent jobbers dealing principally in automotive parts, accessories and supplies. Since June 19, 1936, said respondent jobbers have been engaged in the purchase and resale of said automotive products in interstate commerce and have been and are now engaged in active and substantial competition with other corporations, partnerships, firms and individuals also engaged in the purchase and resale of such automotive products of like grade and quality in interstate commerce which have been purchased from the same or competitive sellers.

3. Respondent Metropolitan Automotive Wholesalers Cooperative, Inc., was organized by the respondent members on March 30, 1948, and this respondent is, in fact, a successor to respondent Automotive Group Buyers, Inc. Respondent Metropolitan Automotive Wholesalers Cooperative, Inc., took over all assets and contracts and assumed the liabilities of respondent Automotive Group Buyers, Inc., and thereafter the Automotive Group Buyers, Inc., became dormant.

4. Respondent jobbers organized and have maintained, controlled and operated respondent Metropolitan Automotive Wholesalers Cooperative, Inc., and its predecessor, Automotive Group Buyers, Inc., for the purpose of inducing the granting or allowance of lower and more favorable prices by manufacturers and sellers of automotive parts, accessories and supplies. It was the regular procedure for the respondent jobbers, acting through Metropolitan Automotive Wholesalers Cooperative, Inc., and its predecessor, to notify manufacturers and sellers of various lines of automotive parts, accessories and supplies to submit their prices to the executive secretary in charge of operations. If satisfactory arrangements as to price could be made, the matter was then submitted to the purchasing committee for the purpose of

determining suitability and acceptance of the product. Thereafter the members of the group organization would consider the offers and vote to accept or reject the seller's line to the exclusion of the lines of the seller's competitors. This, however, was not a rigid requirement in that the individual members could continue to handle competitive lines which they were already selling or for which they had a preference. In actual practice, most of the members of the group organization sold and distributed the manufacturers' lines accepted by the group.

5. The pricing practices of many of the manufacturers or sellers who entered into contracts with the respondent jobbers as members of Metropolitan Automotive Wholesalers Cooperative, Inc., consisted of the issuance of distributor or jobber price lists which listed the basic prices of the sellers' products. All allowances, discounts, and rebates were off the distributor or jobber price lists. As part of their pricing structure these sellers allowed a retroactive volume rebate based upon the total purchases of the customer during the entire year. For example, one such supplier granted annual volume rebates ranging from 3 percent on a yearly volume of \$1,800 in purchases, to 15 percent on purchases of a yearly volume of \$10,000 or more. In the case of the respondent jobbers, purchasing as members of Metropolitan Automotive Wholesalers Cooperative, Inc., the retroactive annual volume rebate allowed by the suppliers was based not on the total purchases of the individual jobbers, but instead was based on the total purchases of all members of the group organization.

6. The purchasing procedure followed by the respondent jobbers as members of Metropolitan Automotive Wholesalers Cooperative, Inc., provided for the forwarding of purchase orders by the individual respondent jobber member to the seller, either directly or through the group office. Monthly settlements were made between the supplier and the group office for the aggregate purchase orders of all the respondent jobber members so received, and each respondent jobber member also settled monthly with the group office for its individual purchases so made. The annual volume rebate allowed by the seller was based upon the aggregate purchases of the members of the group and was paid to the group office, which in turn distributed such volume rebate, less expenses, to its jobber members in proportion to the amount of such jobber's individual purchases.

7. The annual volume rebates were granted and allowed by the sellers to each individual respondent jobber member on the

basis of the total purchases of all the members of the group, irrespective of whether or not the amount of such individual member's purchases met with the requirements of any particular bracket of the seller's volume rebate schedules as set forth in the seller's contracts. The group buying organizations, Automotive Group Buyers, Inc., and Metropolitan Automotive Wholesalers Cooperative, Inc., were in reality bookkeeping devices for the collection of rebates, discounts and allowances received from sellers for purchases made by their jobber members. Such respondent jobbers in fact purchase their requirements of the seller's products direct from the seller and at the same time receive a more favorable price or a higher rebate based upon the combined purchases of all the members.

8. The purpose of the respondent jobbers in organizing and maintaining respondents Automotive Group Buyers, Inc., and Metropolitan Automotive Wholesalers Cooperative, Inc., was to obtain a price lower than a jobber respondent could obtain on the amount of his purchases if made as a nonmember of the group. The jobber respondents knew that the net prices obtained through the use of the group buying device were not based upon the quantities or other factors involved in any particular sale, but rather upon the combined dollar amount of all sales to them as purchasers, and bear relation to factors other than actual costs of production or delivery. The method of purchase was substantially the same as if the jobber member had been operating individually instead of as a group member. The deliveries by the seller were made direct to the respondent jobber in the same manner as deliveries would have been made had respondent jobber been a purchaser independent of any group organization. Respondent jobbers further knew that they were getting a lower price through the means of the group organization than was obtained by jobbers competing with them in the resale of the supplier's products in the same marketing area where such competitors were not members of a buying group.

9. Illustrative of the monetary benefits derived by respondent jobbers as members of the group buying organization as opposed to those individual purchasers buying without the benefit of such group consolidation of purchases and as opposed to what the respondent jobber would have paid had it been operating without the benefit of group consolidation of purchases are the following tabulations taken from Commission Exhibits 1, 194 and 195; and tabulations taken from Commission Exhibits 2 and 276 B-C:

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RESPONDENT JOBBERS' "GROUP-BUYING" METHOD OF PURCHASING¹

Manufacturer's published discount schedule to trade	Member-jobbers					
	Actual Net purchases each member jobber	Manufacturer's schedule discount rate applicable	Manufacturer's schedule discount amount due	Manufacturer's "group" discount rate	Manufacturer's "group" discount amount paid	Actual price difference
Net purchases	1	2	3	4	5	6
		Percent		Percent		
Under \$1,800.....		None		19.99	\$29.26	\$29.26
\$1,800 - \$2,400.....		3		20.02	231.15	231.15
\$2,400 - \$3,600.....		5		20.00	394.84	394.84
\$3,600 - \$5,000.....		7		20.53	1,063.82	387.98
\$5,000 - \$6,500.....		9		19.93	1,031.77	365.73
\$6,500 - \$8,000.....		11		20.00	2,740.29	683.07
\$8,000 - \$10,000.....		13		20.02	305.06	305.06
Over \$10,000.....		15		20.00	445.72	378.86
				19.79	379.30	321.80
				20.00	2,081.17	520.04
				20.00	15.36	15.36
Totals.....	\$43,590.65		\$4,732.42		\$8,737.78	\$4,005.32

¹ Compiled from Commission Exhibit No. 1, showing actual purchases from Exhibit Nos. 194 and 195, being the applicable Standard Motor Products, Inc. Standard Motor Products, Inc. during 1949 and comparison with Commission rebate contract and endorsement.

RESPONDENT JOBBERS' "GROUP-BUYING" METHOD OF PURCHASING²

Manufacturer's published discount schedule to trade		Member-jobbers	Actual net rebateable purchases each member jobber	Manufacturer's schedule non-retroactive discount rate applicable	Manufacturer's schedule discount amount due	Manufacturer's "group" discount rate	Manufacturer's "group" discount amount paid	Actual price difference
Net purchases	Non-retroactive rebate							
	Percent		1	2	3	4	5	6
\$600 or Less.....	None	M. & G. Auto Supplies, Inc.....	2,585.60	{ 0; 5; 7½; 10; 12½	\$180.70	Percent 20.10	\$519.79	\$339.09
\$600 to \$1,000.....	5	Clinton Square Auto.....	10,866.90	{ 0; 5; 7½; 10; 12½; 17½	1,609.21	20.17	2,192.30	583.09
\$1,000 to \$1,500.....	7½	American Motor Specialties.....	3,556.97	{ 0; 5; 7½; 10; 12½; 17½	329.97	20.13	716.10	386.13
\$1,500 to \$2,000.....	10	Bronx Gear & Bearing Co.....	1,836.90	0; 5; 7½; 10	91.19	20.08	368.91	277.72
\$2,000 to \$3,000.....	12½	Cypress Auto Parts Co.....	306.32	None		20.12	61.63	61.63
\$3,000 and over.....	15	Hofwell-Treiber, Inc.....	2,353.06	{ 0; 5; 7½; 10; 12½	151.63	20.04	471.62	319.99
		South Shore Motor Parts Co.....	2,130.27	{ 0; 5; 7½; 10; 12½	123.78	20.10	428.20	304.42
		Miller Auto Supply Co.....	82.75	None		20.00	16.55	16.55
		Eveready Automotive Co.....	915.00	0; 5	15.75	20.04	183.36	167.61
Totals.....			\$24,633.77		\$ 2,502.23		\$4,958.46	\$2,456.23

² Compiled from Commission Exhibit No. 2, showing actual purchases from Exhibits Nos. 276 B & C, being the applicable Whitaker Cable Corporation

Whitaker Cable Corporation during 1949 and comparison with Commissionrebate contract.

10. The automotive parts industry is a highly competitive business involving small margins of profit. The importance of discriminatory prices allowed by the various sellers is pointed up by the importance given by the respondent jobbers to the 2 percent cash discount as increasing their margin of profit and reducing the cost of acquisition of their merchandise. Through the lower cost of merchandise, resulting from such discriminatory prices, the respondent jobbers obtained a competitive advantage over their competitors selling the same or comparable merchandise in the same trade area who receive discounts or rebates based upon the individual purchases.

11. The complaint in this proceeding named as respondents certain individuals who were described as officers and directors of Metropolitan Automotive Wholesalers Cooperative, Inc. Due to the length of time this proceeding has been pending, and since the officers and directors of said group organization change from time to time, it is the opinion of the hearing examiner that no useful purpose would be served by entry of an order against the individuals named in the complaint as officers and directors of Metropolitan Automotive Wholesalers Cooperative, Inc.

CONCLUSION

1. The lower prices granted to the respondent jobbers through the group buying device constituted discriminations in price within the intent and meaning of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. The competitive opportunities of the less favored competitors of the respondent jobbers were injured when such competitors had to pay substantially more for a supplier's products than the respondent jobbers had to pay. The various Circuit Courts of Appeals in six cases have held that the granting of discounts or rebates by suppliers through group buying organizations, under the conditions and circumstances as herein found constituted a price discrimination in violation of Section 2(a) of the Clayton Act.¹

2. The method of operation of the respondents Automotive Group Buyers, Inc., and Metropolitan Automotive Wholesalers

¹ Whitaker Cable Corporation v. Federal Trade Commission (C.C.A. 7) 239 F.2d 253; Moog Industries, Inc. v. Federal Trade Commission (C.C.A. 8) 238 F.2d 43; E. Edelman & Company v. Federal Trade Commission (C.C.A. 7) 239 F.2d 152; C. E. Niehoff & Co. v. Federal Trade Commission (C.C.A. 7) 241 F.2d 37; P. & D. Manufacturing Co., Inc. v. Federal Trade Commission (C.C.A. 7) 245 F.2d 281; P. Sorensen Manufacturing Co., Inc. v. Federal Trade Commission (C.C.A. D.C.) 246 F.2d 687.

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Cooperative, Inc., including the adoption of the line of one seller to the exclusion of its competitors and the holding out to sellers the prospects of increasing their volume and obtaining new customers, served as an inducement to manufacturers and sellers of automotive parts, accessories and supplies to grant to the respondent jobbers a lower price than would have otherwise been obtained.

3. The price differentials involved in this proceeding were substantial. The volume rebates, discounts and other allowances granted by the sellers in this proceeding were made in accordance with such sellers' published price lists distributed generally to their jobber customers. The volume rebates allowed to the respondent jobbers were in fact off scale prices based upon the aggregate purchases of all the members rather than upon the purchases of the individual member. Each of the respondent jobber members knew, or should have known, that the discriminatory prices granted them by sellers in the form of a volume rebate based upon the aggregate purchases of all members could not be cost justified. They knew that they, as well as their competitors in the same trade area, were buying from the seller at the sellers' published price list; that shipments of merchandise by the sellers were made direct to the jobber respondents in the same manner and in substantially the same quantities as to their competitors; and that they received a lower price by means of the group buying organization than their competitors were receiving and lower prices than they themselves would have received had the volume rebate been based upon their individual purchases instead of the aggregate purchases of all the members. The jobber respondents knew that the rebates allowed were based not on the quantities or other factors involved in any particular sale, but rather upon the combined dollar amount of all sales to the group organization and bear relationship to factors other than the actual costs of production and delivery. The respondent jobbers were successful operators in a highly competitive market and knew the facts of life so far as the automotive parts market was concerned and knew that no cost justification could be maintained by the sellers since no difference in the cost of manufacture, sale or delivery was involved. Furthermore, the jobber respondents were placed upon notice as to the illegality of price discriminations received through the medium of group buying organizations by the initial decisions of the hearing examiners, and the decisions

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of the Federal Trade Commission and the Circuit Courts of Appeals in the following cases:

Whitaker Cable Corporation, initial decision, February 11, 1954; Commission affirmance, April 29, 1955; Court affirmance, 239 F. 2d 253 (C.C.A. 7, December 14, 1956).

Moog Industries, Inc., initial decision, March 8, 1954; Commission affirmance, April 29, 1955; Court affirmance, 238 F. 2d 43 (C.C.A. 8, November 5, 1956).

E. Edelmann & Company, initial decision, March 5, 1954; Commission affirmance, April 29, 1955; Court affirmance, 239 F. 2d 152 (C.C.A. 7, December 14, 1956).

C. E. Niehoff & Co., initial decision, July 6, 1954; Commission affirmance, May 17, 1955; Court affirmance, 241 F. 2d 37 (C.C.A. 7, January 9, 1957).

P. & D. Manufacturing Co., Inc., initial decision, December 21, 1954; Commission affirmance, April 26, 1956; Court affirmance, 245 F. 2d 281 (C.C.A. 7, April 30, 1957).

P. Sorensen Manufacturing Co., Inc., initial decision, February 2, 1956; Commission affirmance, June 29, 1956; Court affirmance, 246 F. 2d 687 (C.C.A., D.C., May 23, 1957).

Regardless of these various decisions which came to the attention of the respondent jobbers they had, up until the time of the close of the hearings in these proceedings, continued the practice of purchasing through the group buying organizations.

4. It is not necessary to determine whether or not the respondent Metropolitan Automotive Wholesalers Cooperative, Inc., is a cooperative within the meaning of Section 4 of the Robinson-Patman Act since the law is well settled that Section 4 does not authorize cooperative associations to engage in practices forbidden by Section 2 of the Clayton Act or exempt them from its provisions (*Quality Bakers of America, et al. v. Federal Trade Commission*, 114 F. 2d 393).

5. The acts and practices of the respondent jobbers in knowingly inducing and knowingly receiving discriminations in price through the use of the group buying organizations Automotive Group Buyers, Inc., and Metropolitan Automotive Wholesalers Cooperative, Inc., prohibited by subsection (a) of Section 2 of the Clayton Act, as herein found are in violation of subsection (f) of Section 2 of said Act.

ORDER

It is ordered, That American Motor Specialties Co., Inc., a

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corporation; Bronx Gear & Bearing Co., Inc., a corporation; Clinton Square Auto Parts Corp., a corporation; George Boelger, Mrs. Anna Marian Boelger, Julius N. Cohen, and Mrs. Cherrie Cohen, copartners trading as Eveready Automotive Company; Green's Auto Gear & Parts Co., Inc., a corporation; Howell Treiber, Inc., a corporation; M & G Auto Supplies, Inc., a corporation; Miller Auto Supply & Equipment Co., Inc., a corporation; North Shore Auto Parts Co. of Flushing, Inc., a corporation; S & R Auto Parts, Inc., a corporation; Sanders & Ruskin, Inc., a corporation; South Shore Motor Parts Co., Inc., a corporation; Arthur Schwartz, doing business as Cypress Auto Parts Company, A. Jacoby & Sons, Inc., a corporation; K & G Auto Parts, Inc., a corporation; Norwood Distributors, Inc., a corporation; and Chester Klein, and Mrs. Isabell Klein, copartners trading as Republic Auto Parts, and their respective officers, agents, representatives and employees, in connection with the offering to purchase or purchase of any automotive parts, accessories or supplies or other similar products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

(1) Knowingly inducing, or knowingly receiving or accepting, any discrimination in the price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price known by respondents to be below the net price at which said products of like grade and quality are being sold by such seller to other customers where the seller is competing with any other seller for respondents' business or where respondents are competing with other customers of the seller.

(2) Maintaining, managing, controlling or operating respondent Automotive Group Buyers, Inc., and Metropolitan Automotive Wholesalers Cooperative, Inc., or any other organization of like character, as a means or instrumentality to knowingly induce, or knowingly receive or accept, any discrimination in the price of automotive parts, accessories or supplies, by directly or indirectly inducing, receiving or accepting from any seller a net price known by respondents to be below the net price at which said products and supplies of like grade and quality are being sold by such seller to other customers where the seller is competing with any other seller for respondents' business or where respondents are competing with other customers of the seller.

It is further ordered, That respondents Automotive Group Buyers, Inc., a corporation, and Metropolitan Automotive Wholesalers Cooperative, Inc., a corporation, and their respective mem-

bers, officers, agents, representatives and employees, in connection with the offering to purchase, or purchase, of any automotive parts, accessories or supplies or other similar products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

(1) Knowingly inducing, or knowingly receiving or accepting, any discrimination in price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price known by respondents to be below the net price at which said products and supplies of like grade and quality are being sold by such seller to other customers where the seller is competing with any other seller for respondents' business or where respondents are competing with other customers of the seller.

It is further ordered, That the complaint be dismissed as to the following individual respondents: Alfred Epstein, Isadore Strulson, Abraham Lonoff, Benjamin Green, Peter J. Treiber, Meyer Gladstein, Joseph Finkelstein, Max Leifer, Morris Garber, Herman Sanders, George G. Korshin, Joseph Jacoby, Max Granoff, and Benjamin Peskoe.

For the purpose of determining the "net price" under the terms of this order, there should be taken into account discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are effected.

OPINION OF THE COMMISSION

By ANDERSON, Commissioner:

The complaint herein charges the respondents with violating Section 2(f) of the Clayton Act, as amended by the Robinson-Patman Act. The hearing examiner in his initial decision held that the allegations of the complaint were sustained by the evidence and ordered respondents (except for certain individual respondents against whom the complaint was dismissed) to cease and desist the practices found to be unlawful. Respondents have appealed from this decision.

Respondents herein are jobbers for automotive parts, accessories and supplies, the membership corporation of which they are members and the predecessor of this corporation, now dormant.

The hearing examiner's findings and conclusion might be summarized as follows:

The buying group, Metropolitan Automotive Wholesalers Cooperative, Inc., and its predecessor, Automotive Group Buyers,

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Inc., were organized and operated by respondent jobbers for the purpose of inducing the granting or allowance of lower prices by their suppliers and were in fact bookkeeping devices for the collection of rebates, discounts and allowances received from such suppliers for purchases made by the jobber members. The operation of the buying groups did not result in any significant savings to the sellers with which they dealt. This is obvious because of the fact that the members continued to purchase their requirements in substantially the same manner and to receive deliveries directly from the sellers in substantially the same quantities as though they were operating individually instead of as members of a group. The members, however, received more favorable prices through use of the group buying device than competitors who were not members of a buying group. The discounts allowed to them by various sellers through the application of retroactive volume rebate schedules were based upon the aggregate purchases of all members rather than upon the purchases of the individual members. Respondents were aware of these price differences and of the probable adverse competitive effect thereof. They also knew that the discounts which they received were based not on the quantities or other factors involved in any particular sale, but rather upon the combined dollar amount of all sales to the group organization and were related to factors other than the actual costs of production and delivery. Consequently, they knew or should have known that the lower prices which they received were discriminatory and could not be cost justified.

Respondents in their appeal except to these findings and conclusions and to several rulings of the hearing examiner.

In their exception to certain alleged procedural errors, respondents contend that the hearing examiner erred in admitting into evidence three charts introduced by counsel supporting the complaint. Two of these charts were tabulations of sales made by Standard Motor Products, Inc., and Whitaker Cable Corporation to respondents during the year 1949. The third was a tabulation of sales made by Moog Industries, Inc., during 1947, 1948 and 1949 to buyers located in New Brunswick, N.J., Newark, N.J., and Brooklyn, N.Y. According to the record, information contained in these charts was obtained by Commission accountants from the business records of the three manufacturers. These charts were received following the accountants' testimony as to

how they were prepared and as to the source of the data contained therein. Although respondents failed to cite any authority in support of their position, they contend that since the accounting witnesses who testified concerning the charts had not made the original entries in the records of the manufacturers, the admission of the charts into evidence was in violation of Section 1732 of the Judiciary and Judicial Procedure of the United States Code Annotated.

The hearing examiner's ruling on this point was correct. *Federal Trade Commission v. Cement Institute, et al.*, 333 U.S. 683; *John Bene v. Federal Trade Commission*, 299 F. 2d 468; *Opp Cotton Mills v. Administrator*, 312 U.S. 126. Even if the technical rules for the exclusion of evidence applicable to jury trials applied to this proceeding, the charts, which had been prepared by accountants from records kept in the regular course of business, would be admissible. *Wigmore on Evidence*, 3d Ed., Book V, 1955 Supp., Sec. 1530; *United States v. Mortimer*, 118 F. 2d 266.

Respondents also contend that the distribution made by the group to its members did not result in lower net prices to them. This would seem to be contradicted by the following statement made by their counsel in the oral argument to dismiss at the close of the case-in-chief:

I will concede at the very opening of my motion that if the Government contends that the cooperative was organized for the purpose of ultimately reducing the costs of the members' merchandise by the distribution which he received from the cooperative, I would concede it was done for that purpose. . . .

We think the evidence is clear that respondent jobbers were not in fact purchasing their requirements from the membership corporation but were using this device to obtain discounts or rebates which they would not have received if they had purchased individually. As found by the hearing examiner, the only change in the purchasing procedure followed by jobbers after becoming members of the group was that, as members, they forwarded their purchase orders through the group headquarters and were billed in the same manner. It is also clear that annual volume rebates based upon the aggregate purchases of all members of the group were paid by the seller to the corporation and that these rebates or discounts, less expenses, were distributed to the members in proportion to the amount of each jobber's individual purchases. The fact that the corporation did not distribute these rebates immediately upon receipt thereof from the seller

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and was thereby able to build up a surplus fund, as pointed out by the respondents, is of no particular significance. The important facts are that the corporation was merely a device or instrumentality for collecting the rebates, that these rebates were paid, or were earmarked for payment, to the individual members, and that the prices paid by the members were thereby reduced by approximately the difference between the amount of such rebates and the amount of the rebates which they would have received based upon their individual purchases.

Respondents also argue that such distribution of rebates is permissible under Section 4 of the Robinson-Patman Act. In order to accept this argument we must necessarily hold that a cooperative association may with impunity engage in practices forbidden not only by Section 2(f) of the Clayton Act but by that entire section, since there is nothing in Section 4 which would indicate that its provisions are applicable to one subsection of Section 2 to the exclusion of the others. We do not construe Section 4 as granting such immunity to cooperative associations and consequently must reject respondents' argument on this point. *Quality Bakers of America, et al. v. Federal Trade Commission*, 114 F. 2d 393.

Respondents also contend that there is no proof in the record that any competitor purchased goods of "like grade and quality" to those purchased by respondents, citing the testimony of two witnesses, competitors of respondent jobbers, who, it is argued, did not testify as to which line of Moog products they bought or sold. The two witnesses referred to were called to testify on the subject of competitive injury and not for the purpose of establishing that merchandise sold to respondent jobbers and their competitors was of like grade and quality. The evidence does show, however, that these witnesses and respondent jobbers did in fact handle Moog's coil action line. Proof that respondent jobbers received more favorable prices than their competitors in the purchase of Moog's coil action line appears in the aforementioned tabulation of sales by Moog of this line to respondent jobbers and other jobbers in Newark, N.J., New Brunswick, N.J., and Brooklyn, N.Y. That all items in a particular line may be "sufficiently comparable for price regulation by the statute" is fully explained in *Moog Industries, Inc. v. Federal Trade Commission*, 238 F. 2d 43.

Respondents also urge that there is no proof that the lower prices received by them would lessen competition or tend to

create a monopoly. It is our opinion that the findings by the hearing examiner on this point are fully supported by the record. The evidence shows that these jobbers are engaged in a highly competitive business involving the sale of thousands of items at small margins of profit. The importance of the higher rebates which they received is illustrated by the fact that they and other jobbers who testified invariably take advantage of the 2% cash discount allowed by their suppliers. The fact that they consider this discount to be of importance in increasing their margin of profit and reducing the cost of acquisition of their merchandise is clear. In view of this competitive situation, it is our opinion that the receipt by respondent jobbers of the preferential prices reflected by the record may be substantially to lessen competition as between the jobbers and their competitors.

Respondents assert, however, that from 1948 to 1954 their annual purchases of Moog's coil action line dropped from \$60,895 to \$14,031 and argue that this decline in purchases should be attributed solely to the forces of competition at the jobber level. In the circumstances shown by this record, we do not believe that the mere showing of a decline in sales, which may logically be attributed to any number of causes, is inconsistent with the findings of potential competitive injury.

Relying on the Supreme Court's decision in *Automatic Canteen Company of America v. Federal Trade Commission*, 346 U.S. 61, respondents insist that counsel supporting the complaint has failed to meet the burden of proof necessary to establish that respondent jobbers have knowingly induced or received prohibited discriminatory prices in violation of Section 2(f) of the Clayton Act. This same point was recently raised in another case involving virtually the same factual situation. *In the matter of D & N Auto Parts Company, Inc., et al.*, Docket 5767, and in the matter of *Borden-Aicklen Auto Supply Co., Inc., et al.*, Docket 5766. As we stated in that opinion:

The *Automatic Canteen* case, *supra*, holds, however, that in order to establish a violation of Section 2(f), the Commission as a part of its case must show more than that the buyer knew of the price differentials and of their probable competitive effect. In other words, under the "balance of convenience" rule applied by the court, the burden is on counsel in support of the complaint to come forward originally with evidence that the buyer is not a mere unsuspecting recipient of the prohibited discriminations. Such evidence, under the Court's opinion, must include a showing that the buyer, knowing full well that there was little likelihood of a cost justification defense available to the seller, nevertheless induced or received the discriminatory prices.

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Just what evidence is necessary to make this showing, as the court indicated, will, of necessity, vary with the circumstances of each case. That trade experience in a particular situation can afford a sufficient degree of knowledge, however, is clear.

It is obvious from the record in this matter that respondent jobbers were receiving rebates which ranged up to 19% higher than those received by competing jobbers and that respondents were aware of these price differences and of the probable adverse effect thereof on competition. They also knew that the only difference in the methods or quantities in which goods were sold and delivered to members of the group and to nonmember jobbers which could give rise to a savings in cost to the seller was in the manner in which the various purchasers were billed. Only one billing was required for purchases by all members of the group, whereas separate billings were required for other jobbers operating individually. The savings to the seller on billing costs would not be significant, however, and certainly would not be sufficient to justify price differences ranging up to 19%. Respondents, therefore, having knowledge of this fact, knew or should have known that the lower prices which they received could not be cost justified.

Respondents also knew that the price differences they received had their source in a rebate system and that the rebates allowed by Moog and various other sellers were based, not on the quantities or other factors involved in any particular sale, but rather upon the combined dollar amount of all sales to a purchaser, or to a group, made in the preceding year. Under such a system the prices necessarily bear relation to factors other than actual costs of production, sale or delivery, and the inevitable result is systematic price discrimination. *Moog Industries, Inc. v. Federal Trade Commission, supra*. Consequently, respondents should have known that the sellers could not have cost justified their lower prices to them.

We do not construe the Court's opinion in *Automatic Canteen* as imposing upon counsel supporting the complaint the additional burden of showing as a part of his case that respondents knew or should have known that the "defenses" of fluctuating market conditions and good faith meeting of lower competitive prices were not available to the sellers. As we stated in the matter of *D & N Auto Parts Company, Inc., et al., supra*, we believe that the respondents would more readily have evidence concerning such "defenses" and that under the "balance of convenience"

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doctrine would have the burden of coming forward with it. However, if in this respect we are in error, it seems clear that the required knowledge on the part of respondents has been shown.

As to the meeting of competition defense available to a seller under Section 2(b), respondents knew or should have known that the rebate system used by their suppliers was unlawful, for the reasons stated above, and that any competing seller granting the same prices to them on the same basis would also be using an illegal pricing system. Consequently, they should have known that their suppliers could not be meeting in good faith the equally low price of a competitor since the prices they would be meeting would not be lawful prices.

In the circumstances shown to exist, respondents also should have known that the price discriminations involved here were not caused by price changes made from time to time in response to changing conditions affecting the market for or the marketability of goods concerned. They knew that these discriminations which continued over a period of years did not result from occasional or sporadic changes in the seller's basic prices but from the use of a continuing rebate system. Thus, they knew or should have known that the lower prices they received did not bear any relation to changing market conditions and that the seller could not avail itself of the defense provided by the last proviso of Section 2(a).

Respondents' appeal is denied and the initial decision will be adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal and adopting the initial decision:

It is ordered, That the respondents, except those against whom the complaint has been dismissed, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order contained in the initial decision.

Decision

55 F.T.C.

IN THE MATTER OF
CANNON MILLS, INC.

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

Docket 7115. Complaint, Apr. 10, 1958—Decision, Mar. 12, 1959

Order requiring a seller of textile products, with main office in New York City, to cease advertising falsely that its "X-ron" blankets, containing 65% rayon and 25% cotton, were composed predominantly of orlon and nylon, and to disclose clearly when the silk-appearing bindings were acetate.

Mr. Alvin D. Edelson for the Commission.

Mr. James L. Rankin, of *Geary & Rankin*, of Chester, Pa., and *Mr. William H. Beckerdite*, of Concord, N.C., for respondent.

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on April 10, 1958, issued and subsequently served its complaint in this proceeding upon the respondent named in the caption hereof, charging it with unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondent's answer thereto, hearings were held, at which testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before the above-named hearing examiner, duly designated by the Commission, and said testimony and other evidence were duly recorded and filed in the office of the Commission. In addition, a hearing was held on September 5, 1958, for oral argument before the hearing examiner. Thereafter, the proceeding regularly came on for consideration by said hearing examiner on the complaint, the answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions presented by counsel and the said oral argument. Said hearing examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public, and makes the following findings as to the facts, conclusions drawn therefrom, and order.