

of September 1960, become the decision of the Commission; and, accordingly:

It is ordered, That respondents herein 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 to cease and desist.

IN THE MATTER OF

FRED BRONNER CORPORATION, ET AL.

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

Docket 7068. Complaint, Feb. 20, 1958—Order, Sept. 29, 1960

Order dismissing—lacking proof of substantial lessening of competition—complaint charging a toy importer in New York City with violating Sec. 2(a) of the Clayton Act by granting a discount of 3% off list price to some purchasers—members of March of Toys, Inc., a buying corporation for a group of toy jobbers and wholesalers—but not to others competing with them.

Mr. Lewis F. Depro and Mr. Jerome Garfinkel for the Commission.
Mr. Harry Katz, of New York, N. Y., for respondents.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

The complaint herein was issued by the Commission on February 20, 1958, and charged that the respondents have violated section 2(a) of the Clayton Act, as amended. The complaint alleges that the respondents have been, and are now, discriminating in price between different purchasers of their toys by selling such toys to some purchasers at substantially higher prices than to other purchasers. Specifically, the complaint states that since 1954 a discount of three percent off the list price has been given to some purchasers but not to others, the favored purchasers being members of a corporation known as March of Toys, Inc., who are toy jobbers and wholesalers. The complaint further alleges that the discrimination in price was substantial and may have the effect of substantially lessening competition between respondents and their competitors, as well as between the favored and unfavored purchasers of respondents.

The respondents in their answer to the complaint admit that for a brief and inconsequential period after 1954, an allowance of three percent was made in some instances, but denied such allowance was

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contrary to law. The answer set forth the following affirmative defenses:

1. The discounts in question were so trivial and insignificant that the effect was not such as may substantially lessen competition or tend to create a monopoly in any line of commerce.
2. Respondents voluntarily abandoned and discontinued the granting of the discount prior to the issuance of the complaint and have not resumed, nor do they intend to resume, the granting of such discount at any time in the future.
3. The discount made only due allowance for differences in cost.
4. The discount was granted in good faith and without any intention on the part of the respondents to violate any provision of law.

Hearings were held on April 14, June 15, and August 31, 1959, in New York, N. Y. Stipulations entered into by the counsel of the parties hereto setting forth what four proposed witnesses located at Philadelphia, Pa., three proposed witnesses located at Chicago, Ill., and two proposed witnesses from New York City would have testified to had they been called and used in support of the complaint eliminated the necessity of holding further hearings in New York City and hearings at Philadelphia and Chicago. Thereafter, Proposed Findings of Fact and Conclusions were filed by all counsel. There is little, if any, dispute between the parties as to the facts of the case, the questions are as to the conclusions derived therefrom.

The hearing examiner has given consideration to the proposed findings filed by the parties hereto, and all findings of fact and conclusions not hereinafter specifically found or concluded are herewith rejected.

Upon consideration of the entire record herein, the examiner makes the following:

FINDING OF FACTS

1. Fred Bronner Corporation is a corporation organized 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 251 Fourth Avenue, New York, N. Y. Since April 1, 1956, it has been engaged in the importation of toys from abroad and the sale thereof to wholesalers, jobbers and department stores located in various parts of the United States. The respondent Fred Bronner has been the sole owner of the stock, the president of the corporation since its inception, and has controlled the policies thereof during said period. Between April 1954 and April 1, 1956, Fred Bronner, as an indi-

vidual, engaged in the same type of business as the corporate respondent has conducted since April 1, 1956.

At the outset of his business in 1954, Mr. Bronner rented one room in New York City which served as both office and storage space. He had no employees, acted as his own salesman, did all the packaging and shipping, typed all invoices and kept his own records. During his absence from the office, his telephone messages were taken by a telephone answering service. Mr. Bronner hired his first employee, a secretary, in February 1955, and two or three months later he engaged a shipping clerk. Two more employees were added sometime in 1956, one more in November 1957, and two more in February 1959, making a total of seven employees.

At no time did respondents employ salesmen to sell their wares but have used independent sales representatives who are paid the standard commission of five percent. The total of sales made by independent sales representatives in 1954 and the greater part of 1955 was inconsequential. It was not until late in 1955 that Mr. Bronner started to organize an independent sales representative force, and by January 1956 he had five such representatives soliciting orders.

One of the first lines of toys imported by Mr. Bronner was the "Matchbox" series. This is a series of tiny metal miniatures of different kinds of vehicles, such as cars and trucks, which are enclosed in boxes resembling matchboxes. Other domestic concerns also import this line. The "Matchbox" series has represented by far the major part of the respondents' business since 1954. The respondents sold the "Matchbox" series to wholesale customers for \$2.55 per dozen. Wholesalers sold these toys to retailers for \$3.60 per dozen, which is a mark-up of approximately 40 percent. The toys retail for 49 cents each.

For the year 1954, Mr. Bronner's gross sales amounted to approximately \$20,000 which increased to \$200,000 in 1955, \$350,000 in 1956 and \$450,000 in 1957.

In the conduct of their business respondents have been in competition with other corporations, partnerships and individuals in the importation, sale and distribution of toys.

In the course and conduct of their business respondents have engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, having shipped their products from their places of business in the State of New York to purchasers located in other States.

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In or about December 1954, respondent Fred Bronner entered into an arrangement with an association of toy wholesalers known as March of Toys, Inc., whereby Fred Bronner agreed to grant the members of said association a three percent discount upon all toy purchases made from said individual respondent. March of Toys is a buying organization for a group of wholesalers dealing in toy products, and its principal office is located in New York, N. Y. At the time the arrangement was made for the discount, the following concerns were members of the March of Toys:

<i>Name of Concern</i>	<i>Location</i>
1 ¹ Baltimore Products Company-----	Baltimore, Md.
2 Consolidated Athletic Supply Company -----	Detroit, Mich.
3 Federal Wholesale Company -----	Los Angeles, Calif.
4 General Novelty Company -----	Philadelphia, Pa.
5 Universal Merchandise Co. -----	New Orleans, La.
(now Gotham Industries, Inc.) -----	
6 Greenman Brothers -----	Mineola, N.Y.
7 Nesson Sales Co. -----	Norfolk, Va.
8 Rochester Stationery Co. -----	Rochester, N.Y.
9 Schwarz Paper Co. -----	Lincoln, Nebr.
10 M. Seller Co. -----	San Francisco, Calif.
11 Schrager Bros. -----	Pittsburgh, Pa.
12 Singerman & Wasserman -----	St. Louis, Mo.
13 Stratton & Terstegge -----	Louisville, Ky.
14 Thebault Olson Corp. -----	Chicago, Ill.
15 Thoreson Sales Co. -----	Dallas, Texas
16 Watson-Triangle Co. -----	Miami, Fla.
17 Fellows & Co. -----	Boston, Mass.
18 Harold Hahn Co. -----	New Haven, Conn.

¹ In tabulation hereinafter set forth, the number listed above to the left of the name of the concern will be used to identify the concern.

Following the aforementioned discount arrangement, Fred Bronner received orders from, and shipped his products to, various members of March of Toys, located in the State of New York and in other States. Upon such sales the respondents allowed a discount of three percent of the wholesale price, irrespective of the size of the order. On each invoice rendered by the respondents to such purchasers the discount was noted thereon. The corporate respondents after it came into existence in April 1956, allowed the three percent discount to four members of March of Toys.

The respondents' gross sales to members of March of Toys during the period when the three percent discount was allowed, the total discounts allowed to such members and the month and year of the last discount given, were as follows:

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	1955		Last discount given	1956	
	Gross	3 Percent		Gross	3 Percent
1.....	\$2,270.24	68.40	11/55	\$2,113.20	-----
2.....				1,482.76	-----
3.....					-----
4.....	146.40	4.28	4/55		-----
5.....	284.40	8.53	2/55		-----
6.....	2,626.80	77.01	3/56	797.46	22.03
7.....	886.50	26.50	10/55	630.90	-----
8.....	1,031.49	23.61	10/55		-----
9.....	390.60	11.72	4/55		-----
10.....	378.80	9.53	2/55	112.20	-----
11.....				189.45	-----
12.....	574.78	12.98	10/55		-----
13.....					-----
14.....	5,719.62	171.53	9/56	524.67	11.87
15.....	492.30	14.77	10/56	1,106.25	27.53
16.....	4,282.40	127.54	10/56	5,407.58	70.00
17.....					-----
18.....	6,944.60	196.69	11/56	4,201.28	102.14
Total.....	26,037.93	753.14		16,565.75	233.57

In addition to the members of March of Toys, the respondents granted a three percent discount to Schranz & Bieber Co., a wholesaler located in New York City. The discount granted to Schranz & Bieber Co., amounted to \$120.77 in 1955; \$85.14 in 1956; \$111.73 in 1957; and \$40.67 in 1958; a total of \$358.31.

All of the purchasers of respondents were allowed a discount of two percent on all invoices paid by the tenth day of the following month (2/10 E.O.M.). Excluding the members of March of Toys and Schranz & Bieber Co., no other purchaser of respondents was allowed the three percent discount or any other discount in lieu thereof. The toy products purchased from respondents by the customers who were allowed the three percent discount are of the same grade and quality as those purchased by other customers of respondents not receiving such allowance. In many instances, the dollar volume of purchases made by wholesalers not granted the three percent discount exceeded those made by members of March of Toys and Schranz & Bieber Co., who were receiving such allowances from respondents on purchases. Those wholesalers not receiving the three percent discount, purchased respondents' top products in the same manner as did those wholesalers who did receive the three percent discount.

Members of March of Toys who were allowed the three percent discount by respondents operated in the same areas and competed with other toy wholesalers who purchased from respondents but were not allowed the three percent discount by respondents. The record contains evidence of specific competition in the metropolitan areas of New York City, Philadelphia, Chicago and Baltimore between the favored and unfavored purchasers of respondents, but

inasmuch as there is no dispute on this point the details will not be related.

When the arrangement was made for the allowance of a three percent discount to March of Toys members, Fred Bronner did not know of the existence of a price discrimination statute and was unaware that the granting of the discount might involve a claim of violation of the statute. He did not become aware of the existence of a price discrimination statute until April 1956, when he was visited by an investigator representing the Commission. There is no merit to the asserted defense that the discount was granted in good faith and without any intention to violate any provision of the law. Ignorance of the law will not relieve one from, nor excuse him of, the consequences of his wrongful acts.

Although the respondents pleaded that the discount made only due allowance for difference in cost and there was some evidence that respondents did not have to pay the usual five percent commission in some instances on sales to the favored purchasers, no serious effort was made to assert this defense. Respondents did not keep any cost accounting records to determine specific or detailed operating costs.

To find a violation of section 2(a) of the Clayton Act, as amended, it must be established that the price discrimination by the respondents has the probable harmful effects, reading from the statute, "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." A price discrimination is not alone sufficient to constitute a violation of the act. The evil results at which the statute is directed are the possibility of a substantial lessening of competition, the tendency to create a monopoly, or the injury, destruction or prevention of competition. Therefore, the acts of the respondents, must not only amount to a price discrimination, but the price discrimination must be sufficient to constitute the evil which the law seeks to prevent.

There is no evidence in the record to establish that there has been an actual, substantial lessening of competition, injury, or that a degree of monopoly has been created by the acts of the respondents.

It is therefore necessary to make a determination from the evidence whether, or not, the price discrimination by the respondents has the probable harmful effect, "may substantially lessen competition." The word "substantially" does indicate that a reasonable possibility of lessening competition must exist. It must not be imaginary or illusive, but it must constitute a reasonable possibility that competition may be lessened. To make such a determination

some of the factors to consider are the amount of the discrimination, the size of respondents, their economic power and their position in the toy industry.

In *Whitaker Cable Corp. v. Federal Trade Commission*, 239 F. 2d 253 (7th Cir. 1956), certiorari denied 353 U.S. 938 (1957) the Court stated (at p. 256):

Petitioner's relative position in the industry standing alone is, of course, of no particular significance, but in so far as it reflects relative size, this is a material factor which the Commission should consider. Congress has not outlawed price differentials *per se*, unjustified though they may be. The Act was not intended to reach every remote, adverse effect on competition. The effect must be substantial. See *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 357, 42 S. Ct. 360, 66 L. Ed. 653; *Standard Oil Co. of Cal. & Standard Stations v. United States*, 337 U.S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371; *Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission*, 7 Cir. 191 F. 2d 786, at page 790, certiorari dismissed 344 U.S. 206, 73 S. Ct. 245, 97 L. Ed. 245, "And we construe the Act to require substantial, not trivial or sporadic, interference with competition to establish violation of its mandate." If the discrimination complained of does not, cannot and will not have the defined effect of injury to or substantial lessening of competition, or tendency to create a monopoly, the Act has not been violated and the Commission is without authority to prohibit such discrimination. *Anchor Serum Co. v. Federal Trade Commission*, 7 Cir., 217 F. 2d 867. This is implicit in the very language employed by the Act. Any other construction would turn the Act into price control law contrary to its manifest purpose. We do not mean to suggest that the Act may be violated a little without fear of its sanctions but rather that insignificant "violations" are not, in fact or in law, violations as defined by the Act. *If the amount of the discrimination is inconsequential or if the size of the discriminator is such that it strains credulity to find the requisite adverse effect on competition, the Commission is powerless under the Act to prohibit such discriminations whether first line or second line competition be involved.* [Emphasis added.]

In 1954, his first year in business, the gross sales of Fred Bronner totalled approximately \$20,000 and during that period no special discount was allowed. In 1955 the gross sales totalled \$200,000. During said year 11 of the 18 members of March of Toys made purchases totalling \$26,037.93 and each member was allowed the three percent discount totalling \$753.14. In 1956 the gross sales totalled \$350,000. During that year ten members made purchases totalling \$16,565.75 and five members were allowed discounts totalling \$233.57.

Other than what has been related, there was no evidence to show the importance or the substantiality of respondents' sales in the toy market. Government reports disclose that in 1956 the value of shipments by domestic toy manufacturers amounted to \$469,000,000 (*Annual Survey of Manufacturers*, U. S. Department of Commerce, 1956) while top imports during the same year amounted to

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\$39,000,000 at the importer's value (*Statistical Abstract of the United States*, U. S. Department of Commerce, 1957). Toy sales at wholesale in 1956 were therefore in excess of \$500,000,000.

It also appears from the record that the discount had no apparent effect upon competition for it did not induce members of March of Toys to continue to purchase respondents' line, nor did it deter other wholesalers from doing business with respondents. Sales to non-March of Toys members increased substantially as sales of March of Toys members fell.

It is found that the evidence of record in this proceeding is not sufficient to warrant the reasonable and logical inference therefrom that the price discrimination was such that it might lessen competition, or tend to create a monopoly or to injure, destroy or prevent competition with the respondents, or with any person who received the discount or with customers of either of them.

Late in 1955, within a year after the discount was first allowed, the respondent Fred Bronner of his own volition began to discontinue it. At that time he did acquire sales representation in various parts of the country and his selling agents were paid a commission on all sales effected in their respective territories, including sales made to members of March of Toys. About the end of 1955 Mr. Bronner went to the representatives of March of Toys, the one with whom he had made the arrangement for the discount allowance, and told him he could no longer continue to give the three percent discount and give the salesmen five percent commission in addition. The abandonment of the discount was not related to the investigation and was undertaken before the respondents were aware of the investigation. Respondents have unconditionally pledged never to resume the discount. The discounts were not discontinued at one time. Mr. Bronner explains this as follows: "It was just—perhaps I did not act like a firm the size of General Electric would do, as of January 1st there will be no discounts. I was a small man and I went about it the way a small man would. I spoke to Mr. Lang and told him I would discontinue the discount, and with individual members I started to discontinue giving them a discount."

As shown in a tabulation, hereinbefore set forth, five March of Toys customers of respondents received discounts during the year 1956. The last discount allowed to such members was in November 1956, and it has never been allowed since that time. There were two March of Toys customers who made purchases during the year 1956 but did not make any purchases in 1955. They were not allowed the three percent discount which would indicate that respondents had started to put into effect the program for a discontinuance of the discount.

As primarily pointed out the respondents favored one customer who was not a member of March of Toys, with the three percent discount. Fred Bronner testified, when used as a witness in support of the complaint, that only March of Toys customers had been granted the discount. At a subsequent hearing when Mr. Bronner was putting in his defense he corrected this statement when he testified that he had checked his records and found that he had granted Schranz & Bieber Co. a three percent allowance from 1955 to January 24, 1958, when the last allowance was given them. In explanation Mr. Bronner had this to say: "In connection with this, the reason why this discount, this allowance was continued so long, I really tried to find out for myself why it was done. I only discovered it now, without being aware of it, honestly, but this is actually what happened, and this is the only explanation I have."

The record shows that respondents cooperated to the fullest extent in the course of the investigation, withholding no information and making freely available to the investigator all records and information requested. In his appearances at the hearings Fred Bronner gave the definite impression of being honest and frank and it is the opinion of the hearing examiner that he has the desire to respect the law and he would not have knowingly violated the law. Considering all the circumstances of the case it would appear that respondents have voluntarily discontinued all of the practices involved in the complaint, that a resumption of those practices is not likely, and that everything that could be accomplished by a cease and desist order has already been accomplished.

CONCLUSIONS

1. In the course and conduct of their business in commerce, respondents for a period of time allowed certain of their purchasers a three percent price discount which was not offered or allowed other purchasers of respondents competing with said favored purchasers.
2. The commodities purchased by the competing favored and unfavored purchasers of respondents were of like grade and quality.
3. Many of the purchases involved in the discrimination in price were in commerce, as "commerce" is defined in the Clayton Act, as amended. In addition, commodities of like grade and quality were shipped by respondents from their place of business in New York State to competing favored and unfavored customers located in various other States of the United States.
4. There were no cost savings to the respondents with respect to their business operations which would have justified the difference in price to various purchasers.

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5. The evidence was not sufficient to warrant the reasonable and logical inference therefrom that the price discrimination was such that it 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 respondents or the purchasers who received the benefit of such discrimination, or with the customers of either of them.

6. Respondents had initiated a program to discontinue the price discrimination before they became aware of the investigation by the Commission and abandoned and discontinued such discrimination to members of March of Toys more than sixteen months before the issuance of the complaint; respondents co-operated fully with the Commission in the course of the investigation, there is no likelihood of resumption of the discount and respondents unconditionally pledged never to resume the discount.

ORDER

It is ordered, That the complaint herein be, and the same hereby is, dismissed.

OPINION OF THE COMMISSION

By KINTNER, *Chairman*:

The complaint herein charges respondents with violating Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. Counsel supporting the complaint have appealed from the hearing examiner's ruling dismissing the complaint and from the findings and conclusions on which this ruling was based. Respondents have also appealed from the hearing examiner's conclusion that the price differences here involved were not cost justified.

There is no dispute that respondents, in the sale of imported toys, granted certain wholesale customers a 3% discount off the wholesale price, which discount was not granted to other wholesalers competing with these favored customers. The favored purchasers, with one exception, were members of a corporation known as March of Toys, Inc., which operated as a buying corporation for a group of toy wholesalers located throughout the country. The record discloses that respondents began giving this discount in December, 1954, and that the last discount given to a member of March of Toys was in November, 1956. The only customer receiving a discount who was not a member of March of Toys was a wholesaler located in New York City, who received the 3% off wholesale price for purchases made from 1955 through January, 1958.

The facts concerning respondents' gross sales to March of Toys members and the dollar amounts of the discounts are set forth in the tabulation on page 5 of the initial decision. In summary, these figures show total gross sales to members in the amount of \$26,037.93 with a total discount of \$753.14 in 1955 and corresponding amounts of \$16,565.75 and \$233.57 in 1956. The highest discount given to a single member in 1955 was \$196.69 and the lowest amount was \$4.28. In 1956, the highest amount was \$102.14 and the lowest was \$11.87. The favored wholesaler who was not a member of March of Toys received discounts totaling \$120.77 in 1955; \$85.14 in 1956; \$111.73 in 1957, and \$40.67 in 1958.

The individual respondent began importing and selling toys in April, 1954, and incorporated this business on April 1, 1956, with himself as president and sole owner of all the stock. The record contains no evidence as to the relative size of respondents in the toy industry during the period in which the discount was granted. However, the record discloses that respondents' gross toy sales were approximately \$20,000; \$200,000; \$350,000; and \$450,000, respectively, for the years 1954 through 1957.

Counsel supporting the complaint contend that the hearing examiner erred in his ruling that the evidence fails to establish that the effect of the price difference may be substantially to lessen competition between competing purchasers. The hearing examiner based this ruling principally on the statement by the court in *Whitaker Cable Corp. v. Federal Trade Commission*, 239 F. 2d 253, 256 (7th Cir. 1956), Cert. denied 353 U.S. 938, that

If the amount of the discrimination is inconsequential or if the size of the discriminator is such that it strains credulity to find the requisite adverse effect on competition, the Commission is powerless under the Act to prohibit such discrimination whether first or second line competition be involved.

Since the court in that case sustained the Commission's finding that respondent was a major manufacturer in the industry there involved and that the amount of business done by respondent was substantial, the meaning of its statement is not entirely clear. The hearing examiner apparently interpreted the "amount of the discrimination" to mean the actual dollar amounts of the discount. However, it is contended by counsel supporting the complaint that the percentage rate of the discount should be the test for determining the probable effect on competition. They argue that the wording in the *Whitaker* case is not inconsistent with their position and point to the action of the same court in *E. Edelmann & Co. v. Federal Trade Commission*, 239 F. 2d 152 (7th Cir. 1956), Cert. denied 355 U.S. 941, which was decided on the same day. In that case, respondent

urged that the price discriminations and the profits derived therefrom by the favored purchasers were small or inconsequential and could only have negligible effects upon competition. Counsel supporting the complaint argue that the court in overruling this contention and sustaining the Commission's finding that the price differentials had the required adverse competitive effect, based its action on the percentage rate of the differential.

Regardless of whether the court in the *Whitaker* case meant the dollar amount or the percentage rate of the discount, it is our view that neither of these factors can be considered separate and apart from the other circumstances of record in determining whether a price discrimination has the proscribed adverse effects. As stated by the court in the *Whitaker* case, "Congress has not outlawed price differentials *per se*, unjustified though they may be." Either of the aforementioned factors must be viewed in the light of the actual competitive situation surrounding the particular pricing practice charged to be illegal. It is clear that this was done by the court in both the *Whitaker* and *Edelmann* cases. We turn therefore to a consideration of the competitive conditions of the market in this case as reflected by the record before us.

There is in the record a stipulation agreed to by counsel as to the testimony of eight toy wholesalers who purchased from respondents and who did not receive the 3% discount. Each stated that it is in competition with a member of March of Toys who is shown by the record to have been granted the 3% discount. Each testified that the 2% discount for cash allowed by respondents to all of their customers was deemed important to it and that it took advantage of cash discounts whenever offered, by others as well as respondents.

Two toy wholesalers were called as witnesses by counsel supporting the complaint. Both testified that they purchase from respondents, do not receive the 3% discount, and resell in competition with the wholesalers who do. Both stated that they take advantage of the 2% cash discount. One testified that his overall net profit ran between 2% and 5% and that a 3% discount would be definitely important to his business. During the years 1956 and 1957 the total sales of this wholesaler were from \$700,000 to \$950,000. It made no purchases from respondents in 1955 and in 1956 its purchases from respondents totaled \$3,780.85. The other witness testified that his percentage of net profit ranges between 2% to 3% of gross sales. There is no evidence in the record as to this witness' annual sales volume. Its purchases from respondents totaled about \$2,828.00 in 1955 and 1956. It is in competition with a favored member of March of Toys in 6% of its business.

The only testimony of record concerning the markup on respondents' toys is that of one of the wholesaler witnesses who testified on cross-examination that he buys from respondents at \$2.55 a dozen and resells at \$3.60 a dozen, a markup of about 41%. Moreover, the record contains no evidence as to the intensity of competition between the favored and nonfavored wholesalers or the competitive condition generally existing in the wholesale toy industry.

It is, of course, well settled that the importance of an allowance for cash to a purchaser and the purchaser's net profit margin are significant factors in determining the probable effect on competition and possible injury to that purchaser as a result of a price discrimination. However, in the automotive parts cases, relied on by counsel supporting the complaint,¹ there were additional factors pertinent to the price discriminations there involved which are not shown to exist in this case. Included among these factors was the unusually keen competition existing in the resale of the products and the small markups on individual products, in many cases not greatly exceeding the percentage of the cash discount allowed by the supplier. In addition, the percentage and dollar volume of the rebates ranged considerably higher than those in this proceeding. Furthermore, the testimony in the automotive parts cases as to the bearing of the cash discount on the purchasers' ability to compete was much more meaningful than the rather vague testimony offered herein.

On the basis of the record before us, we cannot conclude that the testimony concerning net profits and the importance of the cash discount would support a finding that the pricing practice here in question may have the proscribed competitive effect.

While in effect conceding that the dollar amount of the price discrimination is not substantial, counsel supporting the complaint rely on the Supreme Court's holding in the *Morton Salt* case² to support their argument that the 3% price discount granted by respondents is illegal for the reason that if discounts at the same rate were granted to respondents' favored customers by all of their suppliers, the effect on competition would be substantial. In the *Morton Salt* case, there was sufficient evidence to show that in the respondent's sale of salt, less-than-carload purchasers might have been handicapped in competing with the more favored carload purchasers by

¹ *Moog Industries, Inc. v. Federal Trade Commission*, 238 F. 2d 43 (8th Cir. 1956); *P. Sorensen Manufacturing Co., Inc. v. Federal Trade Commission*, 246 F. 2d 687 (D.C. Cir. 1957); *Standard Motor Products, Inc. v. Federal Trade Commission*, 265 F. 2d 674 (2d Cir. 1959), Cert. denied 361 U.S. 826 (1959); *In the Matter of Thompson Products, Inc.*, Docket 5872 (1959) (pending in the United States Court of Appeals for the Sixth Circuit); *In the Matter of Namsco, Inc.*, 49 F.T.C. 1161 (1953).

² *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37 (1948).

the differential in price established by the respondent. The court ruled that this competitive handicap could not be minimized by reason of the fact that salt is only a small item in the non-favored purchasers' businesses. In effect, the court held that it was not necessary for the Commission to consider sales in other merchandise categories in determining injury to the purchaser victimized by respondent's price differential. The contention of counsel supporting the complaint that we project the discount to other merchandise purchased by the favored customers is clearly beyond the holding in the *Morton Salt* case and must be rejected.

Under the circumstances, it is our opinion that the evidence of record fails to establish that the effect of the price difference here involved may be substantially to lessen competition between competing purchasers.

Counsel supporting the complaint have also taken exception to the hearing examiner's ruling that respondents have voluntarily abandoned the discount in question and there is no likelihood of resumption. In addition, respondents have appealed from the hearing examiner's conclusion that the price differences resulting from the 3% discount were not cost justified. In view of our holding that the charge in the complaint is not sustained by the evidence of record, a determination of the questions raised by these exceptions is not necessary to a disposition of this proceeding and, therefore, will not be made.

The appeal of counsel supporting the complaint is denied. As modified in accordance with this opinion, the initial decision will be adopted as the decision of the Commission.

Commissioners Secrest and Anderson concur in the result, and Commissioner Kern dissents.

CONCURRING OPINION OF COMMISSIONER SECREST

This case turns on the substantiality of injury to competition or the probability thereof—that is—has the substantial injurious competitive effects contemplated by the statute been made out or can we project ourselves into the future and foresee the probability thereof under the facts of this particular case.

As indicated in the majority opinion the total discriminatory discounts amounted to only \$1,345.02 over a four year period³ and these discounts have since been discontinued. Under these facts I am following the majority since I cannot see that *substantial* injury to competition has been done or foresee the future probability that

³ \$873.91 in 1955, \$318.71 in 1956, \$111.73 in 1957 and \$40.67 in 1958.

the statutorily envisioned injury may occur under the state of this present record.

The automotive parts records⁴ can be distinguished from the instant record on the conclusive evidence of substantial injurious competitive effects and on the further record facts that the discount schedules utilized therein were used on an industrywide basis which made the probability of future injury clearly foreseeable.

CONCURRING OPINION OF ANDERSON, COMMISSIONER

As I understand the majority opinion, dismissal of the complaint in this proceeding is based solely on the conclusion that the record fails to show that the price differences involved may reasonably be expected to adversely affect competition or tend to create a monopoly within the meaning of Section 2(a) of the amended Clayton Act. I agree that the record is deficient in this respect, and therefore concur in the result.

The fact that the respondents have granted to certain of their wholesaler customers a 3% discount off the wholesale price of their toys, which they have not granted to other competing wholesaler customers, is undisputed. There is also testimony that the 2% discount for cash which the respondents grant to all of their customers is a matter of importance to such customers, and, further, that the profits of some of the customers *on their overall business* (involving the purchase and sale of many items in addition to toys purchased from the respondents) have ranged from 2% to 5% of gross sales.

This, however, without more, does not demonstrate the competitive significance of the 3% discount, totaling some \$1,350 over a period of four years, granted by the respondents. Any inference of adverse competitive effect of the resulting price differences must be supported by additional circumstances. In other cases, some of the factors which have been considered important in this respect have been the magnitude of the discriminations, the intensity of competition as between the favored and the non-favored purchasers, and the margins of profit obtained by the purchasers on resale of the commodities involved. In the absence of evidence such as this or a showing of other circumstances from which it might be concluded

⁴ *Whitaker Cable Corp. v. Federal Trade Commission*, 239 F. 2d 253, 256 (7th Cir. 1956), Cert. denied 353 U.S. 938; *E. Edelmann & Co. v. Federal Trade Commission*, 239 F. 2d 152 (7th Cir. 1956), Cert. denied 355 U.S. 941; *Moog Industries, Inc. v. Federal Trade Commission*, 238 F. 2d 43 (8th Cir. 1956); *P. Sorensen Manufacturing Co., Inc. v. Federal Trade Commission*, 246 F. 2d 687 (D.C. Cir. 1957); *C. E. Niehoff & Co. v. Federal Trade Commission*, 241 F. 2d 37 (7th Cir. 1957); *Standard Motor Products, Inc. v. Federal Trade Commission*, 265 F. 2d 674 (2d Cir. 1959), Cert. denied 361 U.S. 826 (1959).

that purchasers paying the higher prices have been or may be handicapped in competing with purchasers paying the lower prices, dismissal of the complaint was proper.

DISSENTING OPINION OF COMMISSIONER KERN

The majority opinion issued this day dismisses the Commission's complaint on the ground that "the evidence of record fails to establish that the effect of the price difference here involved may be substantially to lessen competition between competing purchasers." I find myself in reluctant disagreement with my colleagues for, as I assess the evidence of record, it clearly establishes the statutory requisite of probability of injury to the non-favored buyers. Moreover, in assessing the evidence, I accept the view of the majority that the hearing examiner erred in placing blind reliance upon a single statement in the *Whitaker Cable Corporation* case⁵ and that consideration should be given the entire competitive condition in the market as reflected by the record before us. However, it is in the evaluation of the market factors involved that I discover an irreconcilable area of disagreement.

An examination of the record convinces me that practically all of the factors which persuaded the Commission and the reviewing court in the case of *E. Edelmann & Company v. Federal Trade Commission*,⁶ are present here. One cannot minimize the undisputed testimony of two nonfavored toy wholesalers that the net profit margin in their businesses ran between 2% and 5%, that a 3% special discount would be definitely important, and that they always take advantage of the 2% cash discount. Moreover, this special 3% discount (constituting the price discrimination involved here) was solicited by a cooperative buying group of toy wholesalers, which group not only considered this special discount as important, but respondent found the discontinuance of such special discount could only be accomplished slowly and at some aggravation to the favored recipients. These facts, it seems to me, bring this case squarely within the *E. Edelmann* case wherein the court stated: "There was evidence tending to show that differentials of small amounts were important to the trade and the existence of so-called cooperative buying groups bears this out. These and other findings justified the Commission in concluding that the profit differences which resulted from petitioner's pricing practices were not insignificant or infinitesimal." In my view the above language fits the factual situation in this proceeding like a glove.

⁵ *Whitaker Cable Corp. v. Federal Trade Commission*, 239 F. 2d 253 (7th Cir. 1956), Cert. denied 353 U.S. 938.

⁶ 239 F. 2d 152 (7th Cir. 1956), Cert. denied 355 U.S. 941.

Furthermore I find other convincing evidence in the record which was not even mentioned in the majority opinion and yet which I consider of considerable significance.

The individual respondent in this case testified that he had considerable difficulty in terminating the special discount to favored wholesaler customers, thereby establishing the importance these customers accorded such a discount.⁷

Moreover, the record contains some testimony, although unnecessary to the establishment of probability of injury, that the special discount granted favored customers was reflected in a lower price by such favored wholesaler to the retail trade.⁸

The individual respondent himself recognized the impropriety of the special discount. He specifically admitted the unfairness of the practice on several occasions during the course of his testimony.⁹ I had thought that admissions of this character constituted the highest form of probative evidence. It seems strange that the individual respondent could readily see the competitive inequity of the practice, yet the majority of my colleagues in the exercise of their expertise, cannot translate that freely admitted competitive inequity into the statutory requirement of probability of competitive injury.

Finally, the reasons given by the majority for distinguishing the instant case from the automotive parts cases not only do not impress me, but in my view are not borne out by the record. It is said that in the automotive parts industry competition was unusually keen

⁷ Mr. Bronner, the individual respondent, testified as follows: "In two or three instances I continued the discount until '56. These were my more important customers and it was perhaps difficult for me at that time to make a clear break, as I perhaps should have done."

"I realize this now. At that time I felt, well, you don't, being a small man, you just don't go around hitting your customers over the head. You have something in mind. I knew what I wanted to do, and you do it slowly and gradually. This is why some of these discounts were continued until '56." (R. 139)

⁸ A nonfavored wholesaler witness, Mr. Gurdin, testified as follows: "The Witness: . . . There are complaints in general that they sell at a lesser discount than we do."

Q. Who sells at a lesser discount?

A. That Greenman Brothers sells at a cheaper price than what we sell merchandise for.

Q. You have heard that?

A. Yes, sir.

Q. From whom have you heard that from?

A. From my sales representatives." (R. 64-65) Greenman Brothers was one of the favored toy wholesalers.

⁹ At pp. 30-31 of the record the individual respondent Bronner stated: "I just didn't feel good that I was making a differentiation between one group of customers and others. Under these circumstances I told Henry Lang I would have to discontinue it. . . ."

Same witness on pp. 137-138 of the record testified:

Q. During 1955 and 1956, there were a number of—you had a number of customers, did you not, who purchased in volumewise larger than some of the March of Toys members?

A. That is correct, sir. And as soon as I realized it, I also realized that eventually I have to discontinue the discount I am giving to March of Toys. I didn't consider it fair or ethical to continue giving one group of wholesalers the discount where I had other wholesalers buying in approximately the same quantities who do not receive the discount.

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and mark-ups small, in many cases not greatly exceeding the cash discount. The same situation is shown by this record. Nor is the importance of the special discount any less meaningful here or the testimony vague in this respect. Indeed, the following language in the Commission's opinion in the matter of *Standard Motor Products, Inc.*, D. 5721, is equally applicable to the testimony in this record:

The difference in price paid by the nonfavored customer as against the favored is illustrated in the charts included herein. It is a matter of mathematical calculation. The parties involved carry on business under substantially the same conditions. Competition is keen on all levels and margins of profit small. There is evidence that in some cases the overall net profit is between 2% and 4%. Testimony of distributors indicated that they take advantage of the 2% cash discount and that they find it essential to their business.

Moreover, the majority opinion also places some reliance upon the fact that the dollar volume of the rebates was less substantial than in the automotive parts cases. I concur in the majority's view that the argument of counsel supporting the complaint attempting to extend the principle of the *Morton Salt*¹⁰ case is clearly beyond the holding in that case and should be rejected. However, such an extension I do not regard as necessary. A practice barely entered into may violate the statute. The Commission has in the automotive parts cases determined that a similar discount given under similar competitive conditions is violative of the statute. It moved promptly in connection with the particular discrimination involved here. In so doing it fulfilled one of the primary purposes considered important by the Congress in its passage of the Robinson-Patman Act, namely, to reach discriminations in price in their incipency before actual harm can occur.¹¹ To suggest a requirement that significant discounts become substantial in volume before they fall within the ambit of the statutory proscription would have the effect of nullifying that Congressional intent.

On the basis of the foregoing analysis, I find it necessary to conclude that the action of the majority constitutes a retreat from the position taken by the Commission and sustained by the courts in the automotive parts cases, an act of retrogression which will adversely affect enforcement of the Robinson-Patman Act in a most critical and important area.

As a result of their determination of the lack of probability of injury to competition, the majority find it unnecessary to reach two other aspects of the appeal—one by counsel supporting the complaint excepting to the hearing examiner's ruling that respondents

¹⁰ *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37 (1948).

¹¹ *Corn Products Refining Co. v. United States*, 324 U.S. 726, 738 (1945).

have voluntarily abandoned the discount in question and that there is no likelihood of resumption; the other by respondents' counsel appealing from the hearing examiner's conclusion that the price differences resulting from the 3% special discount were not cost justified.

In order not to lengthen this opinion unduly, suffice it to state that in my view there is no satisfactory evidence of abandonment, nor is there a satisfactory showing of cost justification. I would therefore overrule the hearing examiner's determination with respect to abandonment, sustaining the appeal of counsel supporting the complaint on this point. I would sustain the hearing examiner's ruling with respect to there being an insufficient showing of cost justification and would deny respondents' appeal as to this point. In my view an appropriate order to cease and desist should be entered. I dissent from the action of the majority dismissing this proceeding.

ORDER DISMISSING COMPLAINT

This matter having been heard by the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision dismissing the complaint; and

The Commission, for the reasons stated in the accompanying opinion, having denied the aforementioned appeal, and having modified the initial decision to the extent necessary to conform to the views expressed in the said opinion:

It is ordered, That the initial decision of the hearing examiner, as so modified, be, and it hereby is, adopted as the decision of the Commission.

It is further 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 respondents at any time in the future as may be warranted by the then existing circumstances.

Commissioners Secrest and Anderson concurring in the result, and Commissioner Kern dissenting.