

Decision

IN THE MATTER OF

LEO L. LOWY TRADING AS AMERICAN BALL BEARING
COMPANY ET AL.

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

Docket 7565. Complaint, Aug. 7, 1959—Decision, Dec. 8, 1960

Order requiring a Brooklyn manufacturer of a complete line of precision ball and roller bearings under the trade name "ABC", to cease discriminating in price in violation of Sec. 2(a) of the Clayton Act by giving some customers greater discounts than others competing with them through its practice of charging individual jobbers 10% more than "distributors" and 20% more than members of buying groups it classified as "warehouse distributors".

Mr. Peter J. Dias and Mr. Robert G. Cutler, supporting the complaint.

Respondent *Leo L. Lowy*, for respondents.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the respondents named in the above caption on August 7, 1959, charging violations of § 2(a) of the Clayton Act as amended, by discriminating in price between competing purchasers in the sale of automotive bearings for replacement purposes. On September 23, 1959, respondents filed an answer which denied making unlawful price discriminations. Thereafter hearings were held in New York, New York; Denver, Colorado; and Los Angeles, California. Testimony and other evidence was received from respondents Lowy and Parker, but respondents were not represented by counsel at the hearings. The respondents were represented by respondent Lowy at the New York hearings, but not at Denver or Los Angeles, where purchasers testified. Respondents did offer a document, which was received in evidence after the close of the reception of evidence in support of the complaint; and this document constitutes all the evidence offered by respondents in their defense.

Proposed findings, conclusions and proposed order were submitted by counsel supporting the complaint, but were not submitted by respondents.

The real issue in this matter is whether the sellers' price differentials may have any of the adverse effects proscribed by the statute.

Respondents contend that competition may not be adversely affected unless a price advantage to a buyer is reflected in the buyer's resale price, thus diverting business from non-favored buyers on the

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basis of price alone. This contention is not sound. Although there is no evidence in the record of any price-cutting by any of respondents' customers, the Commission and the courts have repeatedly pointed out that a price advantage may be used in many other ways to lessen competition. It is not necessary that it be shown in what way it was done, or that business has actually been diverted, in order for a finding to be made that the statute has been violated.

Respondents also contend that counsel supporting the complaint made the statement:

In this connection you were further advised that your category of "warehouse distributor" was falsely applied to some customers in that such customers were merely buying groups composed of jobbers who were in fact in competition with others of your customers variously classified as distributors and jobbers,

in the presence of the hearing examiner, and that the statement was prejudicial. Counsel supporting the complaint state that they believe the statement was not made in the hearing examiner's presence, and the hearing examiner does not recall the specific statement, although he is aware that the statement reflects the position taken by counsel supporting the complaint, since much of the evidence relates to buying groups. In any event, making the statement in the presence of the hearing examiner would not be improper, and such statement could not be considered as evidence, but merely as a statement of what counsel supporting the complaint expected the evidence to show.

The proposals of counsel supporting the complaint are, in the main, adopted and incorporated in this initial decision. Those not so incorporated are hereby rejected.

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

FINDINGS OF FACT

1. Respondent Leo L. Lowy is an individual formerly trading as American Ball Bearing Company, having his principal office and place of business located at Flushing Avenue and Cumberland Street, Brooklyn 5, New York.

2. Respondent American Ball Bearing Corporation, hereinafter sometimes referred to as the corporate respondent, is a 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 Flushing Avenue and Cumberland Street, Brooklyn 5, New York.

3. Respondent Al Parker, an individual, is a sales contractor employed by Leo L. Lowy and the corporate respondent, on a commis-

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sion basis, to promote the sale of their products. Said respondent maintains an office in his home at 570 River Drive, Passaic, New Jersey, and has office space at the corporate offices in Brooklyn, New York. There is no evidence that this respondent served in any executive capacity for either of the other respondents.

4. Respondent Lowy founded the American Ball Bearing Company in 1910, and commencing at that time engaged in the manufacture, sale and distribution of a complete line of precision ball and roller bearings under the trade name "ABC". The aforesaid business and business status was continued until December 31, 1957. Thereafter the corporate respondent took over the business of the company and continued the manufacturing and sales policies instituted and carried out by the company during the preceding years.

5. Respondent Lowy's duties, authority and responsibilities were not altered by the change in the company's business status, and he has been at all times primarily responsible for the management and operation of the corporation as he was for the company.

6. Respondents' operation is fully integrated, in that theirs is the only factory in the world which manufactures all types of automotive replacement bearings. Respondents do not produce products of differing grade and quality, and said products are sold as a line.

7. Respondents' products are manufactured in Brooklyn, New York, and from that point shipped to purchasers located in the various states of the United States, and in the District of Columbia, and to fifteen warehouses located in various states of the United States maintained by respondents to facilitate delivery of their products to purchasers.

8. Respondents' bearings are sold for use, consumption or resale within the United States and the District of Columbia. Respondents maintain and at all times mentioned herein have maintained a course of trade and commerce in said products among and between the states of the United States and in the District of Columbia.

9. Respondents, in the course and conduct of their business, as aforesaid, are now and have been in active and substantial competition with other corporations, partnerships, firms, and individuals manufacturing, selling and distributing automotive bearings in interstate commerce to purchasers of the same. Many of the aforesaid purchasers of the respondents' bearings are in competition in the resale of those bearings.

10. Among the purchasers of respondents' products are many who are engaged in the resale of respondents' products, as well as other automotive replacement parts, and these are variously classified by respondents as jobbers, distributors and warehouse distributors.

11. Respondents issue jobber and distributor price-lists, both of which list the same bearings, but the prices shown in the distributors' price-list are ten percent (10%) lower than those shown in the jobbers' price-list.

12. Respondents do not issue a separate price-list for warehouse distributors, but instead grant such purchasers a twenty percent (20%) discount off jobber prices.

13. Respondents' pricing practices, in connection with their entire line of bearings, result in jobbers paying approximately 10% and 20% more than distributors and warehouse distributors, respectively, and distributors paying approximately 10% more than warehouse distributors. All purchasers buy products of the same grade and quality.

14. Respondents define the respective classifications of purchasers as follows: *Jobber*: Receives shipments from the factory or respondents' branch warehouses. The jobber sells to service-stations and repair shops and carries a very small stock, which he may replenish by a purchase from the warehouse distributor. *Distributor*: Receives shipments from the factory only. The distributor sells to industrial accounts, export accounts and fleet owners. He carries a larger stock than the jobber and does not need to purchase from the warehouse distributor or from respondents' branch warehouses. *Warehouse Distributor*: Receives his shipments from the factory. Carries a complete stock of ABC Bearings, of which there are over 1,400 sizes of six different types. The warehouse distributor sells to jobbers.

15. Any of the three classifications of purchasers may pick up their requirements at respondents' branch warehouses, but warehouse distributors are not expected to do so frequently. The 20% discount granted warehouse distributors is predicated mainly upon the risk incurred in maintaining a large inventory, and they are expected to warehouse respondents' products in quantity. For this reason, warehouse distributors who obtain products at respondents' warehouses are charged a 5% service charge for such purchases. This 5% is levied after the 20% discount has been deducted from the warehouse distributor's bill.

16. All invoices are issued to purchasers from respondents' home office in Brooklyn, regardless of whether the shipment to or pick-up by, the purchaser originates at the factory in Brooklyn or one of its various branch warehouses.

17. The respondents' classification of some of the purchasers of its products is arbitrary, in that respondents have made no attempt to insure that purchasers classified as distributors and warehouse distributors performed the functions expected of them to qualify

for their respective discounts, and did not compete with each other or with jobbers.

18. Many purchasers, classified by respondents as warehouse distributors and distributors, failed to perform the functions necessary to qualify under respondents' definitions for the respective discounts granted purchasers in those classifications. For example:

A. Respondents have classified as warehouse distributors Southern California Jobbers, Inc., hereinafter sometimes referred to as SCJ, of Los Angeles, California, and Southwestern Warehouse Distributors, Inc., hereinafter sometimes referred to as SWD, of Dallas, Texas. Both of these companies are merely buying offices for automotive-parts jobbers who are members of the respective groups. SCJ has 63 members and SWD more than 40.

Purchases by group members from the respondents are made either by the member phoning or mailing orders directly to the ABC warehouse or through the group office to the factory. Products so ordered are either shipped by respondents from their factory directly to the group member, or the products are picked up at the ABC warehouse by the member or by the group's trucking service. SCJ did not warehouse ABC products, and the same is apparently true of SWD, since all purchases were drop-shipped to members of that group or picked up at ABC warehouses.

Respondents are informed by their branch warehouses of all shipments, including pick-ups, made from or at said warehouses, and all invoices are prepared and are mailed to purchasers from the factory in Brooklyn. All purchases by group members are billed to and paid by the group-buying office at jobber prices less 20%, deducted from the face of the invoice, plus a 5% penalty for ABC warehouse pick-up. The group-buying office in turn bills its members and collects from them.

The 20% warehouse-distributor discounts received by SCJ from the respondents are rebated annually as a dividend to the jobber members of the group who purchased the line. The rebate, after deduction of group office expenses, is paid, pro rata, to each member based upon his volume of purchases.

B. Distributors, as heretofore found, were so classified because they were expected to sell to industrial accounts, export accounts and fleet owners. However, since respondents do not impose such conditions upon distributors, they sell to the same class of customers as do jobbers.

19. SCJ and SWD are in fact buying agents for the jobber members of those respective groups, and the individual jobber members of the respective groups are respondents' purchasers.

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20. Many of respondents' purchasers, in each buying category, are competitively engaged in the resale of ABC bearings to the same class of customers in the same trade areas, and in many instances to the same customer.

21. Individual jobbers, in competition with distributors and members of buying groups classified as warehouse distributors, are placed at a competitive disadvantage by having to pay 10% and 20% more for ABC bearings than their competitors, thereby resulting in injury to competition.

22. Among the terms and conditions of sale available to all classifications of purchasers of ABC bearings is a cash discount of 2% allowed for payment of bills by the tenth of the month following the month during which the bill is received. Jobber witnesses stated that they took advantage of the cash discount because it is an important factor in the automotive replacement parts business, where profit margins are small.

23. It follows that since a cash discount of 2% is important to the automotive jobber, any differential greater than that will place the non-favored purchaser at a competitive disadvantage. Many testified that any price differential would place them at a disadvantage.

24. ABC purchasers classified as distributors are competitively injured by having to pay 10% more for bearings than members of buying groups with whom they compete.

25. The following computations, taken from Commission's Exhibits 1 through 5 and their subparts, portray the dollar advantage gained by the members of the buying groups:

	No. of sales	Gross amount	After 20% deduction	Saving to group
SWD—Dallas area 1958 (CX 1 A-O).....	596	\$142,961.81	\$114,369.45	\$28,592.36
SWD—Dallas area Jan.-Aug., 1959 (CX 2 A-J)....	378	104,718.74	83,774.99	20,943.75
SWD—Denver area 1958-Aug., 1959 (CX 3 A-L)....	327	20,173.33	16,138.66	4,034.77
SCJ—1958 (CX 4 A-O).....	604	14,858.49	11,886.79	3,071.70
SCJ—Jan.-Oct., 1959 (CX 5 A-J).....	398	11,346.06	9,076.85	2,269.21

CONCLUSIONS

In the course of their business in interstate commerce, respondents have discriminated in price in sales of their products of like grade and quality between different purchasers who compete in the resale of such products. The effect of these discriminations may be substantially to lessen competition in the line of commerce in which the purchasers are engaged, or to injure, destroy or prevent competition with the favored purchasers.

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The aforesaid discriminations in price by respondents, as herein found, constitute violations of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

It is ordered, That respondent Leo L. Lowy, individually and trading as American Ball Bearing Company, and as General Manager of American Ball Bearing Corporation, and respondent American Ball Bearing Corporation, their officers, representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale, for replacement purposes, of automotive bearings in commerce as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating directly or indirectly, in the price of such bearings, by selling to any purchaser at net prices higher than the net prices charged any other purchaser who competes in the resale or distribution of respondents' products with the purchaser paying the higher price.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondent Al Parker, an individual.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 8th day of December 1960, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Leo L. Lowy, individually and trading as American Ball Bearing Company, and American Ball Bearing Corporation, a corporation, 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

LIFETIME CUTLERY CORP. ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF